NORTH CAROLINA REPORTS

VOLUME 322

SUPREME COURT OF NORTH CAROLINA

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IN MEMORIAM

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ASSOCIATE JUSTICE
3 JANUARY 1975-31 DECEMBER 1984

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OF
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ORDERS OF THE COURT

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DANIEL T. COLEMAN ..... Charlotte
KIM RENITA COLLUMS ..... Charlottesville, Virginia
PAUL JACOB CONE II ..... Summerville, South Carolina
AUDREY LANE COOPER ..... Rocky Mount
CLARENCE ANTHONY CORBETT ..... Elizabethtown
JOSEPH JOHN COREY, JR. ..... Cary
DAVID PAUL COSS ..... Winston-Salem
RITA HOLBERT COX ..... Fayetteville
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CHARLES DAVID CREECH ..... Chapel Hill
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MARTHA ANNE CROMARTIE ..... Chapel Hill
JEFFREY LLOYD CROOK ..... Albemarle
JONATHAN MICHAEL CROTTY ..... Altamonte Springs, Florida
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ANDREA A. CURCIO ..... Durham
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LESLEE KAREN DAUGHERTY ..... Chapel Hill
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RAYMOND M. DAVIS ..... Durham
REBEKAH WILSON DAVIS ..... Asheville
RODNEY BRAWLEY DAVIS ..... Charlotte
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ANGELA CAROL DEESE ..... Cary
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ELIZABETH ANN DENNING ..... Winston-Salem
AMY MCGRATH DICKEN ..... Lexington, Kentucky
JAMES MATTHEW DILLON ..... Winston-Salem
SAMUEL BOBBITT DIXON ..... Edenton
WILLIE OTIS DIXON IV ..... Durham
ROBERT C. DODGE ..... Burlington
GEORGE WALKER DOUGLAS ..... Winston-Salem
MARK EDWARD DREYER ..... Tulsa, Oklahoma
GARTH KLEBER DUNKLIN ..... Chapel Hill
JANET B. DUTTON ..... Chapel Hill

PAUL STUART EDWARDS ..... Winston-Salem
WILLIAM K. EDWARDS ..... Chapel Hill
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JIMMY WADE GOODMAN ..... Dunn
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SCOTT DOUGLAS HAMMOND ..... Chapel Hill
JOANNA GEORGE HANSEN ..... Fayetteville
MARTHA BARNES HARRELL ..... Kinston
DONALD J. HARRIS ..... Williamsville, New York
KENNETH LEWY HARRIS ..... Fayetteville
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CATHERINE GROSS HENDREN ..... Winston-Salem
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STEPHEN GRAHAM INMAN ..... Buies Creek
STEPHANIE BURCH IRVINE ..... Windsor
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EDNA CAROLINE MCEACHERN	Wilmington
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LAUREN ANN MURPHY	Bahama
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GREGORY BRUCE PARK	Charlotte
BETTY LUCETA PARKER	Raleigh
JEFFREY BRIAN PARSONS	Burlington
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PAT LEIGH PITTMAN	Fairmont
KAREN CULBRETH POOLE	Raleigh
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DANIEL CARTER POPE, JR.	Raleigh
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R. DANNETTE UNDERWOOD	Clayton
MICHAEL LEE UNTI	Raleigh
THOMAS MIZELL URQUHART	Ahoskie
PATRICK GEORGE VALE	Winston-Salem
GEORGE THOMAS VALSAME	Garner
MARK DOUGLAS VAUGHN	Winston-Salem
JOHN E. VICK, JR.	Charlotte
MARY COKER VILAS	Carrboro
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GEORGIA BUSH VRIONIS	Tampa, Florida
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NANCY ELIZABETH WALKER	Charlotte
JERRY MCLAIN WALLACE, JR.	Buies Creek
ELIZABETH POWER WARNER	Raleigh
JAMES THOMAS WATERS	Statesville
GEORG-ANN WATSON	Durham
WILLIAM HARDY WEATHERSPOON, JR.	Raleigh
KRISTIE LYNN WEBBER	Chapel Hill
ROBERT SIMPSON WELCH	Clarksburg, West Virginia
CHRISTOPHER JOSEPH WERTE	Winston-Salem
MARY ELIZABETH WERTZ	Long Beach
WILFORD V. WEST IV	Buies Creek
S. MARK WHITE	Chapel Hill
T. SCOTT WHITE	Charlotte
KEVIN WAYNE WHITEHEART	Winston-Salem
CHARLES MARK WILEY	Kernersville
JENNIE M. WILHELM	Winston-Salem
THOMAS SCOTT WILKINSON	Durham
JOSEPH J. WILLIAMS	Chapel Hill
JUNE CAROL WILLIAMS	Reidsville
SCOTT R. WILLIAMSON	Winston-Salem
ANNE RENEE WINNER	Asheville
FREDERICK MARTIN WOLFE	Chapel Hill
SARAH JOYCE WOLFE	Chapel Hill
ROBERTA ANN WOOD	Winston-Salem

WILLIAM ARNOLD WOOD II ..... Greensboro
SHARON ANN WOODARD ..... Greenville
MARIAN LOUISE WORKMAN ..... Chapel Hill
RONALD C. WRIGHT ..... Raleigh
CHRISTOPHER EDWIN WYATT ..... Columbia, South Carolina
ANN FRANKL WYKER ..... Raleigh
CINDY YORK ..... Chapel Hill
CONSTANCE L. YOUNG ..... Sand Springs, Oklahoma
TERRI LYNN YOUNG ..... Pinehurst
CLAUDE NORMAN YOUNG, JR. ..... Garner

Given over my hand and Seal of the Board of the Law Examiners this the 8th day of September, 1988.

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

I, FRED P. PARKER III, Executive Secretary of the Board of Law Examiners of the State of North Carolina do certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 9th day of September, 1988 and said persons have been issued certificates of this Board:

FEBRUARY, 1988 NORTH CAROLINA BAR EXAMINATION APPLICANTS

JOHN F. BUCKLEY IV ..... Palmyra, Virginia
MICHAEL SHIELDS CONNOR ..... Gastonia
TERESA ELLEN SKIPPER DAVIS ..... Charlotte
EDWARD JAMES GEHRKE II ..... Raleigh
JOSEPH PAUL GRAHAM ..... Cary
KAREN RIGEL HAIGHT ..... Hilliard, Ohio
RICK DEWAYNE LAIL ..... Charlotte
MERRILL M. MASON ..... Chattanooga, Tennessee
ELIZABETH MEACHUM STANALAND ..... Tampa, Florida
SAMUEL BRINTON TAYLOR ..... Laguna Hills, California

JULY, 1988 NORTH CAROLINA BAR EXAMINATION APPLICANTS

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ROBERT ALAN COHEN ..... Durham
PELL CARLTON COOPER ..... Chapel Hill
THEODORE ALAN FEITSHANS ..... Raleigh

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ROBERT JOHN GLEASON ..... Durham
GEORGE FREDERICK GOOSMANN IV ..... Asheville
THOMAS HILLIARD III ..... Raleigh
ALAN EUGENE HOAL ..... Raleigh
ROBERT EDWARD JOHNSON ..... Durham
HARLEY HARRELL JONES ..... Winston-Salem
LAURA VIRGINIA LEAK ..... Clinton
RODNEY ORR LOHMAN, JR. ..... Raleigh
RICHARD JOHN LUPTAK ..... Gastonia
JOHN HOWARD MACFARLAN ..... Boca Raton, Florida
CHARLES KENNETH MEDLIN, JR. ..... Kinston
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SIOBHAN T. O'DUFFY ..... Raleigh
CONRAD E. PAYSOUR III ..... Greensboro
PATRICIA GREENE PEGRAM ..... Gastonia
FREDERICK GEORGE PETRICK, JR. ..... Carrboro
DAWN RAY ..... Goldsboro
HELEN CATHERINE RIDDLE ..... Morganton
STEPHEN J. SEGRETO ..... Ringwood, New Jersey
JULIA LYNETTE SHUPING ..... Salisbury
GEORGE MACDOUGALL TAULBEE ..... Charlotte
ROBERT GREGORY TOMCHIN ..... Charlotte
ROBERT K. TROBICH ..... Charlotte
BEVIN WILEY WALL ..... Newport
JANE RIVES WARD ..... Wilmington
HALLETT SYDNEY WARD III ..... Winston-Salem
SUSAN ANTHONY WINCHELL ..... Arlington, Virginia

Given over my hand and Seal of the Board of Law Examiners this the 21st day of September, 1988.

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

I, FRED P. PARKER III, Executive Secretary of the Board of Law Examiners of the State of North Carolina do certify that the following named persons were admitted to the practice of law in the State of North Carolina by comity on the 23rd day of September, 1988.

KATHLEEN JOAN GALLAGHER ... Clemmons, applied from the State of Pennsylvania
JAMES L. BLASZAK ..... Elyria, Ohio, applied from the State of Ohio

DENNIS EDWARD DOWNES
Sag Harbor, New York, applied from the State of New York
—2nd Department
MARY LOLLAR HOSTETTER ..... Jacksonville, applied from the District of Columbia
ROBERT RICHARD FREDEKING II
Huntington, West Virginia, applied from the State of West Virginia
CHARLES MATTHEW KINCAID
Huntington, West Virginia, applied from the State of West Virginia
THOMAS EDWARD SCHOENHEIT ..... Matthews, applied from the State of Tennessee
BYRON R. SHANKMAN ..... Charlotte, applied from the State of Virginia
DAVID E. WOLFF ..... New York, New York, applied from the State of New York
—2nd Department
MARY FOUST PYRON ..... Greensboro, applied from the State of Tennessee
JAMES T. HUGHES, JR.
North Myrtle Beach, South Carolina, applied from the State of Pennsylvania

Given over my hand and Seal of the Board of the Law Examiners this the 28th day of September, 1988.

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

I, FRED P. PARKER III, Executive Secretary of the Board of Law Examiners of the State of North Carolina do certify that the following named person duly passed the examinations of the Board of Law Examiners as of the 23rd day of September, 1988:

CHRISTINA ELISA FERREYRA ..... Fayetteville

The following named person duly passed the examinations of the Board of Law Examiners as of the 30th day of September, 1988:

HOWARD A. BECKER ..... Durham

and said persons have been issued certificates of this Board.

Given over my hand and Seal of the Board of Law Examiners this the 10th day of October, 1988.

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

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

On October 26, 1988 the following individuals were admitted:

SAMUEL H. FRITSCHNER ..... Hendersonville, applied from the State of Kentucky
HENRY R. POLLARD IV ..... Richmond, Virginia, applied from the State of Virginia
KIRK GIBSON WARNER ..... Raleigh, applied from the State of Ohio
STEPHEN W. ADKINS ..... Martinsville, Virginia, applied from the State of Virginia
DAVID L. LANGE ..... Durham, applied from the State of Illinois
JOSEPH ALBERT ROMITO .... Orland Park, Illinois, applied from the State of Illinois
DANIEL L. WENTZ .. Fargo, North Dakota, applied from the State of North Dakota

Given over my hand and Seal of the Board of Law Examiners this the 31st day of October, 1988.

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

I, FRED P. PARKER III, Executive Secretary of the Board of Law Examiners of the State of North Carolina, do certify that the following named person was admitted to the practice of law in the State of North Carolina by comity on the 10th day of November, 1988.

BRUCE JOEL JACOBSOHN ..... Charlotte, applied from the State of Pennsylvania

I further certify that the following named persons duly passed the examinations of the Board of Law Examiners and said persons have been issued license certificates of this Board:

LARRY DONNELL LITTLE ..... Winston-Salem
License date: October 28, 1988
NATHANAEL KEVIN PENDLEY ..... Winston-Salem
License date: November 11, 1988

Given over my hand and Seal of the Board of Law Examiners this the 14th day of November, 1988.

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

LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Secretary of the Board of Law Examiners of the State of North Carolina do certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 16th day of December 1988 and said persons have been issued certificates of this Board.

ELIZABETH ANN FARR	Winston-Salem
DAVID WILLIAM CARTNER	Newland
VANESSA EVANS BURTON	Winston-Salem
ANN VARCHETTO DORNBLAZER	Charlotte
HELENE WYNN JOHNS	Charlotte
CECILIA MARIA BARAJAS	Raleigh
MARY JEAN DAVIS	Winston-Salem
JAMES DOGOBERTO CONCEPCION	Charlotte
MITCHELL HAROLD LASKY	Raleigh
SCOTT F. NORBERG	Atlanta, Georgia
LARRY CONSTANTINE ECONOMOS	Charlotte

Given over my hand and Seal of the Board of Law Examiners this the 30th day of December, 1988.

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

LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Secretary of the Board of Law Examiners of the State of North Carolina do certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 12th day of January, 1989 and said persons have been issued certificates of this Board:

JOSEPH ALBERT BRODERICK ..... Chapel Hill, applied from the State of New York —1st Department

G. NICHOLAS CASEY, JR.
Charleston, West Virginia, applied from the State of West Virginia

MARY LOU HILL
Anderson, South Carolina, applied from the State of West Virginia

JOSEPH J. LEVIN, JR.
Washington, District of Columbia, applied from the District of Columbia

JAMES MONROE MABON, JR.
Charlotte, applied from the States of Pennsylvania and Virginia

GEORGE D. NEWTON, JR. ..... Winston-Salem, applied from the State of Illinois

CHARLES MICHAEL PUTTERMAN ..... Raleigh, applied from the State of New York —1st Department

MITCHELL S. BIGEL ..... Matthews, applied from the State of New York —2nd Department

JAMES ROBERT ROGERS
Charleston, West Virginia, applied from the State of West Virginia

CHARLES PAUL NEMETH
Rosslyn Farms, Pennsylvania, applied from the State of Pennsylvania

GARROD S. POST ..... Butner, applied from the State of Michigan

Given over my hand and Seal of the Board of Law Examiners this the 17th day of January, 1989.

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

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. JIMMY DEVOE McELRATH

No. 7A87

(Filed 6 April 1988)

1. **Homicide § 21.5— first degree murder—evidence entirely circumstantial—sufficient**

The State's trial evidence identifying defendant as the person who committed the victim's murder, albeit circumstantial in nature, was sufficiently substantial to warrant sending the case to the jury where the victim had recently separated from defendant's daughter and divorce was imminent; defendant met the victim at a restaurant in Georgia on the morning of 23 December 1984; the victim telephoned his next-door neighbor on that same morning and left a message for his roommate that he was traveling to North Carolina with defendant; defendant traveled to North Carolina on 23 December, stayed overnight at his summer home, and departed for Georgia late in the afternoon on the following day; the victim's body was located on 26 December nine and a half miles from defendant's home; testing by law enforcement officers yielded positive reactions for the presence of blood at numerous sites in defendant's home and automobile; metal shavings attached to newly-drilled holes in the trunk of defendant's automobile tested positive for blood; rope found at the scene and green paint found on the rope were similar to rope and paint found at defendant's house; and shotgun wadding and pellets removed from the victim's body were consistent with ammunition discovered at defendant's house.

2. **Criminal Law § 35— murder—evidence that crime committed by another—erroneously excluded**

The trial court erred in a prosecution for first degree murder by excluding a drawing found by law enforcement officers among the victim's personal effects which included a rough map of the area surrounding defendant's North Carolina home and numerous written notations indicating a possible larceny scheme. The exhibit was relevant to the crucial issue of whether defendant was in fact the true perpetrator of the crime in that the exhibit,

together with additional evidence of the victim's argument with and ultimate departure with persons other than defendant from a restaurant on the day of his disappearance, would constitute a possible alternative explanation for the victim's unfortunate demise. There was prejudice because this was a very close case in which there was only circumstantial evidence identifying this defendant to the exclusion of other persons as the perpetrator.

3. **Criminal Law § 73.2— hearsay—intent to engage in future act—admissible**

The trial court did not err in a first degree murder prosecution by admitting into evidence a telephone message written by the victim's next-door neighbor to the victim's roommate where the message constituted a statement by the victim of his then existing intent to do an act in the future. N.C.G.S. § 8C-1, Rule 803(3).

Justice MITCHELL dissenting.

Justices MARTIN and FRYE join in this dissenting opinion.

APPEAL as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by *Allen, J.*, at the 11 August 1986 Criminal Session of Superior Court, HAYWOOD County, upon defendant's conviction by a jury of first-degree murder. Heard in the Supreme Court on 9 December 1987.

Lacy H. Thornburg, Attorney General, by John H. Watters, Assistant Attorney General, for the State.

Smith, Bonfoey & Queen, by Frank G. Queen, Burton C. Smith, Jr., and Constance C. Moore, for defendant-appellant.

MEYER, Justice.

Defendant was convicted of the first-degree murder of his son-in-law, Steven Wade Boyer. 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 accordingly sentenced to the mandatory life term. In his appeal to this Court, defendant brings forward numerous assignments of error relative to the guilt-innocence phase of his trial. We have reviewed the entire record, and because we find that the trial court committed prejudicial error in refusing to admit certain relevant and potentially exculpatory evidence offered by defendant, we hold that defendant is entitled to a new trial.

The facts and circumstances surrounding the mysterious disappearance and death of Steven Wade Boyer are amongst the most bizarre and unusual in the annals of crime in this state. On 26 December 1984, a nude, headless, and handless body was discovered along the side of Highway 276 in rural Transylvania County, North Carolina. The body was later identified, and it was stipulated at the trial to be that of the victim, Steven Wade Boyer. The cause of death, as revealed by the subsequent autopsy, was a shotgun wound to the victim's lower left chest. Boyer's head and hands were apparently severed from his body by the perpetrator after the victim had died and have never been found.

The State's case against defendant Jimmy Devoe McElrath is based entirely upon circumstantial evidence amassed by various law enforcement officers during a lengthy investigation. The State's evidence tended to show that, at the time of the victim's death, defendant, who grew up in Haywood County, North Carolina, was retired from General Motors Corporation, for which he had been a dealer consultant in the southeastern United States for some twenty years. Defendant and his wife, Nancy, owned two homes—a summer home in Cruso, Haywood County, North Carolina, and a winter home in Islamorada, Monroe County, Florida.

The victim was married to defendant's daughter, Ellen. At the time of the events in question, however, the victim and defendant's daughter were living apart from one another in separate apartments in Smyrna, Georgia, and a divorce was apparently imminent. It was in this context that defendant and his wife traveled from their Florida home to their daughter's apartment in Smyrna to spend the Christmas holidays.

Defendant and his wife, Nancy McElrath, arrived at their daughter's home late on the evening of 21 December 1984. On the following day, 22 December, defendant went to visit the victim at his apartment in Smyrna. Though the victim was not at home at the time of defendant's initial visit, defendant returned later that evening and spoke to the victim on that occasion. During the course of this second visit, defendant and the victim apparently agreed to meet at 10:30 a.m. the following morning at a nearby Denny's Restaurant in Smyrna.

On 23 December, the day defendant and the victim met at Denny's, the victim disappeared. Jim Baumgarten, the victim's

roommate, testified that he last saw the victim at about 9:40 a.m. Baumgarten testified further that upon getting out of the shower some time later, he found a note on his kitchen window which had been written by his next-door neighbor, Sherri Elliott. That note, which was introduced into evidence by the State, read as follows: "Jim, Steve called and said that he was riding to Waynesville[,] North Carolina with his father-in-law. Sherri." Later that day, Sherri explained to Baumgarten that the victim had called her to say that he could not reach Jim and that he wanted to leave a message.

On 26 December 1984, the victim's nude, headless, and handless body was discovered alongside Highway 276 in rural Transylvania County, 9.5 miles away from defendant's nearby summer home in Haywood County. The body was very clean, as if it had been washed, and contained a strikingly small amount of blood. The body bore multiple marks which seemed to indicate that it had been tightly wrapped or bound. In addition to the principal chest wound caused by the shotgun blast and the wounds caused by the amputations, there were numerous scratches on the surface of the body. Some of the scratches appeared on the chest, and many more were present on the back in the upper shoulder area, as if the victim had been pulled by the legs over a rough surface. Also found at the scene were blood spots on the pavement near the side of the road and a two- to three-foot piece of white rope which bore a green stain.

Clyde Kelly is defendant's long-time friend and neighbor, and he lives directly across Pisgah Creek from defendant's summer home in Haywood County. Kelly testified that it is very unusual for the McElraths to come to Haywood County during the winter. According to Kelly, defendant and his wife would generally leave their North Carolina home for Florida in October, not to return until the following April. Kelly testified further that he had never known defendant to come to the North Carolina home without his wife. During the winter months, the home is winterized, with the only electrical power left connected being that to the refrigerator.

On 23 December 1984, Clyde Kelly left his house at about 4:00 p.m. and noticed that the gate to the McElrath home, usually left locked during the winter months, was open. Defendant's black Pontiac automobile was parked next to the house, the blinds to

the house were down, and there were no lights on. When Kelly returned to his home between 9:00 p.m. and 10:00 p.m. that night, he noticed that some lights, including the outside light over defendant's garage, were on. Kelly did not go to defendant's house on that occasion.

The following day, 24 December, at approximately 1:00 p.m., Clyde Kelly noticed that both of defendant's automobiles, the black Pontiac and a brown Pontiac, were parked outside the garage at defendant's house. Kelly then went over for a visit and found defendant in his driveway switching tires from one car to the other. Defendant told Kelly that he and his wife had driven from Florida to Smyrna, Georgia, to visit their daughter Ellen for Christmas because she was depressed about the breakup of her marriage to the victim. Defendant told Kelly further that he had driven to Haywood County from Smyrna in order to visit his father who had recently had an accident. While with defendant in the driveway, Kelly noticed that the trunks of both automobiles were open and empty. Later, while talking to defendant inside the home, Kelly noticed that Nancy McElrath did not seem to be present, but saw nothing else that seemed unusual. Kelly continued talking to defendant until about 4:15 p.m. that afternoon when he returned to his own home.

Arthur Huber, who is a friend and off-and-on business partner of defendant, owns the grocery store in Cruso, Haywood County, North Carolina. At around 11:00 a.m. on 24 December, defendant visited Huber at his store. While at Huber's store, defendant borrowed Huber's 3/8″ drill, saying he needed it to work on a dishwasher at his home. Huber testified that there was a drill bit in the drill when he loaned it to defendant. The drill bit was not in the drill when defendant subsequently returned it. As a part of the lengthy investigation of the case, police officers did a very thorough search of defendant's brown Pontiac automobile. Among other things, they found multiple drill holes in the trunk, including the fender wells, all of which had a shiny appearance.

Various law enforcement officers testified at trial to the results of an exhaustive investigation of the Haywood County home. Officers found rope at defendant's home which was similar to the rope found near the victim's body. They also found green paint which could have been the same paint that caused the green

stain on the rope in question. Numerous knives and two shotguns were seized by officers from the home, but neither of the guns and none of the knives bore any trace of blood. The cases in which the shotguns were found were covered with dust and cobwebs and had apparently not been opened recently. However, shotgun pellets and wadding taken from the victim's body were nonetheless consistent with ammunition found at defendant's home.

Officers testified further about the testing of various sites in defendant's home for the presence of blood. For the purpose of these tests, a positive reaction to phenolphthalein or luminol creates a presumption that blood is present. Further testing is necessary to confirm that the substance is human blood and/or to determine the relevant blood type. The phenolphthalein reacted positively in the following areas: a curtain on the door between the garage and the kitchen, the garage floor under a garden hose and at a spot near the middle of the floor, and on the vanity in one of the bathrooms. The spot on the bathroom vanity was confirmed as blood through further testing. The minuscule amount of material involved at the other sites prevented further testing. Luminol testing, which is used to locate blood that is not visible, identified the presence of blood at additional sites in defendant's home, including the utility room and the sink and the floor in the bathroom.

Defendant's brown Pontiac automobile was subjected to an extensive investigation which included exhaustive testing for blood with phenolphthalein and luminol. Positive reactions to the chemicals, presumptively indicating the presence of blood, occurred at test sites in the trunk, in the fender well, near the license plate, between the front seats, and on two of the metal shavings attached to the newly drilled holes in the trunk. The matting under the rear seat was quite wet, and officers detected the odor of urine in the rear seat area.

Defendant presented evidence which tended to show that he never saw the victim again after their morning meeting at Denny's Restaurant on 23 December. According to defendant, while he and the victim were talking in the Denny's parking lot, another car approached. The victim walked over to the car and began to argue with one of its occupants. The victim returned to

defendant's car, told defendant that he would see him later, and departed in the other car. After the victim departed, defendant himself left and drove to his summer home in North Carolina.

Defendant testified that his principal reason for going to North Carolina on 23 December was to visit his father who had recently been injured in an accident. Patsy Clark Kelly, a life-long friend of defendant, testified that she saw and talked to defendant at The Pantry, a convenience store in Canton, North Carolina, between 3:00 p.m. and 3:30 p.m. on the afternoon of 23 December. She testified further that she stood with defendant as he put gas in his car and that, though she did not look directly into defendant's car, she did not see anyone with him. According to Ms. Kelly, defendant acted normally during their brief conversation.

Defendant also testified that, arising early on the morning of 24 December, he drove to his parents' home in nearby Canton, North Carolina, to visit with them over breakfast. While returning home later that morning, defendant stopped at the Cruso Grocery and borrowed a 3/8″ drill from the owner of the grocery, Arthur Huber. Defendant borrowed the drill in order to do some work on the dishwasher water pump at his home. More precisely, defendant needed the drill because he had recently lost the ring finger on his right hand in a boating accident and, as a result, needed the power tool to help him in removing screws from the pump. Using Arthur Huber's drill, defendant worked on the pump for approximately one and a half hours upon arriving home.

Defendant testified further that, after completing work on the dishwasher water pump, he switched a number of the tires on his two Pontiac automobiles. According to defendant, while talking with his friend and neighbor, Clyde Kelly, he switched the tires from his brown Pontiac to his black Pontiac because the tires on his black Pontiac had recently been punctured. Later, after Kelly had departed, defendant drained the water from the plumbing in the home and left for Smyrna, Georgia, in the black Pontiac at about 4:00 p.m.

Defendant spent the next few days with his daughter at her Smyrna, Georgia, apartment, and he and his wife returned to Florida on 28 December. As a result of a 3 January 1985 telephone call, defendant's wife became concerned about her daughter and decided to return to Smyrna to stay with her until

her divorce from the victim became final on 7 February. Defendant and his wife left on 4 January and, while traveling north, decided to go by the North Carolina home in order to pick up the brown Pontiac and some of defendant's wife's winter clothes. The McElraths arrived at their summer home at around 4:00 a.m. on 4 January. According to defendant, they slept until 12:00 noon the following day and departed shortly thereafter for their daughter's home in Smyrna.

On the basis of this and other evidence, the jury found defendant guilty of the first-degree murder of his son-in-law, Steven Wade Boyer. Because the matter was tried as a noncapital case, Judge Allen sentenced defendant to the mandatory life term. In his appeal to this Court, defendant brings forward numerous assignments of error, three of which we address below: first, that the trial court committed reversible error in failing to grant defendant's motions to dismiss on the grounds that the evidence was insufficient as a matter of law to take the case to the jury; second, that the trial court committed reversible error in refusing to admit into evidence a documentary exhibit which was relevant and potentially exculpatory; and third, and finally, that the trial court committed reversible error in admitting into evidence a written telephone message to defendant because the statement was inadmissible hearsay. We deal with each of these assignments of error in turn.

I.

[1] In his first assignment of error, defendant asserts that the trial court committed reversible error in denying his motion to dismiss on the grounds that the evidence was insufficient as a matter of law. Specifically, defendant argues that Judge Allen's decision to submit to the jury the charge of first-degree murder was improper because there was not substantial evidence that this defendant was in fact the perpetrator of the crime. Although it is admittedly a close question, we do not agree, and we therefore overrule defendant's assignment of error.

As an initial matter, we note that defendant moved for a dismissal on two separate occasions—once at the conclusion of the State's evidence and a second time at the conclusion of all of the evidence. Because defendant introduced evidence at trial on his own behalf, he waived his right to complain on appeal of the

denial of his initial motion to dismiss at the conclusion of the State's evidence. *State v. Leonard*, 300 N.C. 223, 266 S.E. 2d 631, *cert. denied*, 449 U.S. 960, 66 L.Ed. 2d 227 (1980); N.C.G.S. § 15-173 (1983). Accordingly, only the sufficiency of the evidence at the close of all of the evidence is before us here.

This Court has previously addressed on numerous occasions the nature of the legal test for the sufficiency of the evidence in a criminal matter. In *State v. Johnson*, 199 N.C. 429, 154 S.E. 730 (1930), for example, Chief Justice Stacy wrote one of the classic statements of the sufficiency of the evidence test:

> It is sometimes difficult to distinguish between evidence sufficient to carry a case to the jury, and a mere scintilla, which only raises a suspicion or possibility of the fact in issue. The general rule is that, if there be any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury.

Id. at 431, 154 S.E. at 731 (citations omitted).

More recently, in the case of *State v. Bullard*, 312 N.C. 129, 322 S.E. 2d 370 (1984), we described the test in greater detail:

> When a defendant moves for dismissal, the trial court must determine whether there is substantial evidence of each essential element of the offense charged (or of a lesser offense included therein), and of the defendant being the one who committed the crime. If that evidence is present, the motion to dismiss is properly denied. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982); *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E. 2d 164, 169 (1980) (citation omitted).
>
> In ruling on a motion to dismiss, the evidence must be considered by the court in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn from the evidence. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649. Contradictions and discrepancies must be

> resolved in favor of the State, and the defendant's evidence, unless favorable to the State, is not to be taken into consideration. *Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649; *State v. Jones*, 280 N.C. 60, 184 S.E. 2d 862 (1971). The test of the sufficiency of the evidence on a motion to dismiss is the same whether the evidence is direct, circumstantial, or both. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114. All evidence actually admitted, both competent and incompetent, which is favorable to the State must be considered. *State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975).

Bullard, 312 N.C. at 160, 322 S.E. 2d at 387-88.

Defendant's precise contention under this assignment of error is that the State failed to introduce substantial evidence at trial that defendant was in fact the person who committed the crime in question. The question before us is therefore whether, upon viewing all the evidence in the light most favorable to the State and upon granting the State every reasonable inference to be drawn from the evidence, *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982), a reasonable juror might accept the evidence as adequate to support the conclusion this defendant was in fact the perpetrator of this grisly crime, *State v. Smith*, 300 N.C. 71, 265 S.E. 2d 164 (1980). Defendant argues that the only correct answer to this question is "no." Though we regard this as a very close question, we believe that the correct answer is "yes," and we therefore overrule defendant's first assignment of error.

In our opinion, the State's trial evidence identifying defendant as the person who committed the victim's murder, albeit circumstantial in nature, was sufficiently substantial to warrant sending the case to the jury. The victim had recently separated from defendant's daughter, and a divorce was imminent. Defendant met the victim at a Denny's Restaurant in Smyrna, Georgia, on the morning of 23 December 1984. Unable to contact his roommate, the victim telephoned his next-door neighbor on that same morning and left a message that he was traveling to North Carolina with defendant. Defendant did in fact travel to North Carolina on 23 December, stayed overnight at his summer home there, and departed for Smyrna once again late in the afternoon on the following day, 24 December. The victim's body was located

on 26 December along the side of Highway 276 at a spot only 9.5 miles from defendant's home.

Phenolphthalein and luminol testing by law enforcement officers yielded positive reactions, presumptively indicating the presence of blood, at numerous sites in defendant's home and in his brown Pontiac automobile. Among the sites testing positively for blood were metal shavings attached to newly drilled holes in the trunk of defendant's automobile. Rope found at the scene and green paint found on that rope were similar to rope and paint found at defendant's house. Finally, shotgun wadding and pellets removed from the victim's body were consistent with ammunition discovered at defendant's house.

It is undeniably true that defendant's challenge to the sufficiency of evidence in this case reveals a close question. Nevertheless, it is our firm belief that all the evidence, when viewed in the light most favorable to the State and when granted every reasonable inference, is such that a reasonable juror might conclude that it was this defendant who committed the murder of Steven Wade Boyer. This case was for the jury, and the trial court therefore acted properly in denying defendant's motion to dismiss at the close of all of the evidence. Defendant's first assignment of error is hereby overruled.

II.

[2] In his next assignment of error, defendant asserts that the trial court committed reversible error in refusing to admit into evidence defendant's proposed Exhibit No. 34. The exhibit in question is a drawing found by law enforcement officers among the victim's personal effects which includes a rough map of the area surrounding defendant's North Carolina home and numerous written notations indicating a possible larceny scheme. Defendant argues specifically, first, that Exhibit No. 34 was clearly relevant to a crucial issue in the case, to wit, whether this defendant, and not some other person, was in fact the perpetrator of the crime and that it therefore should have been admitted into evidence at trial. This evidence of a possible larceny scheme involving defendant's North Carolina home, claims defendant, together with other evidence that the victim argued with and then departed with the occupants of another vehicle at Denny's Restaurant on the day of his final disappearance, casts doubt upon the State's position that

it was this defendant who was responsible for the victim's demise. Defendant argues, second, that because the State's case against him was based entirely on circumstantial evidence and because the evidence in question casts doubt upon such a fundamental part of the State's case—namely, that defendant was in fact the perpetrator of the crime—the trial court's error in failing to admit the exhibit was prejudicial error entitling him to a new trial. We agree with defendant, and accordingly, we order a new trial.

In his first argument, defendant asserts, correctly in our view, that defendant's proposed Exhibit No. 34 was clearly relevant to a crucial issue in the case and should have been admitted by the trial court. As stated above, the exhibit in question is a drawing found by law enforcement officers among the victim's personal effects which includes, first of all, a map. The map is unambiguously a rough rendering of the area surrounding defendant's summer home in North Carolina and includes the location of defendant's home in relation to other landmarks as well as a portrayal of certain roads in the vicinity. The drawing also includes numerous notations indicating the possible existence of a larceny scheme with defendant's summer home as its target. Among these notations are a series of numbers corresponding to a safe combination at defendant's home and a list which includes such entries as "be sure they're here," "alibi," "how to conceal bike," and "lay bike flat."

Defendant argues, in essence, that Exhibit No. 34 should have been admitted at trial because it casts doubt upon a fundamental element of the State's theory of the case—namely, that the victim met his demise at the hands of this defendant and not someone else. Defendant produced evidence at trial tending to show that the victim talked briefly with several other persons while he was in the Denny's Restaurant parking lot with defendant on 23 December, that the victim argued with those persons, and that the victim subsequently left with those persons in their vehicle. Defendant no doubt hoped to persuade the jury that the victim, along with the other persons at the Denny's Restaurant parking lot, was engaged in a scheme to rob defendant's summer home, that the victim had a falling out with those persons, and that the victim was in fact done in by his co-conspirators—all of this in the hope that one or more of the jurors would develop a reasonable doubt as to defendant's role as the perpetrator of the

crime. The exhibit was a crucial part of defendant's effort in that it might have provided evidence that the victim in fact contemplated and planned such a robbery, and more importantly, that he shared his knowledge of the location of the house, the relevant roads, the combination to defendant's safe, and other details of the plan with co-conspirators by drawing these things out on paper for them. Thus, defendant asserts that he was robbed of a crucial opportunity by the trial court's ruling on the piece of evidence in question. We agree.

As an initial matter, we note that the relevance standard to be applied in this and other cases is relatively lax. After all, evidence is relevant if it has "*any* tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1986) (emphasis added). *See also State v. Goodson*, 313 N.C. 318, 327 S.E. 2d 868 (1985). Relevant evidence, as a general matter, is considered to be admissible. N.C.G.S. § 8C-1, Rule 402 (1986). We note also that the standard in criminal cases is particularly easily satisfied. "Any evidence calculated to throw light upon the crime charged" should be admitted by the trial court. *State v. Huffstetler*, 312 N.C. 92, 104, 322 S.E. 2d 110, 118, *cert. denied*, 471 U.S. 1009, 85 L.Ed. 2d 169 (1984).

We find that we are in agreement with defendant that the exhibit in question in this case was relevant to a crucial issue—namely, whether defendant was in fact the true perpetrator of the crime—and that the exhibit was therefore wrongly rejected by the trial court. In this case, the State had the burden of presenting evidence of each of the essential elements of the crime of first-degree murder and, more importantly, of the *defendant's status as the perpetrator of the crime. State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982). The very existence of the drawing, as defendant argues, indicates that the victim may have contemplated and planned a robbery of defendant's summer home in North Carolina, and more importantly, that he may have shared those plans with one or more co-conspirators. The exhibit, together with the additional evidence of the victim's argument with and ultimate departure with persons other than defendant from Denny's Restaurant on the day of his disappearance, would constitute a possible alternative explanation for the victim's un-

fortunate demise and thereby casts crucial doubt upon the State's theory of the case. We cannot but conclude that Exhibit No. 34 was relevant to a crucial issue in this case and that the trial court therefore erred in refusing to admit it into evidence.

Having determined that the trial court's failure to admit the exhibit in this case was error, the remaining question facing us is whether its action was sufficiently prejudicial to warrant our order of a new trial. Because the evidence against this defendant was entirely circumstantial and because the excluded evidence was relevant to, and cast doubt upon, such a fundamental element of the State's theory of the case, we believe that it was, and we so order.

The burden upon defendant to demonstrate prejudice in a case such as this is described in N.C.G.S. § 15A-1443(a), which provides in pertinent part as follows:

> (a) A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant.

N.C.G.S. § 15A-1443(a) (1983).

We believe that defendant has met his burden here. As we stated previously in this opinion, this is a very close case in which there is only circumstantial evidence identifying this defendant, to the exclusion of other persons, as the perpetrator. Moreover, it is this very issue to which defendant's proposed Exhibit No. 34 is relevant since it casts doubt upon the State's evidence that defendant was the killer and suggests instead an alternative scenario for the victim's ultimate demise. We are simply unable to say that, had the trial court properly admitted defendant's proposed exhibit, there is not a reasonable possibility that a different result would have been reached. Accordingly, the trial court's error in failing to admit defendant's exhibit was prejudicial error entitling defendant to a new trial.

III.

[3] Because of the likelihood that it will recur in the retrial of this case, we now address an important additional assignment of error by defendant. He argues that the trial court committed reversible error in its admission into evidence of a telephone message written by the victim's next-door neighbor, Sherri Elliott, to the victim's roommate. Defendant asserted at trial, and asserts on appeal, that the written phone message constitutes inadmissible and prejudicial hearsay. The State contends that it was admissible under an exception to the hearsay rule. The trial court, over defendant's objection and consistent with the State's contention, found that this highly incriminating evidence was admissible under the residual hearsay exception found at Rule 803(24) of the North Carolina Rules of Evidence. We find that the evidence of the written telephone message is admissible, not under Rule 803(24), but rather under Rule 803(3) as a statement of intent to engage in a future act.

As we stated above in our initial review of the facts, the State presented evidence at trial of a 23 December 1984 telephone call from the victim to his next-door neighbor. Unable to reach his roommate by phone on the morning of his meeting at Denny's Restaurant with defendant, the victim called Sherri Elliott, his next-door neighbor, and left a message. The original message, as written by Ms. Elliott, and as originally proffered by the State, read as follows:

> Jim,
>
> Steve called and said that he was riding to Waynesville[,] North Carolina with his father-in-law. If he is not back by 5:00 call the Smyrna Police because something may have happened to him.
>
> Sherri

After conducting a voir dire hearing to determine what, if any, part of the telephone message was admissible under Rule 803(24) of the North Carolina Rules of Evidence, the trial court allowed the State to introduce only this part of the statement:

Jim,

Steve called and said that he was riding to Waynesville[,] North Carolina with his father-in-law.

Sherri

Rule 803(24) of the North Carolina Rules of Evidence, also known as the residual hearsay exception, provides as follows:

> (24) 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 803(24) (1986) (emphasis added).

Because of the residual, "catchall" nature of the Rule 803(24) hearsay exception, it is potentially subject to abuse in the face of unfettered judicial discretion. *State v. Smith*, 315 N.C. 76, 91, 337 S.E. 2d 833, 844 (1985). Accordingly, evidence proffered for admission pursuant to Rule 803(24) must be carefully scrutinized by the trial court within the framework of the rule's requirements. *Smith*, 315 N.C. at 92, 337 S.E. 2d at 844. In *Smith*, this Court interpreted the six-part inquiry in which the trial court must engage pursuant to Rule 803(24) prior to admitting or denying hearsay evidence proffered for purposes of the residual hearsay exception. Specifically, the trial court must determine the following: first, that proper notice was given of the intent to proffer hearsay evidence under Rule 803(24); second, *that the hearsay evidence is not specifically covered by any of the other hearsay ex-*

ceptions; third, that the hearsay evidence possesses certain circumstantial guarantees of trustworthiness; fourth, that the evidence is material to the case at bar; fifth, that the evidence is more probative on an issue than any other evidence procurable through reasonable efforts; and sixth, that admission of the evidence will best serve the interests of justice. *Smith*, 315 N.C. at 92-96, 337 S.E. 2d at 844-47.

In the case at bar, Judge Allen engaged in the six-part inquiry required by this Court in *Smith* and made findings in the record as to each of the six components. As to the first portion of the telephone message, Judge Allen determined that all six tests were satisfied, and he admitted the evidence accordingly. In fact, Judge Allen's analysis, though it ultimately yielded the correct result, need not have proceeded beyond the second requirement—namely, that the evidence in question is not specifically covered by any other hearsay exception. We believe that the victim's statement to Sherri Elliott over the telephone that he was going to North Carolina with defendant constitutes a statement by the victim of his then-existing intent to do an act in the future. Accordingly, we hold that this written telephone message is admissible hearsay under Rule 803(3) of the North Carolina Rules of Evidence as evidence of a then-existing mental, emotional, or physical condition. *See* N.C.G.S. § 8C-1, Rule 803(3) (1986).

Rule 803(3) of the North Carolina Rules of Evidence provides as follows:

> (3) Then Existing Mental, Emotional, or Physical Condition. —*A statement of the declarant's then existing* state of mind, emotion, sensation, or physical condition (such as *intent*, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

N.C.G.S. § 8C-1, Rule 803(3) (1986) (emphasis added). Rule 803(3), like the rest of the new evidence rules, became effective only on 1 July 1984, and, before today, no post-Rules case from this Court has dealt with the issue of whether Rule 803(3) allows the admission of a hearsay statement of a then-existing intent to engage in

a future act. Today, we address that issue squarely, and we hold that it does. We hold further that the admitted portion of the written telephone message in this case constituted just such a statement.

Pre-Rules cases from this and other courts are instructive here. In the seminal case of *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285, 36 L.Ed. 706 (1892), for example, a suit was brought on a life insurance policy and was defended on the ground that the insured, Mr. Hillmon, was not dead but, pursuant to a conspiracy to defraud the insurer, had killed his traveling companion, Walters, and left his body to be found at their campsite. The United States Supreme Court, on appeal from a judgment for the plaintiff-beneficiary, granted a new trial for error in excluding as evidence letters written by Walters to his sister and his fiancee, in one of which he wrote, "I expect to leave Wichita on or about March the 5th, with a certain Mr. Hillmon, a sheep-trader, for Colorado or parts unknown to me." *Id.* at 288, 36 L.Ed. at 708. Rejecting plaintiff-beneficiary's hearsay argument, the Court stated that "whenever the *intention* is of itself a distinct and material fact in a chain of circumstances, it may be proved by contemporaneous oral or written declarations of the party." *Id.* at 295, 36 L.Ed. at 710 (emphasis added).

This Court applied the so-called *Hillmon* doctrine in the important pre-Rules case of *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755, *cert. denied*, 414 U.S. 874, 38 L.Ed. 2d 114 (1971). There, the Court held admissible testimony that the declarant (the victim in a murder case), while preparing to leave home, told his wife that he was going with defendant on a business trip to Wilmington, Delaware. The Court stated that "[t]he sound basis for its admission is . . . the exception to the hearsay rule permitting the admission of declarations of a decedent to show his intention, when the intention is relevant per se and the declaration is not so unreasonably remote in time as to suggest the possibility of a change of mind." *Id.* at 587, 180 S.E. 2d at 772.

In *State v. Cawthorne*, 290 N.C. 639, 227 S.E. 2d 528 (1976), a pre-Rules case strikingly similar in its facts to the case at bar, this Court followed *Vestal* in holding that the admission of certain hearsay evidence was proper. There, a Yellow Cab dispatcher testified that after she directed one of the drivers to go to the Red

Carpet Inn, the driver called in on his radio to say that he had picked up the fare and that he was taking his passengers to a particular location just off Highway No. 17. The driver was subsequently shot and killed during the course of an armed robbery. The Court held that "[the driver's] challenged statement to the dispatcher was properly admitted . . . under the exception to the hearsay rule enunciated in *State v. Vestal*." *Id.* at 649, 227 S.E. 2d at 533.

The exception to the hearsay rule exemplified in the *Hillmon*, *Vestal*, and *Cawthorne* decisions is now codified in the Federal Rules of Evidence and, in our view, is inherent in the recently adopted North Carolina Rules of Evidence. The Commentary to Rule 803(3) of the Federal Rules of Evidence explicitly embraces the *Hillmon* doctrine, noting that "[t]he rule of *Mutual Life Ins. Co. v. Hillmon* allowing evidence of intention as tending to prove the doing of the act intended, is, of course, left undisturbed." Fed. R. Evid. 803(3) advisory committee's note (citation omitted). North Carolina Rule of Evidence 803(3) is identical to its federal counterpart and, therefore, should also be read to embrace the rule announced in the *Hillmon* case and applied in this Court's own decisions. We find support for our position in Dean Brandis' commentary to Rule 803(3):

> [A]dmitting [a statement of intent] to prove subsequent conduct in accordance with the expressed intent is squarely within the Rule, provided the time lapse is not so great as to make the statement too remote to be acceptably relevant.

1 Brandis on North Carolina Evidence § 162 (1986 Cum. Supp.).

In the case at bar, Judge Allen ruled correctly but for the wrong reason. In his telephone conversation with Sherri Elliott, the victim stated his then-existing intent to engage in a future act—namely, that he was going to North Carolina with defendant. Hearsay evidence in the admitted portion of the statement was admissible at trial, not pursuant to Rule 803(24), but rather, pursuant to the *Hillmon* doctrine incorporated within Rule 803(3). At defendant's new trial, this evidence, if introduced, would be admissible. As the question was neither briefed nor argued, we express no opinion as to the admissibility of that part of the telephone message not admitted at defendant's first trial.

In conclusion, we have reviewed the entire record and each of defendant's assignments of error in this case. We hold, pursuant to our discussion in Part II of this opinion, that the trial court committed prejudicial error in failing to admit certain relevant and potentially exculpatory evidence offered by defendant. Accordingly, the result is a

New trial.

Justice MITCHELL dissenting.

I dissent from that part of the opinion of the majority holding that the trial court committed prejudicial error by excluding a drawing found in the victim's home among his personal effects and from the result reached by the majority. I believe the trial court properly excluded the drawing.

We have held that:

> A defendant may introduce evidence tending to show that someone other than defendant committed the crime charged, but such evidence is inadmissible unless it points directly to the guilt of the third party. Evidence which does no more than create an inference or conjecture as to another's guilt is inadmissible. *State v. Stanfield*, 292 N.C. 357, 233 S.E. 2d 574 (1977); *State v. Jenkins*, 292 N.C. 179, 232 S.E. 2d 648 (1977); *State v. Shinn*, 238 N.C. 535, 78 S.E. 2d 388 (1953); *State v. Smith*, 211 N.C. 93, 189 S.E. 175 (1937). '[T]he admissibility of another person's guilt now seems to be governed, as it should be, by the general principle of relevancy under which the evidence will be admitted unless in the particular case it appears to have no substantial probative value.' 1 Stansbury's N.C. Evidence § 93 at 302-03 (Brandis rev. 1973).

State v. Hamlette, 302 N.C. 490, 501, 276 S.E. 2d 338, 346 (1981). I see no reason to believe this rule has been altered by the adoption of Chapter 8C of our General Statutes, the North Carolina Rules of Evidence. I do not agree with the majority that the drawing constituted a "possible alternative explanation for the victim's unfortunate demise and thereby cast crucial doubt upon the State's theory of the case." The drawing has absolutely no tendency to implicate any person other than the victim in anything. Even viewing the drawing in the light most favorable

to the defendant, it can only be said at most to give rise to speculation or conjecture of a type which until now has not been viewed as sufficient to render evidence either relevant or admissible.

The majority's discussion of this issue reveals on its face the extreme speculation and conjecture which must be employed in order to warp this evidence to fit our rules. The majority says that the drawing indicates that the victim "may" have planned a robbery of the defendant's North Carolina home. The majority then speculates that the victim "may" have shared those *possible* plans with one or more co-conspirators. The majority then concludes that such speculation stacked upon conjecture could lead a jury to find a "possible" alternative explanation for the victim's death. It seems clear to me that the drawing should have been excluded from evidence because it neither tended to exculpate the defendant nor inculpate any other person. *See State v. Rogers*, 316 N.C. 203, 341 S.E. 2d 713 (1986); *State v. Gaines*, 283 N.C. 33, 194 S.E. 2d 839 (1973).

Even if it is assumed—erroneously in my view—that the drawing found among the personal effects of the victim was admissible, I do not believe the defendant has carried his burden of showing 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) (1983). From substantial evidence introduced at trial, the jury could and apparently did believe that the victim—or more accurately a large part of him—was taken away from the defendant's home by the defendant in his car trunk after the defendant had murdered and butchered the victim. The evidence of the defendant's activities at his home at about the time the murder must have occurred was more than sufficient to permit the jury to find that the defendant killed the victim there, then cut off his head and hands to prevent identification of the body before dumping it beside the highway. The evidence was also sufficient to support a reasonable jury finding that the defendant then returned to his home in North Carolina and, before hiding the car used to transport the body, drilled holes in the trunk and washed it out in a nearly successful effort to remove all evidence of bloodstains.

Substantial evidence tended to show that the defendant murdered and butchered the victim in the defendant's home before

dumping his body by the side of the road. Even if one were inclined to join the majority in its pure speculation and conjecture that the victim planned to rob the defendant's home, this would be one more piece of evidence tending to indicate that the victim was in the home at the time he was murdered and his dismembered body removed from the home by the defendant in the defendant's car. The possibility that some phantom "others" may have been present in the defendant's home with the victim is the sheerest speculation and conjecture not supported by either substantial or insubstantial evidence.

For the foregoing reasons, I dissent from the result reached by the majority and vote to find no error in the trial of this case.

Justices MARTIN and FRYE join in this dissenting opinion.

STATE OF NORTH CAROLINA v. SHARON ANNETTE HATFIELD ANDERSON

No. 202PA87

(Filed 6 April 1988)

1. **Obscenity § 3— patent offensiveness—views of average adult in community—expert opinion testimony inadmissible**

In this prosecution for disseminating obscenity, the trial court did not abuse its discretion in excluding opinion testimony by defendant's expert witness, based on a study he performed, that the average adult in the community would not find the four magazines in question to be patently offensive on the ground that the witness was no better qualified than the jury to address this question and could not assist the jury where the magazines defendant was accused of selling contained photographic depictions of actual acts of vaginal, anal or oral intercourse; the witness's study was designed to determine nothing more than the availability and accessibility of an extremely broad range of sexually suggestive materials which he described as "adult materials"; and the witness made no effort in his study to identify or isolate any factors bearing on the average adult's reaction to materials that were limited to pictorial portrayals of actual acts of vaginal, anal or oral intercourse.

2. **Obscenity § 3— right to view materials containing nudity and sex—expert testimony—survey results inadmissible**

In a prosecution for disseminating obscenity, the trial court did not err in refusing to permit defendant's expert sociologist to testify concerning the cumulative responses to questions in a survey he conducted of county resi-

dents pertaining to the views of those interviewed as to when, where and how adults should be able to obtain and view materials portraying nudity and sex, since the survey amounted to little more than a referendum on the desirability of the First Amendment and N.C.G.S. § 14-190.1, and the survey results would not assist the jury in resolving the issue before it as to whether the magazines in question appealed to a prurient interest in sex in a patently offensive manner. N.C.G.S. § 8C-1, Rule 702.

3. **Criminal Law § 102.6— jury argument—proper statement of contentions and inferences**

The prosecutor's jury argument in an obscenity case that if the items in question "are not obscene, I don't know what it would take to be" did not amount to an expression of personal belief in violation of N.C.G.S. § 15A-1230 (a) but came within the latitude that may be allowed counsel in stating contentions and drawing inferences from the evidence.

4. **Criminal Law § 102.6— jury argument—proper statement of contentions and inferences**

A prosecutor's jury argument in an obscenity case stating that an exhibit contained picture after picture of anal intercourse and asking what is more unhealthy than anal intercourse and how it can be anything but obscene was within the latitude allowed counsel in stating contentions and arguing reasonable inferences to be drawn from the evidence.

5. **Criminal Law § 170.3— jury argument—misstatements of law—error cured by instructions**

The trial court's proper instructions on the applicable law in an obscenity case cured any prejudice to defendant which may have resulted from possible misstatements of law in the prosecutors' jury arguments.

6. **Criminal Law § 102.7— jury argument not improper attack on credibility of witness**

The prosecutor's jury argument in an obscenity case that, based on the testimony of a State's witness, the jury should disbelieve the testimony of defendant's expert witness was a proper contention based on the evidence and not an improper attack on the credibility of the expert witness.

7. **Criminal Law § 170.3— jury arguments—personal opinions—errors cured by instructions**

The trial court's prompt curative instructions were sufficient to remove any possible prejudice that may have resulted when the prosecutors in an obscenity case went outside the record to express personal opinions at several points during their arguments to the jury.

8. **Obscenity § 1— dissemination of obscenity—constitutionality of statute**

The statute prohibiting the dissemination of obscenity, N.C.G.S. § 14-190.1, is not facially unconstitutional under the N.C. Constitution on the ground that its incorporation of the *Miller* test for obscenity adopted by the U.S. Supreme Court is unfair in a criminal context. Nor is the statute facially invalid under Art. I, §§ 14 and 19 of the N.C. Constitution because it fails to specify the geographic area intended by the term "community standards."

9. Obscenity § 3— disseminating obscenity—intent—knowledge of contents of materials

The jury in a prosecution for disseminating obscenity was required to find that defendant possessed the requisite intent and guilty knowledge to support a conviction where the trial court specifically instructed the jury that to satisfy the intent requirement of the statute, the State must prove that defendant knew the content, character and nature of the magazines in question when she sold them.

10. Obscenity § 3— value of materials—reasonable person standard

Unlike appeal to the prurient interest and patent offensiveness, the literary, artistic, political or scientific value of material alleged to be obscene may not be judged by contemporary community standards but is to be determined on the basis of whether a "reasonable person" would find such value in the material.

11. Obscenity § 3— value of magazines—failure to instruct on reasonable person standard

Failure of the trial court to instruct the jury in an obscenity case that it must apply a reasonable person standard in determining the value of the magazines in question did not amount to prejudicial error where the court did not erroneously instruct the jury that they should apply contemporary community standards in determining value.

ON discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 85 N.C. App. 104, 354 S.E. 2d 264 (1987), awarding the defendant a new trial upon her appeal from judgments entered 28 March 1986 by *Lewis (Robert D.), J.*, in Superior Court, CATAWBA County. Heard in the Supreme Court on 10 November 1987.

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

James, McElroy & Diehl, P.A., by Edward T. Hinson, Jr.; Lipsitz, Green, Fahringer, Roll, Schuller & James, by Paul J. Cambria, Jr., pro hac vice; and, Herbert L. Greenman, pro hac vice, for the defendant-appellee.

North Carolina Civil Liberties Union Legal Foundation, by Michael K. Curtis, amicus curiae.

MITCHELL, Justice.

The defendant Sharon Annette Hatfield Anderson was tried upon proper indictments charging her with four offenses of feloniously disseminating obscenity in violation of N.C.G.S.

§ 14-190.1(a)(1). The jury returned verdicts finding the defendant guilty of two of the offenses charged and not guilty of the two remaining offenses. The defendant appealed to the Court of Appeals, which entered a decision on 7 April 1987 ordering a new trial on the ground that the trial court had committed reversible error by excluding certain expert testimony. On 7 July 1987, this Court allowed the State's petition for discretionary review.

The evidence for the State tended to show that on 7 October 1985, Steven Muhler, an investigator with the Hickory Police Department, entered the Imperial Popular Newsstand and Adult Bookstore. On that occasion, the defendant, Sharon Annette Hatfield Anderson, sold Muhler two magazines entitled *Jets of Jizz* and *Ass Masters Special #3*. On 8 October 1985, Muhler again entered the store, and the defendant sold him two magazines entitled *Super Sex Stars #1* and *Ass Masters Special #4*. The defendant was arrested on 9 October 1985 and charged with four counts of felonious dissemination of obscenity in violation of N.C.G.S. § 14-190.1(a)(1).

At the conclusion of the State's case-in-chief, the defendant offered the testimony of Dr. Joseph Scott, a sociologist. Dr. Scott testified that he had been employed by the defendant to conduct a study to determine "the tolerance level in this community for adult material." He testified that he attempted to determine whether the magazines in question exceeded the level of community tolerance by examining the availability and accessibility in Catawba County of "adult material." Thereafter, the trial court excluded Dr. Scott's opinion as to whether the magazines in question "exceeded the community level of tolerance." The trial court also refused to allow him to give his opinion as to whether the materials in question "depicted or described sex in a patently offensive way, in a way not tolerated by the average adult in this community."

The defendant also offered the opinion testimony of another sociologist, Dr. Charles Winick, who had conducted a poll or survey among certain residents of Catawba County. The first question in the survey asked whether, in the opinion of those interviewed, changing standards in recent years had made the depiction of nudity and sex in materials available only to adults more or less acceptable. The next four questions were directed to

whether those interviewed felt that consenting adults should have the right to obtain and view materials that depict nudity and sex. The final question asked whether those interviewed understood that the references to "nudity and sex" in the previous questions meant "exposure of the genitals and every kind of sexual activity, no matter how graphically depicted."

The trial court allowed the defendant to introduce the cumulative responses of those interviewed concerning changing standards and the definition of "nudity and sex" as used in the survey. Also, Dr. Winick was allowed to give his opinion based on the survey conducted that there was a very high degree of acceptance and toleration of sexually explicit material in Catawba County. The trial court did not allow the defendant to introduce the cumulative responses indicating the opinions of those interviewed with regard to whether consenting adults should have the right to obtain and view materials depicting nudity and sex, as the trial court concluded that those questions and answers were not relevant to any issue to be resolved at trial.

Thereafter, the defendant introduced the testimony of Dr. John T. Wheeler, another sociologist with training in the areas of family and sex therapy. Dr. Wheeler gave his opinion that the average adult applying contemporary community standards would not be stimulated in a prurient fashion by the materials at issue in the present case.

The defendant took the stand and testified on her own behalf that she was not aware of the contents of the magazines she sold Muhler and did not recall the sales for which she was charged. On cross-examination, the defendant acknowledged that she knew that the Imperial Popular Newsstand and Adult Book Store was an adult book store, and that she had sold magazines similar to those in evidence in this case on a daily basis while employed there. She testified that she was aware of a change in the obscenity law of North Carolina which had taken effect on 1 October 1985. She also testified that, from her conversations with a police officer named Tony Keller, she had a feeling that something was "going down." She felt this to be the case because Keller had been spending a lot of time in the store and had kept telling her that she needed to get out of the store before she was arrested.

The jury returned a verdict acquitting the defendant of disseminating obscenity by the sale of the magazines *Jets of Jizz* and *Super Sex Stars #1*. The jury found the defendant guilty of disseminating obscenity by the sale of *Ass Masters Special #3* and *Ass Masters Special #4*. The trial court entered judgments sentencing the defendant to imprisonment for three years for each count, but suspended the sentences and placed the defendant on supervised probation for a period of five years. As a special condition of probation, the defendant was ordered to serve an active term of imprisonment of six months. The defendant was fined $5,000.00 for each count, as a condition of probation.

The Court of Appeals concluded that the trial court's exclusion of portions of the testimony of Dr. Winick was proper. The Court of Appeals also concluded, however, that the trial court had committed prejudicial error by the exclusion of certain proffered testimony of Dr. Scott and held that the defendant must be awarded a new trial. We reverse the holding of the Court of Appeals and remand this case for reinstatement of the judgments of the trial court.

I.

[1] The State as appellant on discretionary review assigns error to the holding of the Court of Appeals that the trial court committed reversible error by excluding certain testimony of Dr. Scott. The State argues in support of this assignment that the trial court acted within its discretion in excluding his testimony. We agree.

Certain principles governing the admission of expert testimony in obscenity cases are well established. The prosecution is not constitutionally required to introduce expert testimony tending to show that materials alleged to be obscene are in fact obscene, once the materials have been placed in evidence. *Paris Adult Theater I v. Stanton*, 413 U.S. 49, 37 L.Ed. 2d 446 (1973). The materials themselves are the best evidence of what they represent. *Id.* Ordinary rules governing admission of expert testimony do not fit neatly into the trial of obscenity cases, because expert testimony usually is admitted to explain to juries what they otherwise would not understand. *Id.* "No such assistance is needed by jurors in obscenity cases." *Id.* at 56, 37 L.Ed. 2d at 456. The Supreme Court of the United States has held, however, that

the defendant may introduce appropriate expert testimony during obscenity trials. *Kaplan v. California*, 413 U.S. 115, 121, 37 L.Ed. 2d 492, 498 (1973). Nevertheless, in obscenity trials the trial court retains "wide discretion in its determination to admit and exclude evidence, and this is particularly true in the case of expert testimony." *Hamling v. United States*, 418 U.S. 87, 108, 41 L.Ed. 2d 590, 615 (1974).

The admissibility of expert testimony in North Carolina is now governed by Rule 702 of our Rules of Evidence. N.C.G.S. § 8C-1, Rule 702 (1986). We have construed that rule to mean that: "Expert testimony is properly admissible when it can assist the jury in drawing certain inferences from facts and the expert is better qualified than the jury to draw such inferences." *State v. Evangelista*, 319 N.C. 152, 163, 353 S.E. 2d 375, 383 (1987). In applying the rule, the trial court is afforded wide discretion and will be reversed only for an abuse of that discretion. *See id.* at 164, 353 S.E. 2d at 384; *State v. Knox*, 78 N.C. App. 493, 337 S.E. 2d 154 (1985). Further, under Rule 403 even relevant evidence may properly be excluded by the trial court if its probative value is outweighed by the danger that it would confuse the issues before the court or mislead the jury. *State v. Mason*, 315 N.C. 724, 731, 340 S.E. 2d 430, 434-35 (1986). Whether to exclude expert testimony for this reason also rests within the sound discretion of the trial court, which will be reversed only for an abuse of discretion. *Id.*

Applying the foregoing standards in reviewing the trial court's exclusion of certain of Dr. Scott's testimony as tendered by the defendant, we conclude that the trial court did not abuse its discretion. Instead, the trial court acted well within its discretion in excluding the proffered expert testimony, either on the ground that it would not assist the jury in understanding the evidence or determining a fact in issue or on the ground that the defendant had failed to establish a proper basis for Dr. Scott's opinion testimony as to any fact in issue.

In determining whether the material in question in an obscenity case is obscene, the factfinder is required to apply "contemporary community standards." *Miller v. California*, 413 U.S. 15, 37, 37 L.Ed. 2d 419, 438 (1973). In making its determination, the trier of fact must be guided by:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24, 37 L.Ed. 2d at 431. Whether material appeals to the "prurient interest" and what is "patently offensive" are questions of fact. *Miller v. California*, 413 U.S. at 30, 37 L.Ed. 2d at 434. As required by the decision in *Miller*, N.C.G.S. § 14-190.1 specifically defines the acts of "sexual conduct" the portrayal of which may be found obscene if otherwise in violation of the statute. N.C.G.S. § 14-190.1(c) (1986).

Further, subsection (b) of the statute incorporates the three part test of *Miller* by providing that material will be found obscene only if:

> (1) The material depicts or describes in a patently offensive way sexual conduct specifically defined by subsection (c) of this section; and
>
> (2) The average person applying contemporary community standards relating to the depiction or description of sexual matters would find that the material taken as a whole appeals to the prurient interest in sex; and
>
> (3) The material lacks serious literary, artistic, political, or scientific value; and
>
> (4) The material as used is not protected or privileged under the Constitution of the United States or the Constitution of North Carolina.

N.C.G.S. § 14-190.1(b) (1986). Although the statute specifically sets forth the "contemporary community standards" test only with reference to that part of the definition of obscenity relating to "prurient interests," the factfinder must be required under the statute to apply "contemporary community standards" in resolving questions concerning *both* the appeal of the material to the prurient interest *and* its patent offensiveness. *See Smith v. United States*, 431 U.S. 291, 300-301, 52 L.Ed. 2d 324, 334-35

(1977). The primary reason for applying "the standard of 'the average person, applying contemporary community standards' is to be certain that . . . [the material] will be judged by its impact on an average person . . . ." *Miller v. California*, 413 U.S. at 33, 37 L.Ed. 2d at 436.

In the present case, Dr. Scott testified that he had been employed by the defendant to "determine what the tolerance level was in the community for adult materials." Acting according to these instructions, he conducted a study of businesses in the Catawba County area that carried "adult materials." He testified that the materials he included in his study ranged from the "extremely mild to naked shots of women [sic] breasts and vulva area and penis and so forth up where you have pictures of couples together where they are engaging in oral, anal and vaginal sex." In describing how he attempted to determine whether the sexual conduct depicted in the magazines the defendant was charged with selling exceeded the level of community tolerance, he testified:

> Well, I looked at the amount of material that was available today and certainly available for a long time. Looked at the availability of volume of the material and then I looked at the accessibility. There is a step from available to accessibility. It is like drugs are available in a community but that does not mean they are accessible. They do not have that in a store labeled as such for purchase, it is hidden.
>
> That is why I was looking for the accessibility of the adult material, in other words how open and easy it was for a wide range of people to obtain and how it was tolerated. In doing so and trying to determine the level of tolerance, I went to adult book stores, the three of them for example, to look at what they were showing, what types of movies they were showing and magazines they had for sale. I went to the video shops, your neighborhood video outlet, to determine the type of x-rated films they had to rent and the number at the time.

Thereafter, Dr. Scott was questioned by defense counsel and the trial court as follows:

> Q. Now as a result of this study, were you able to render and are you able to render an opinion whether or not the materi-

al in this case, these four magazines depict and describe sexually patently offensive conduct specifically defined by the law of North Carolina?

A. Yes.

COURT: To the average person in the community.

Q. To the average adult person in the community.

A. Yes.

Q. What is your opinion?

A. My opinion is that it is tolerated by the average adult person in the community.

COURT: That is not the question, sir. The question is whether it is patently offensive to the average adult person in the community.

A. My answer would be that it is not patently offensive to the average person in the community.

The trial court sustained the State's objection to the proffered testimony of Dr. Scott that in his opinion the average person in the community would not find the four magazines in question to be patently offensive.

The State contends that the trial court properly excluded Dr. Scott's testimony on the ground that the defendant had failed to demonstrate that Dr. Scott had an adequate basis for forming an opinion on the issue of whether the average adult applying contemporary community standards would find the magazines in question patently offensive. On appeal, we must consider whether the proffered testimony would have assisted the jury in drawing inferences concerning that issue from facts, and whether Dr. Scott was better qualified than the jury to draw such inferences. More to the point, we must determine whether the trial court abused its discretion in determining that Dr. Scott could not assist the jury in this regard or was no better qualified than the jury drawn from Catawba County to determine whether the average adult applying contemporary community standards would find the materials in question patently offensive. *State v. Evangelista*, 319 N.C. at 163-64, 353 S.E. 2d at 383-84; *State v. Knox*, 78 N.C. App. 493, 337 S.E. 2d 154 (1985); N.C.G.S. § 8C-1, Rules 702 and 705 (1986).

In attempting to establish a basis for Dr. Scott's expert opinion, the defendant presented evidence that Dr. Scott had visited a variety of outlets where "adult material" could be found, including adult book stores, video shops, and convenience stores. The fact that Dr. Scott "found adult material" at several locations in Catawba County did not provide a sufficient basis to support the admission of his expert testimony concerning whether the average adult in the community would find the materials the defendant was accused of selling to be patently offensive.

The "sexual conduct" which if depicted will support a conviction under our obscenity statute is *specifically limited* by N.C.G.S. § 14-190.1(c)(2) to:

> (1) Vaginal, anal, or oral intercourse, whether actual or simulated, normal or perverted; or
>
> (2) Masturbation, excretory functions, or lewd exhibitions of uncovered genitals; or
>
> (3) An act or condition that depicts torture, physical restraint by being fettered or bound, or flagellation of or by a nude person or a person clad in undergarments or in revealing or bizarre costume.

N.C.G.S. § 14-190.1(c) (1986). The magazines that the defendant was accused of selling contain photographic depictions of actual "acts of vaginal, anal or oral intercourse" on each and every page.

Dr. Scott's study does not appear in any way to have focused on whether the average adult applying contemporary community standards would find magazines limited exclusively to pictorial portrayals of actual acts of "vaginal, anal or oral intercourse" to be patently offensive. To the contrary, he indicated that the "adult magazines" he found at several locations in Catawba County covered a wide scope of materials ranging from the "extremely mild" to pictorial portrayals of mere nudity. Some unspecified number included some pictures of couples engaging in "oral, anal and vaginal sex." It is crystal clear from Dr. Scott's testimony that his study was designed to determine nothing more than the availability and accessibility of an extremely broad range of sexually suggestive material which he described as "adult material."

It is well established that:

> [T]he availability of *similar* materials on the newsstands of the community does not automatically make them admissible as tending to prove the nonobscenity of the materials which the defendant is charged with circulating. . . . 'Mere availability of *similar* material by itself means nothing more than that other persons are engaged in similar activities.'

Hamling v. United States, 418 U.S. at 125-26, 41 L.Ed. 2d at 625-26 (emphasis added) (quoting *United States v. Manarite*, 448 F. 2d 583, 593 (2d Cir.), *cert. denied*, 404 U.S. 947, 30 L.Ed. 2d 264 (1971)).

In the present case Dr. Scott's study did not even focus on the availability of material *similar* to the magazines the defendant was accused of selling. At best, his study could be said to have focused on the availability of a very broad range of sexually oriented materials that were largely dissimilar to the magazines in question, but that included some materials similar to them. Further, from his testimony it seems that he did not record the number of places where he found materials portraying actual acts of "vaginal, anal or oral intercourse" or the number of such materials he found.

Dr. Scott's study was simply too unfocused and unspecific to provide him with a sufficient basis to give an expert opinion regarding whether the average adult applying contemporary community standards would find the magazines at issue to be patently offensive. His own testimony indicated that he did nothing more than investigate the availability and accessibility of materials that were only generally sexually oriented and that he defined as "adult materials." His testimony indicated that he made no effort in his study to identify or isolate any factors bearing on the average adult's reaction to materials that were limited to pictorial portrayals of actual acts of "vaginal, anal or oral intercourse." He did not inquire of anyone's views with regard to materials limited to such portrayals and did not determine what percentage of the magazines or other materials sold or viewed in Catawba County contained such portrayals. He made no effort to determine what percentage of the population of the county viewed x-rated movies or what percentage of such movies contained depictions of actual acts of "vaginal, anal or oral intercourse." In summary, his testimony did not tend to show that he

had gathered any data which would indicate whether the average adult applying contemporary community standards would find materials limited to pictorial portrayals of actual acts of "vaginal, anal or oral intercourse" to be patently offensive.

The trial court properly exercised its discretion by excluding Dr. Scott's expert opinion testimony concerning whether the magazines in question in this case were patently offensive to the average adult, applying contemporary community standards, on the ground that Dr. Scott was no better qualified than the jury to address the question and could not assist the jury. *See State v. Evangelista*, 319 N.C. at 163-64, 353 S.E. 2d 383-84. Certainly, we cannot say that the trial court abused its discretion when it excluded the proffered testimony on this ground. Therefore, we conclude that the Court of Appeals erred in awarding a new trial due to the trial court's exclusion of this evidence.

II.

This case is before us by virtue of our having allowed the State's petition for discretionary review only on the question of the admissibility of Dr. Scott's opinion testimony. The defendant, who was the appellant in the Court of Appeals, has brought forward additional issues that she properly presented for review by the Court of Appeals. Those issues, therefore, are properly before us. App. R. 16.

[2] The defendant first assigns as error the trial court's exclusion of certain evidence during the testimony of the defendant's expert witness Dr. Charles Winick. The Court of Appeals concluded that "the trial court's treatment of Dr. Winick's testimony was appropriate . . . ." *State v. Anderson*, 85 N.C. App. 104, 106, 354 S.E. 2d 264, 265 (1987). We agree.

At trial the defendant attempted to introduce the expert opinion testimony of Dr. Winick, a sociologist, concerning a survey or poll he conducted of certain residents of Catawba County. The questions asked and the responses to them include the following:

> Q:2. In your opinion, have standards changed in recent years, so that depiction of nudity and sex are more acceptable or less acceptable in movies, video cassettes, publications and

other material depicting nudity and sex and available only to adults, but not to children? More acceptable—76%; less acceptable—24%; Neither/DK

Q:3. Do you agree or disagree that adults who want to, have the right to obtain and see movies, video cassettes, publications and other materials depicting nudity and sex and which are available only to adults, but not to children? Agree—80%; Disagree—17%; Neither/DK—3%

Q:4. Do you agree or disagree that adults who want to, have the right to patronize and make purchases at bookstores where publications and other materials depicting nudity and sex are available only to adults, but not to children? Agree—65%; Disagree—31%; Neither/DK

Q:5. Do you agree or disagree that adults who want to, have the right to patronize theatres where movies presenting nudity and sex are available only to adults, but not to children? Agree—75%; Disagree—25%; Neither/DK

Q:6. Do you think it is alright or not alright, for adults who wish to do so, to obtain and see in the privacy of their homes, movies, video cassettes, publications and other materials depicting nudity and sex which are available only to adults and not to children? All right—79%; Not all right—21%; Neither/DK

Q:7. We have used the words nudity and sex in the preceding questions. What we mean by these words includes exposure of the genitals and every kind of sexual activity, no matter how graphically depicted. Is that what you understood we meant, or did you think we meant something else? Understood—90%; Something else—10%

The trial court permitted the defendant to introduce the cumulative responses to survey question "Q:2" regarding changing standards and the responses to survey question "Q:7" concerning the manner of use of the phrase "nudity and sex." The trial court also permitted Dr. Winick to testify that in his opinion the survey demonstrated a "very high degree of acceptance and toleration of sexually explicit material" in Catawba County, and that he was using the phrase "sexually explicit material" as meaning materials similar to the magazines in question.

The trial court did not permit the defendant to introduce the cumulative responses to any of the other survey questions, however, which pertained to the views of those interviewed as to when, where, and how—if at all—adults should be able to obtain and view materials portraying nudity and sex. The trial court excluded this evidence for lack of relevance after concluding that the questions did not address the offensiveness of any material to the average person but, instead, related to "whether those interviewed wished to impose their beliefs or views on others."

We conclude that the trial court properly excluded the cumulative results of the survey with regard to questions 3, 4, 5, and 6. Those questions amounted to little more than a referendum on the desirability of the First Amendment and N.C.G.S. § 14-190.1. The issue the jury was to decide, however, was whether the average adult, applying contemporary community standards, would find that the magazines in question appealed to a prurient interest in sex in a patently offensive manner. The trial court did not abuse its discretion when it determined that the cumulative results of the responses to questions 3, 4, 5, and 6 would not assist the jury in resolving the issue before it and excluded those questions and results. *See State v. Evangelista*, 319 N.C. at 164, 353 S.E. 2d at 384; *State v. Knox*, 78 N.C. App. 493, 337 S.E. 2d 154; N.C.G.S. § 8C-1, Rule 702 (1986).

Additionally, it is clear from the transcript of the trial that the trial court was of the view that any probative value such evidence might have was substantially outweighed by the danger of confusion of the issues or danger of misleading the jury. It was within the discretion of the trial court to exclude the proffered testimony on that basis. *State v. Mason*, 315 N.C. at 731, 340 S.E. 2d at 434-35; N.C.G.S. § 8C-1, Rule 403 (1986). The trial court did not err in excluding the evidence in question, and this assignment of error is overruled.

III.

[3] By her next assignment of error, the defendant contends that various portions of the jury arguments for the State amounted to prosecutorial misconduct so flagrant that the trial court committed reversible error in denying her resulting motion for a mistrial. The defendant first contends that it was reversible error for one of the prosecutors to argue to the jury:

> Let me talk to you about this. If anything could be obscene, if anything could be obscene and these items which you, you have seen are not obscene, I don't know what it would take to be.

The defendant contends that this argument amounted to an expression of the prosecutor's personal belief in violation of N.C.G.S. § 15A-1230(a). Strictly speaking, the argument was not an expression of an opinion but, instead, a statement that the prosecutor would be unable to form an opinion as to what was obscene if the material before the jury was not. At most it amounted to a rhetorical statement implying that the State's evidence was overwhelming and contending that the jury should find the magazines in question obscene.

We have frequently held that counsel must be allowed wide latitude in jury arguments in hotly contested cases. *E.g., State v. Covington*, 317 N.C. 127, 343 S.E. 2d 524 (1986); *State v. Williams*, 314 N.C. 337, 333 S.E. 2d 708 (1985). Counsel may argue the facts in evidence and all reasonable inferences that may be drawn therefrom together with the relevant law in presenting the case. *State v. Covington*, 317 N.C. 127, 343 S.E. 2d 524. Whether counsel has abused this right is a matter ordinarily left to the sound discretion of the trial court. *Id.* Counsel may not, however, place before the jury incompetent and prejudicial matter by expressing personal knowledge, beliefs, and opinions not supported by evidence. *Id.* Upon objection, the trial court has the duty to censor remarks not warranted by the evidence or law and may, in cases of gross impropriety, properly intervene *ex mero motu. Id.* Applying these principles, we conclude that the previously quoted argument was within the latitude that may be allowed counsel in stating contentions and drawing inferences from the evidence. The trial court did not err in overruling the defendant's objection.

[4] The defendant next contends that the trial court erred by overruling her objection to the argument of one of the prosecutors that:

> I contend to you that it is obviously obscene, clearly obscene and patently offensive. Picture after picture of anal intercourse. What is more unhealthy than anal intercourse? How could it be anything but obscene?

This argument also was within the latitude allowed counsel in stating contentions and arguing reasonable inferences to be drawn from the evidence. The trial court did not err in overruling the defendant's objection to this portion of the argument.

[5] The defendant next contends that the prosecutors made numerous misstatements of law in their closing arguments for the State and made statements that led the jury to make improper inferences of law. We have reviewed each of the portions of the arguments to which the defendant has taken exception in this regard. Even if it is assumed *arguendo* that the arguments included misstatements of law or statements that might have tended to mislead the jury as to the applicable law, we detect no prejudice to the defendant.

At the outset of the State's closing arguments to the jury, one of the prosecutors immediately emphasized to the jury:

> Now, this case is, of course, one involving perhaps more of an unusual law and the attorneys, all of us will be arguing the law to you. I want to remind you that what I say to you now and what [other counsel] . . . all say to you first is not evidence and it is not the final word on the law. His Honor is the final word on the law. His Honor is the final word on the law and you should listen very carefully to his charge and apply the law which is your duty as jurors.

At the conclusion of the arguments of counsel, the trial court gave proper instructions on the applicable law. We conclude that those instructions, in the context of this case, cured any prejudice to the defendant which may have resulted from the possible misstatements of law in the prosecutors' arguments to which the defendant has excepted. *See State v. Gladden*, 315 N.C. 398, 340 S.E. 2d 673, *cert. denied*, --- U.S. ---, 93 L.Ed. 2d 166 (1986); *State v. Harris*, 290 N.C. 681, 228 S.E. 2d 437 (1976).

[6] The defendant next contends that the prosecutors "traveled outside the record in their arguments to the jury." She first complains that the prosecutors improperly attacked the credibility of her expert witness, Dr. Scott. At trial Dr. Scott had testified that he found a wide range of materials, including materials depicting vaginal, oral and anal intercourse, in a wide variety of locations, which included the convenience stores marked on a map he used

to illustrate his testimony. To rebut this testimony, the State introduced the testimony of Mr. Jack Shulter, Division Manager for Quick Stop Convenient Stores. Shulter testified that Quick Stop operated convenience stores at some of the locations marked in orange on Dr. Scott's map. Shulter further testified that those stores did not carry the magazines the defendant was accused of selling or any similar materials.

During the State's closing arguments, one of the prosecutors argued:

> What did Mr. Shulter, who was the district manager of the biggest stores in this county or chain in this county tell you? He tells you that you can't find anal intercourse material at these places that Dr. Scott has marked here in orange. He says that is preposterous.

The trial court sustained the defendant's objection to this portion of the arguments and ordered it stricken. The prosecutor then argued:

> It is your job as a jury to decide what is believable and what is not believable and I argue to you from testimony that you have heard from Mr. Shulter that everything that Mr. Scott testified to is unbelievable.

The trial court overruled the defendant's objection to this argument.

In arguing to the jury, the State may comment on any contradictory evidence as a basis for the jury's disbelief of a witness's testimony. *State v. Williams*, 314 N.C. 337, 333 S.E. 2d 708 (1985). Here, the argument allowed by the trial court was based upon Shulter's testimony and was a proper contention that, based on that testimony, the jury should disbelieve Dr. Scott. The trial court did not err in overruling the objection.

[7] The defendant also contends that the prosecutors went outside the record to express personal opinions at several other points during their arguments to the jury on behalf of the State. On each of the occasions complained of, however, the trial court sustained the defendant's objections, admonished the prosecutors, and expressly instructed the jury to disregard the argument in question. The record does not reflect that the prosecutors on any

of these occasions attempted to circumvent the ruling of the trial court or return to the improper arguments. Given this situation, the trial court's prompt curative instructions were sufficient to remove any possible prejudice that may have resulted from the remarks of the prosecutors. *State v. Bruce*, 315 N.C. 273, 337 S.E. 2d 510 (1985). This conclusion draws some additional support from the fact that the jury acquitted the defendant on two counts.

For the foregoing reasons, we conclude that the trial court did not err in denying the defendant's motion for a mistrial based upon alleged prosecutorial misconduct. This assignment of error is overruled.

IV.

[8] The defendant next argues that N.C.G.S. § 14-190.1 is facially unconstitutional under the Constitution of North Carolina. In support of this contention, the defendant argues that the statute incorporates the *Miller* test for obscenity adopted by the Supreme Court of the United States. The defendant argues that the *Miller* test is "unworkable and unfair in the criminal context" and urges us to hold that our statute incorporating it is facially violative of the Constitution of North Carolina. We have recently rejected similar arguments and do so again here. *Cinema I Video v. Thornburg*, 83 N.C. App. 544, 351 S.E. 2d 305 (1986), *aff'd*, 320 N.C. 485, 358 S.E. 2d 383 (1987).

The defendant next argues that the statute is facially invalid under article I, sections 14 and 19 of the Constitution of North Carolina, because it fails to "provide guidance or uniformity in selection of the community by whose standards a defendant's conduct is to be judged." The defendant argues that the statute is fatally flawed in this regard because it does not specify that obscenity is to be judged in accordance with national or statewide "community standards" or otherwise specify the geographic area intended by the use of the term "community standards." When the same argument has been based upon the Constitution of the United States, it has been rejected. *Jenkins v. Georgia*, 418 U.S. 153, 41 L.Ed. 2d 642 (1974). We are constrained to conclude that this argument is equally untenable when based upon the Constitution of North Carolina. *See State v. Bryant and Floyd*, 285 N.C. 27, 203 S.E. 2d 27, *cert. denied*, 419 U.S. 974, 42 L.Ed. 2d 188 (1974). As presently constituted, N.C.G.S. § 14-190.1 is not facially

violative of the Constitution of North Carolina. *Cinema I Video v. Thornburg*, 83 N.C. App. 544, 351 S.E. 2d 305 (1986), *aff'd*, 320 N.C. 485, 358 S.E. 2d 383.

V.

The defendant next contends that the statute was unconstitutionally applied in the present case. In support of this contention, the defendant first renews her argument that the statute was rendered fatally defective because the jury was given no guidance as to "which community's standards" it was to apply in assessing the defendant's guilt. For reasons we have previously discussed in addressing the defendant's contentions as to facial unconstitutionality of the statute, we reject this contention as being without merit.

[9] The defendant next contends that the statute was applied in the present case in an unconstitutional manner, because the trial court's instructions permitted the jury to find the defendant guilty without finding that she knew the contents of the magazines she sold. She argues that, as a result, the jury was not required to find that she possessed the requisite intent and guilty knowledge to support a conviction. The trial court specifically instructed the jury in the present case that to satisfy the intent requirement of the statute, the State must prove that the defendant knew the content, character, and nature of the magazines when she sold them. The statute was constitutionally applied in this regard by the trial court, and the defendant's contention to the contrary is without merit.

[10, 11] Finally, the defendant contends that the statute was applied in violation of the First Amendment in the present case, because the jury was not directed to apply the "reasonable person standard" when determining whether the magazines in question, taken as a whole, lacked serious literary, artistic, political or scientific value. Unlike appeal to the prurient interest and patent offensiveness, the value of material alleged to be obscene may not be judged by contemporary community standards. *See Smith v. United States*, 431 U.S. at 301, 52 L.Ed. 2d at 335. Instead, the literary, artistic, political, or scientific value of material is to be determined based upon whether a "reasonable person" would find such value in the material, taken as a whole. *Pope v. Illinois*, 481 U.S. ---, 95 L.Ed. 2d 439 (1987). However, the Supreme Court of

the United States has indicated that the decision in a particular case as to whether to instruct the jury to apply the reasonable person test in this regard is a matter in the discretion of the trial court. *Id.* at --- n.3, 95 L.Ed. 2d at 445 n.3. In the present case, unlike the situation in *Pope*, the trial court did not erroneously instruct the jury that they should apply contemporary community standards in determining the value of the materials in question. Instead, the trial court merely failed to instruct the jury that it must apply a reasonable person standard. We conclude that this did not amount to prejudicial error. *Id.*

For the foregoing reasons, we conclude that the defendant received a fair trial free of prejudicial error. Accordingly, we reverse the holding of the Court of Appeals, which awarded the defendant a new trial, and remand this case for reinstatement of the judgments of the trial court.

Reversed and remanded.

PHILIP A. WILLIAMS v. J. ELMO JONES, BENJAMIN F. CRAVEN, AND FACTORY AUTOMATORS, INC.

No. 538A87

(Filed 6 April 1988)

Contracts § 27.1— oral agreement—formation of new corporation—sufficiency of evidence

The evidence was sufficient to permit the jury to find that plaintiff and the individual defendants entered into a valid oral contract to form a new corporation capitalized by the individual defendants which would have the exclusive right to sell plaintiff's factory automation systems in that the evidence was sufficient to support findings that (1) there was an offer and acceptance of terms to capitalize a new corporation at a meeting attended by the parties on a specified date, and (2) the terms agreed upon were sufficiently definite and certain to give rise to an enforceable contract.

APPEAL by plaintiff 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. 178, 360 S.E. 2d 298 (1987), affirming the judgment notwithstanding the verdict entered by *Albright, J.*, at the 14 April 1986 session of Superior Court, GUILFORD County. Heard in the Supreme Court 9 February 1988.

Nichols, Caffrey, Hill, Evans & Murrelle, by R. Thompson Wright, for plaintiff-appellant.

Gabriel, Berry, Weston & Weeks, by M. Douglas Berry, for defendant-appellees.

MARTIN, Justice.

This case comes before us on the issue of whether the trial judge erred in entering judgment notwithstanding the verdict. We hold that he did err, and for the reasons explained below, we reverse the Court of Appeals and reinstate the jury verdict.

The evidence presented at trial, taken in the light most favorable to the plaintiff, shows that plaintiff went into business for himself in 1977 as a designer and purveyor of computer systems used to automate factory operations. Plaintiff's capital was intellectual rather than monetary, consisting of a 1972 mechanical engineering degree and five years' experience designing and selling industrial automation systems. By 1983 plaintiff's efforts had produced mixed results. On the one hand, substantial growth and financial success were almost within his grasp. On the other hand, he lacked the capital necessary for the month-to-month operation of his expanding business and for the further expansion which his ambitious plans required. The nature of his business was such that considerable capital outlay was made by his company in the course of fulfilling each order—designing the software, obtaining the hardware, installing the system in operational order, and teaching the client's worker to use the equipment—before the client was billed and the investment, along with a profit, was recouped. Thus, the more successful his salesmanship was, the greater his anxiety about being able to pay his suppliers and meet his payroll.

Late in 1979 or early in 1980, plaintiff met Benjamin F. Craven, later a defendant in this suit. Craven, a certified public accountant, operated a business called Craven Venture Management. He specialized in raising capital for businesses and also acted as an all-purpose financial consultant. Plaintiff first turned to him for help in securing a bank loan and thereafter relied upon the older man for advice and aid with business problems which took him outside his competence in technical matters and sales. It was Craven, for example, who advised plaintiff to do business

under a second corporate aegis, Symex Factory Automation, Inc., in addition to the original, Symex, Inc. The purpose of these maneuvers was to insulate the new corporation from the indebtedness to suppliers which plagued Symex, Inc., and thus to make it more attractive to potential investors. These and other palliatives were not wholly successful, and by July 1983 the Symex companies were facing a choice between finding sources of capital infusion or bankruptcy.

In July 1983 defendant Craven told plaintiff that defendant J. Elmo Jones, who had recently sold his business and retired, was interested in investing in the Symex companies. Jones had met plaintiff some weeks before, discussed plaintiff's business with him, and travelled with him to some Symex job sites to get the flavor of the business, which was entirely alien to his own business experience in textiles. Plaintiff developed some sales projections, working with his accountant, Michael Dimoff. Plaintiff projected that his business could anticipate seven large orders over the following twelve months, averaging $125,000 each, yielding roughly one million dollars in sales for the twelve-month period. Dimoff and Craven worked up a financial portrait of the Symex companies to show Jones.

On 7 July 1983, plaintiff, Dimoff, Jones, and Craven met in Craven's office. All participants at this critical morning meeting testified at the trial, but their testimony was conflicting. Plaintiff and Dimoff testified that the meeting produced a verbal agreement between plaintiff and defendants Jones and Craven to form a new company, Factory Automators, Inc., which Jones and Craven would capitalize, and that the parties hammered out an understanding on the essential terms of the agreement. Collateral matters were to be worked out later, and the agreement in full was to be memorialized in writing at a later time.

Plaintiff and Dimoff testified that at the 7 July 1983 meeting the following terms were agreed upon: (1) Plaintiff was to bankrupt Symex, Inc., and liquidate Symex Factory Automators. (2) Craven and Jones would each contribute $50,000 equity capital in exchange for stock. (3) Plaintiff would contribute his technology. (4) The technology would remain plaintiff's but would be available to the new company under precisely the same licensing arrangements as had existed between plaintiff and Symex. (5) Plain-

tiff would devote his full-time sales efforts to the new company. (6) The new company would employ former Symex employees Joe Kline and Kathy Carpenter, their employment contracts to contain noncompetition and secrecy agreements. (7) Plaintiff was to receive 50 percent of the common stock when retained earnings of the company reached $200,000; he was to receive a pro rata share of this 50 percent as retained earnings approached the $200,000 level. Plaintiff testified that he accepted the terms, that Joe Kline and Kathy Carpenter were called in and told of the agreement, and that the whole party then went to the Starmount Country Club for a celebration lunch.

Jones and Craven deny that they agreed to the above-listed terms at the 7 July 1983 meeting or at any time thereafter. They testified that a meeting or meetings took place sometime in July or August but produced nothing more than a preliminary agreement or an "agreement to agree." According to their testimony, these negotiations left open essential terms necessary to define the business relationship into which the parties contemplated entering. They claim that the deal under discussion included a possible incentive stock bonus of 50 percent if plaintiff's sales efforts were sufficiently fruitful, not payment for his contributed technology. Jones and Craven claim that plaintiff's "technology" was worth little and that the genuinely valuable technical work done in either the Symex companies or the newly formed company was done entirely by Joe Kline. They deny that any clear agreement existed between the parties as to when plaintiff was to receive stock. Additionally, they deny that either licensing agreements for plaintiff's technology or noncompetition agreements for key employees was even discussed, much less agreed upon. Finally, they deny that they agreed to capitalize the new corporation in the form of supplying equity capital. What each defendant in fact did supply, in exchange for the company's stock, was $1,000 in cash and a $50,000 bank loan, for which the corporation was liable.

All parties agree on the following: Although the parties looked to an eventual written agreement, none was ever signed by any of the parties. Despite the absence of the anticipated written agreement, the parties did in fact go forward and create a new company, Factory Automators, Inc., which sold the technology which had been the stock-in-trade of the Symex com-

panies. Plaintiff bankrupted Symex, Inc., and liquidated Symex Factory Automators in July. He immediately went to work as the sales representative of the new company, Factory Automators, Inc., and employed the two other key employees who had been on the Symex payroll. Jones was its president. It was capitalized by Jones and Craven.

Plaintiff began working in sales under Jones' direction in August 1983. In the same month he was presented with a document labeled "Preliminary Draft," which purported to set down the agreement between the three parties. Plaintiff was alarmed because it contained no reference to what he considered to be key terms—in particular, his license for his technology and noncompetition and secrecy agreements for key employees—while it introduced terms not part of the oral agreement—in particular, it referred to a stock incentive bonus plan for himself. Plaintiff never signed the agreement. Relations between Jones and plaintiff deteriorated rapidly. Jones became convinced he had bought a "lemon." He tried vainly and with decreasing patience to reform plaintiff's sales approach, to bring it into line with his own ideas of good salesmanship based on a lifetime in the textile industry. Jones fired plaintiff in June 1984. Plaintiff asked to be allowed to remove his materials from the premises of Factory Automators. The request was denied. Plaintiff left the company with no stock, no licenses, and no technical product he could sell in a new business venture. Craven and Jones continue to operate the company, claiming that due to a combination of Joe Kline's technical expertise and the sales efforts of a new representative, the company has been turned around.

At trial the parties disputed the value of plaintiff's sales efforts during the months that he represented Factory Automators. Plaintiff contended that he met or exceeded the seven-large-order, million-dollar projection he had made in July 1983 when negotiations were underway. He presented evidence that the seven orders were in fact booked before he left the company and before the twelve-month period was concluded. Defendants countered that the projection was vastly inflated relative to the actual sales plaintiff had been able to achieve. The record reveals that the dispute between the parties devolves into a question about the proper method of accounting to be used in recording sales. Defendants employed the so-called "completed contract"

method of accounting, which does not count an order until the job is completed. Plaintiff used the method of counting orders that had been booked. Since typically the jobs done by the company took considerable time and outlay to complete, the different accounting methods produced very discrepant pictures of plaintiff's sales effectiveness. Plaintiff contended that his two financial backers well understood that the business could not be profitable in its first year of operation at the time that the two sides engaged in negotiation. Jones and Craven insisted that they were led to expect a profitable operation in the first year and that plaintiff's performance met neither his projections nor their legitimate expectations.

The case proceeded to trial upon plaintiff's claim for rescission of the contract, and the court submitted five issues to the jury: (1) whether plaintiff entered into a contract with defendants Jones and Craven; (2) if so, whether these defendants substantially breached the contract; (3) whether plaintiff contributed any property of value to the corporation at the time it was organized; (4) whether the property can be returned in kind; and (5) the fair market value of the property so contributed. The jury returned a verdict answering the above five issues in plaintiff's favor and awarded plaintiff damages in the amount of $150,000. The court also submitted an issue to the jury on defendants' counterclaim, asking in what amount, if any, plaintiff was indebted to the defendants. The jury found for the defendants on the counterclaim in the amount of $1,000.

Following the jury verdict the trial court granted defendants' motion for judgment notwithstanding the verdict. Plaintiff appealed to the Court of Appeals, a majority of which affirmed the trial judge's granting of the motion. Judge Phillips dissented on the grounds that the evidence presented a question for the jury of whether there was a binding oral contract. Plaintiff filed notice of appeal to this Court based on Judge Phillips' dissent, pursuant to N.C.G.S. § 7A-30(2).

The sole question before us is whether the evidence presented at trial was sufficient to submit to the jury the issue of whether there was a binding oral contract between plaintiff and Jones and Craven. The standard to be employed by a trial judge in determining whether to grant a judgment notwithstanding the ver-

dict is the same standard employed in ruling on a motion for a directed verdict. The judge must consider the evidence in the light most favorable to the nonmovant and may grant the motion 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, 201 S.E. 2d 897 (1974). All conflicts in the evidence are to be resolved in the nonmovant's favor, and he must be given the benefit of every inference reasonably to be drawn in his favor. *Daughtry v. Turnage*, 295 N.C. 543, 246 S.E. 2d 788 (1978). Conflicts, contradictions, and inconsistencies are to be resolved in the nonmovant's favor. *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973).

After carefully reviewing the trial transcript, we conclude that the evidence, so viewed, would permit a jury to find that at their 7 July 1983 meeting plaintiff and defendants Jones and Craven entered into a valid oral contract to form a new corporation to sell plaintiff's technology. Our analysis divides into two subparts: (1) was there sufficient evidence for the jury to find there was an offer and acceptance of terms to capitalize a new corporation at the 7 July meeting, and (2) if so, were the terms agreed upon sufficiently definite and certain to give rise to a contract enforceable by a court of law? We will address these subparts in turn.

This Court has long stated the general test for the existence of a contract. In *Overall Co. v. Holmes*, 186 N.C. 428, 119 S.E. 817 (1923), this Court said: "A contract is 'an agreement, upon sufficient consideration, to do or not to do a particular thing.' " *Id.* at 431, 119 S.E. at 818 (quoting 2 W. Blackstone, *Commentaries* *442). The trial record clearly presents evidence from which a jury could conclude that the 7 July 1983 meeting produced a binding oral contract to form a new company capitalized by Jones and Craven, which would have the exclusive right to sell plaintiff's factory automation systems. The testimony of plaintiff and accountant Dimoff showed that a firm offer was made to supply $100,000 in capital in exchange for the right to sell the technology. The protestations of Jones and Craven that nothing more than preliminary negotiations were discussed merely contradicted plaintiff's testimony. Indeed, the testimony of plaintiff and Dimoff showed that they, along with key employees Kline and Carpenter, who had just been hired for the new enterprise, were taken by Jones to his country club for a lunch to celebrate the

deal. Objective circumstances supported the testimony. Plaintiff did dissolve the two Symex companies and he immediately put all the technical materials that had been in use at the Symex companies into the custody of the new entity. Although Jones and Craven disparaged the commercial value of these materials, they refused to allow plaintiff to take them from the corporate premises when he was fired. Defendants continue to market the product that plaintiff developed. Defendant Jones testified that once rid of plaintiff's deleterious participation, the company was turned around and ceased to be a "lemon." We conclude that the evidence was sufficient to support a jury finding of an offer and acceptance.

We come now to the question of whether the terms agreed upon at the 7 July 1983 meeting were sufficiently definite and certain to be enforceable.

> There is no contract unless the parties assent to the same thing in the same sense. A contract is the agreement of two minds—the coming together of two minds on a thing done or to be done. "A contract, express or implied, executed or executory, results from the concurrence of minds of two or more persons, and its legal consequences are not dependent upon the impressions or understandings of one alone of the parties to it. It is not what either thinks, but what both agree."

Overall Co. v. Holmes, 186 N.C. at 431-32, 119 S.E. at 818-19 (quoting *Prince v. McRae,* 84 N.C. 674, 675 (1881)).

Defendants argue that even if there were evidence sufficient to find that the parties made an oral contract, the terms supposedly agreed to were too vague, uncertain, and indefinite to constitute an enforceable contract. We disagree. A jury could find based upon plaintiff's testimony, as corroborated by Dimoff, that the parties reached a clear and definite agreement as to the details of the contract. The evidence discloses the understanding that each of the parties had of the motivations and interests of the opposing party or parties, as expressed at the 7 July 1983 meeting or in prior discussions between the parties. The evidence presented by plaintiff showed that he was a man with two objectives in making an agreement with Jones and Craven: (a) to maintain substantial ownership of his company and (b) to maintain

control of his technology. Plaintiff testified that certain terms *not* discussed were simply not material to him; for example, he did not care to bargain for salary. He was prepared to accept any salary which would cover his living expenses.

Plaintiff described his reaction to being told by defendant Craven that defendant Jones was interested in investing in the following terms:

> I had concerns about Elmo. I was afraid that—I wanted Ben to know that I wanted no part of any deal where I might lose my company. I wanted no part of any deal where I wouldn't control my technology. . . . Ben stated specifically, "Phil, I've known Elmo for X years, you know. . . . He doesn't want any part of your business. He'd like to help you out. I can promise you Elmo won't take your business," and I must have beat that thing to death, because I wanted no part of it. We must have talked about that for thirty minutes.

Plaintiff's testimony revealed that he regarded only two financial terms as essential to the agreement and that these terms were agreed to by all parties at the 7 July 1983 meeting. In recognition of the value of his contributed technology, he was to receive 50 percent of the new company's stock when retained earnings reached $200,000 and would receive stock on a pro rata basis as the $200,000 level was approached. Jones and Craven agreed to put up $50,000 each in equity capital. They responded that what they had envisioned was an incentive stock bonus plan for plaintiff, details to be worked out later, and had not agreed to stock in compensation for his technology. Moreover, Jones and Craven insisted that they believed that plaintiff would make provision out of his potential 50 percent of the common stock for stock bonuses or incentives for Joe Kline and Kathy Carpenter. There is nothing vague or indefinite about plaintiff's testimony as to the stock deal he was offered, although it was strenuously contested by the defendants.

Defendant Craven denied that there had been an agreement to fund the new company in the form of equity capital, and defendant Jones went so far as to insist that he had not known what was meant by "equity capital" when the parties met on 7 July 1983. Plaintiff testified that he had wanted and gotten an agreement to supply equity capital because he feared that major

corporations would refuse to buy from his company unless it could demonstrate it possessed significant assets. Plaintiff had discovered when he operated the Symex companies that potential buyers would doubt a debtor firm had the financial stability to stay in business to complete its projects. Again, there is nothing vague or indefinite about the term "$100,000 of equity capital." The issue for the jury was, rather, that of the credibility of the parties.

Plaintiff testified that maintaining control of his technology was of paramount importance to him and that he had stressed this issue in discussions with both Jones and Craven prior to 7 July 1983 and had sought terms to effect his purpose at the 7 July meeting. He had discussed what he refers to as the "TRG incident" with each of them prior to the 7 July meeting and indeed had relied upon defendant Craven for advice in dealing with this episode. In 1980, three key employees had left plaintiff's company to form a competing company, selling the kind of systems they had learned to design while in plaintiff's employ. As a result, plaintiff lacked the manpower to fulfill existing orders and faced competition for new business. Plaintiff reacted by developing a new product line, which he licensed to Symex but which remained his property. Plaintiff also required his employees to sign noncompetition and secrecy agreements to protect the value of his technology. Jones and Craven deny that either licensing or noncompetition and secrecy agreements were even discussed at the 7 July meeting. Plaintiff insists that it was agreed that these protections would follow him from Symex to the new corporation and that defendant Craven was charged with getting the licensing agreement drafted, a licensing agreement which was to be a "carbon copy" of the agreement plaintiff had had with Symex. Viewing the evidence as required, the terms of the oral agreement were neither vague nor indefinite.

Defendants' argument as to vagueness and indefiniteness of the oral contract relies upon certain Court of Appeals cases where plaintiffs were nonsuited because of the imprecision of contract terms. They cite *Lamp Co. v. Capel*, 45 N.C. App. 105, 262 S.E. 2d 368, *cert. denied*, 300 N.C. 197, 269 S.E. 2d 617 (1980), in which the president of a defunct company who had written to a creditor of that company that he "would try to pay off" the company's debt, was held to have penned a letter too vague and

uncertain to support a contract action against him for the debt. Nonsuit also befell the buyer of certain trucks in *Industries, Inc. v. Cox*, 45 N.C. App. 595, 263 S.E. 2d 791 (1980), who alleged an oral contract to receive "patent rights" along with the trucks because the court found it impossible to say which among a large set of possible patent rights was being claimed. Similarly, in *Gregory v. Perdue, Inc.*, 47 N.C. App. 655, 267 S.E. 2d 584 (1980), the court held that a contract to raise chickens without specifying the quantity of birds could not be considered binding. Cases of this kind may be distinguished from the case before us. Here, the plaintiff presented evidence which demonstrates that the terms alleged by defendants to be indefinite were in fact sufficiently well delineated to all parties. Evidence which defined the terms in question was presented in this case, although contested by defendants.

Finally, we note that the failure of the parties to follow through with their intention to reduce the agreement struck on 7 July 1983 to writing does not prevent the underlying oral agreement from binding the parties. Where the evidence presented at trial is sufficient to support plaintiff's contention that a definite agreement was made by the parties, the contract is complete even though the parties contemplated reducing the agreement to writing. *Elks v. Insurance Co.*, 159 N.C. 619, 75 S.E. 808 (1912).

Plaintiff has offered sufficient evidence, when viewed most favorably to him, of each element of his claim so that reasonable men may form divergent opinions of its import. Therefore, the case was properly one for the twelve. *Smith v. McRary*, 306 N.C. 664, 295 S.E. 2d 444 (1982).

The decision of the Court of Appeals is reversed and the cause is remanded to that court for further remand to the Superior Court, Guilford County, for reinstatement of the jury verdict.

Reversed and remanded.

STATE OF NORTH CAROLINA v. GARY EUGENE RHINEHART

No. 513A87

(Filed 6 April 1988)

1. **Criminal Law § 50.2— opinion of officers as to consistency of statements—admissible**

Testimony from two law enforcement officers in a first degree sexual offense case that the victim's statements to them were consistent with the victim's accounts to other people constituted admissible lay opinions under N.C.G.S. § 8C-1, Rule 701 (1986). It was clear that both witnesses rendered lay opinions based upon their own personal perceptions which were helpful to the determination of a fact in issue; moreover, assuming error, there was not sufficient prejudice to warrant a new trial. N.C.G.S. § 15A-1443(a).

2. **Rape and Allied Offenses § 6.1— first degree sexual offense—refusal to submit attempt—no error**

The trial court did not err in a first degree sexual offense prosecution by refusing to instruct the jury on the lesser-included offense of attempted first degree sexual offense where there was no evidence presented at trial from which the jury could reasonably have found that defendant committed merely the lesser-included offense.

3. **Criminal Law § 134.4— first degree sexual offense—committed youthful offender statute not applicable—mandatory life sentence**

The trial court in a prosecution for first degree sexual offense was without discretion to sentence defendant as a committed youthful offender because the first degree sexual offense statute calls for a mandatory life term. N.C.G.S. § 14-27.4, N.C.G.S. § 148-49.14.

APPEAL as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing the mandatory sentence of life imprisonment entered by *Collier, J.*, at the 4 May 1987 Criminal Session of Superior Court, FORSYTH County, upon defendant's conviction by a jury of first-degree sexual offense. Heard in the Supreme Court on 9 February 1988.

Lacy H. Thornburg, Attorney General, by Randy Meares, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Mark D. Montgomery, Assistant Appellate Defender, for defendant-appellant.

MEYER, Justice.

Defendant was convicted by a jury of one count of first-degree sexual offense arising out of an encounter with the nine-year-old male victim. In his appeal to this Court, defendant forwards for our consideration three assignments of error relative to both the guilt-innocence and the sentencing phases of his trial. We have considered the entire record and each of defendant's three assignments in turn, and we detect no error in defendant's trial. Accordingly, we leave undisturbed defendant's conviction and the accompanying mandatory sentence of life imprisonment.

Evidence presented by the State at trial tended to show the following facts and circumstances. On 7 March 1987, the day on which the crime occurred, the victim was nine years and five months old. He lived with his mother, his sister and his brother in their home in Winston-Salem, North Carolina. Defendant Gary Eugene Rhinehart, who was twenty years of age on the date in question, lived in a nearby home with his foster mother.

On Saturday, 7 March 1987, the victim accompanied his younger brother and a friend to a neighborhood recreation center to play basketball. After playing for approximately a half hour, the three youngsters went to a nearby convenience store to get a drink. While at the convenience store, they met defendant.

The youngsters next accompanied defendant to another nearby playground. Once there, the group played basketball for approximately ten more minutes. The victim and his companions then decided to leave. At this point, defendant suggested that they divide into two groups and race back to the victim's house. The victim agreed, and while he and defendant followed a path through the woods, the victim's brother and the other youngster followed the roads to see who would arrive at the victim's house first.

As the victim and defendant followed the path through the woods, the young victim became tired and decided to stop for a brief rest. When the victim stood up again to resume the trek, defendant "jerked" the victim's pants down and began sucking the victim's penis. As the victim tried to scream, defendant placed his hand over the youngster's mouth and told him that if he did not

cooperate, defendant would bite off the victim's penis. Defendant apparently sucked the victim's penis for approximately three minutes, stopping only when he heard the sound of a motorcycle nearby.

Seizing the opportunity provided by the noise of the nearby motorcycle, the victim broke free and ran to his home. Once at home, the then-crying victim told his mother what had happened during his trip through the woods with defendant. She subsequently testified at trial as to what her son had told her on that occasion. There was also testimony from a motorcyclist who stated that he had seen defendant and the victim in the woods while riding in the area on the day in question.

Defendant presented evidence in support of an alibi defense. Defendant himself testified that he did not leave his house on the day in question until approximately 3:00 p.m. and that, though he did see the victim briefly on that day, he did not venture into the woods and he never touched the victim. Defendant's mother corroborated defendant's statement that he did not leave home until 3:00 p.m. and testified further that defendant returned home at approximately 6:00 that evening. One of defendant's friends testified that defendant visited him on the afternoon in question, staying until fairly late.

On the basis of this and other evidence, the jury found defendant guilty of first-degree sexual offense. Pursuant to the jury's verdict, Judge Collier sentenced defendant to a mandatory life term. In his appeal to this Court, defendant brings forward three specific assignments of error: first, that the trial court committed reversible error in allowing two law enforcement officers to testify that the victim made prior consistent statements concerning the events of 7 March 1987; second, that the trial court committed reversible error in refusing to instruct the jury on the lesser included offense of attempted first-degree sexual offense; and third, that the trial court committed reversible error in failing to sentence defendant as a committed youthful offender. We deal with each of these assignments of error in turn.

I.

[1] In his first assignment of error, defendant asserts that the trial court committed reversible error in permitting two law en-

forcement officers, specifically Officers Carter and Carden, to render lay opinions that the victim's statements to each of them concerning the incident of 7 March 1987 were consistent with the victim's accounts to other persons. More specifically, defendant argues first that the officers' testimony in the case at bar constituted inadmissible lay opinion testimony pursuant to Rule 701 of the North Carolina Rules of Evidence. Defendant argues second that the admission of this opinion testimony was so prejudicial to defendant's cause as to entitle him to a new trial. We cannot agree with defendant, and we therefore overrule this first assignment of error.

Deputy Sheriff Dan S. Carter testified for the State at defendant's trial. Deputy Sheriff Carter stated that, on 7 March 1987, he responded to an assault call at the victim's home in Winston-Salem. Once there, he spoke to Officer Blakely of the Winston-Salem Police Department about what had occurred. For the purpose of corroborating Officer Blakely's subsequent testimony, Carter was permitted to testify in some detail as to what Blakely told him the victim had reported. Immediately thereafter, the following exchange occurred during the direct examination:

Q Did you actually talk to [the victim]?

A Yes, I did.

Q Did he tell you what happened?

A Yes, he did.

Q What did he tell—tell us what he told you.

A He basically said the same thing—

MR. REDDEN: Object, Your Honor.

A He said he was pushing his bike—

MR. REDDEN: Move to strike. That's not responsive.

THE COURT: Overruled.

Detective S. G. Carden of the Forsyth County Sheriff's Department also testified for the State at trial. Detective Carden stated that he conducted an interview with the victim at the Sheriff's Department on 9 March 1987. Subsequently, he read into the record an accurate transcription of that lengthy interview. On

cross-examination by defendant's counsel, the following exchange occurred:

> Q Uh-huh. Did he tell the story pretty matter-of-factly?
>
> A The same story I have been able to get was consistent with the story he had told before.
>
> Q Just pretty much recited this thing matter-of-factly?
>
> A Appears to be the same story, yes, sir.

We cannot agree with defendant's assertion here that the above-excerpted statements by Deputy Sheriff Carter and Detective Carden constitute improper expressions of opinion under the North Carolina Rules of Evidence. Rule 701, which details the requirements for the admission of opinion testimony from lay witnesses, 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-1, Rule 701 (1986).

Here, the statements of both Deputy Sheriff Carter and Detective Carden fall squarely within the language of the rule. Carter testified that two conversations in which he had been an immediate party—that with Officer Blakely and that with the victim himself—revealed, in his opinion, the same account of the events of 7 March 1987. Likewise, Carden testified on cross-examination that the statement he had taken from the victim on 9 March revealed the same story the victim had previously related to law enforcement officials. It is crystal clear that both of these witnesses rendered lay opinions based upon their own personal perceptions. It is equally clear that these opinions were helpful to the determination of a fact in issue—namely, the precise nature of the sexual offense perpetrated by defendant. We find no error in the admission of these statements.

Even assuming arguendo that the trial court erred in allowing this lay opinion testimony, we fail to detect sufficient evi-

dence of prejudice to defendant's cause to warrant our order of a new trial. Defendant's burden in a case such as this is to show a reasonable possibility that, but for the trial court's error in admitting the evidence in question, a different result would have been reached at the trial. N.C.G.S. § 15A-1443(a) (1983). This the defendant has failed to show. Thus, even assuming error, which we expressly do not find, no reversible error would appear on this record. Defendant's first assignment of error is hereby overruled.

II.

[2] In his second assignment of error, defendant asserts that the trial court committed reversible error in refusing to instruct the jury on the lesser included offense of attempted first-degree sexual offense. Defendant notes that the victim, upon returning to his home immediately after the incident, twice told his mother that defendant "tried to suck" his penis. As a result of this, argues defendant, a reasonable jury could have found that defendant's acts constituted, not a completed first-degree sexual offense, but rather an attempted first-degree sexual offense. Thus, continues defendant here, the trial court acted improperly in refusing to instruct on the lesser included offense, and defendant is entitled to a new trial. We cannot agree, and we overrule defendant's second assignment of error.

At the close of all the evidence at trial, Judge Collier convened a conference in his chambers for the discussion of what jury instructions were to be given by the court. At the outset, counsel for defendant indicated that he did not desire that any instruction be given concerning attempted first-degree sexual offense. Following additional discussion, however, defendant's counsel reversed his position and requested that Judge Collier give the instruction on the attempt offense. Ultimately, the trial judge ruled that the instruction in question was not called for by the evidence presented and that the only verdicts to be submitted for the jury's consideration were guilty of first-degree sexual offense and not guilty. Defendant's counsel made no objection to Judge Collier's ruling.

Assuming, without in fact deciding, that defendant has properly preserved his right to argue this assignment of error on appeal to this Court, we hold that Judge Collier acted correctly in refusing to instruct the jury on attempted first-degree sexual

offense. This Court has addressed on numerous occasions the circumstances under which a trial court must instruct a jury concerning a lesser included offense. In our oft-cited decision in *State v. Lampkins*, 286 N.C. 497, 212 S.E. 2d 106 (1975), *cert. denied*, 428 U.S. 909, 49 L.Ed. 2d 1216 (1976), for example, we stated as follows:

> When, upon all the evidence, the jury could reasonably find the defendant committed the offense charged in the indictment, but could not reasonably find that (1) he did not commit the offense charged in the indictment and (2) he did commit a lesser offense included therein, it is not error to restrict the jury to a verdict of guilty of the offense charged in the indictment or a verdict of not guilty, thus withholding from their consideration a verdict of guilty of a lesser included offense. Under such circumstances, to instruct the jury that it may find the defendant guilty of a lesser offense included within that charged in the indictment is to invite a compromise verdict whereby the defendant would be found guilty of an offense, which he did not commit, for the sole reason that some of the jurors believe him guilty of the greater offense. 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.

Id. at 504, 212 S.E. 2d at 110.

Moreover, in the somewhat more recent case of *State v. Boykin*, 310 N.C. 118, 310 S.E. 2d 315 (1984), we stated further:

> The law is well settled that the trial court must submit and instruct the jury on a lesser included offense when, and only when, there is evidence from which the jury could find that defendant committed the lesser included offense. However, when the State's evidence is positive as to every element of the crime charged and there is no conflicting evidence relating to any element of the crime charged, the trial court is not required to submit and instruct the jury on any lesser included offense. The determining factor is the

> presence of evidence to support a conviction of the lesser included offense.

Id. at 121, 310 S.E. 2d at 317 (citations omitted).

In our view, no evidence was presented at trial from which the jury could reasonably have found that defendant committed merely the lesser included offense of attempted first-degree sexual offense. Relevant to the difference between the attempted and the completed offenses, the victim testified at trial that defendant sucked his penis for approximately three minutes while they were in the woods on 7 March. This testimony was consistent with the accounts of the incident given by the victim to the various law enforcement officers who testified at trial. Placed in this context, the nine-year-old's emotional statements in the minutes following the incident that defendant had "tried to suck" his penis pale in significance. The statements, in the context of the entire body of evidence presented at trial, do not support defendant's position that there was sufficient evidence of the existence of a mere attempt to warrant an attempt instruction. Judge Collier's decision not to charge was not error, and defendant's assignment of error is hereby overruled.

III.

[3] In his third assignment of error, defendant asserts that the trial court committed reversible error in failing to sentence defendant as a committed youthful offender pursuant to N.C.G.S. § 148-49.14. Defendant argues that the trial judge incorrectly concluded that he was without discretion to sentence this defendant as a committed youthful offender because our first-degree sexual offense statute, codified at N.C.G.S. § 14-27.4, calls for a mandatory life term. This Court has very recently addressed this precise issue and decided it against defendant's contention.

In the recent case of *State v. Browning*, 321 N.C. 535, 364 S.E. 2d 376 (1988), defendant assigned as error the trial judge's refusal to sentence him pursuant to the committed youthful offender statute following his conviction for first-degree sexual offense. In rejecting defendant's argument, we stated as follows:

> We now hold that article 3B of chapter 148 of the General Statutes of North Carolina [committed youthful offender statute] 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.

Browning, 321 N.C. at 541, 364 S.E. 2d at 379. We decline defendant's invitation to reconsider our decision in *Browning*, and accordingly, this third and final assignment of error is hereby overruled.

In conclusion, having carefully reviewed the record and each of defendant's assignments of error, we find that defendant received a fair trial, free of prejudicial error. Accordingly, we leave undisturbed defendant's conviction of first-degree sexual offense and the accompanying sentence of life imprisonment.

No error.

POOR RICHARD'S, INC. D/B/A POOR RICHARD'S v. HERMAN STONE, POLICE CHIEF CHAPEL HILL, NORTH CAROLINA AND LINDY PENDERGRASS, SHERIFF ORANGE COUNTY, NORTH CAROLINA

No. 397A87

(Filed 6 April 1988)

1. **Constitutional Law § 12.1— regulation of businesses dealing in military goods—due process**

Provisions of Art. 1 of G.S. Ch. 127B which require businesses dealing in military goods to obtain a license, post a $1,000 bond, provide certain information about the owners, and maintain certain records relating to their transactions involving military property do not unreasonably obstruct plaintiff's fundamental right to earn a livelihood in violation of Art I, §§ 1 and 19 of the N.C. Constitution since the nature of the property involved distinguishes plaintiff's business from other retail facilities so as to justify its regulation, and the means used are not unduly burdensome on the regulated businesses. Nor does the statute violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution since it bears a rational relation to a legitimate state objective.

2. **Constitutional Law § 12.1— regulation of businesses dealing in military goods—equal protection**

The statute regulating businesses dealing in military goods, Art. 1 of G.S. Ch. 127B, is reasonably grounded on the inherent difference between military

property and goods ordinarily sold to civilians so that it does not create an impermissible classification in violation of the equal protection provisions of the state or federal constitutions.

APPEAL by the state pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 86 N.C. App. 137, 356 S.E. 2d 828 (1987), affirming order of *Battle, J.*, permanently enjoining defendants from enforcing Article 1, Chapter 127B of the North Carolina General Statutes. Heard in the Supreme Court 8 December 1987.

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

Poyner & Spruill, by J. Phil Carlton and Susanne F. Hayes, for plaintiff-appellee.

EXUM, Chief Justice.

The issue presented on appeal is whether Article 1, Chapter 127B, regulating businesses dealing in military goods, is unconstitutional under the due process and equal protection provisions of the state and federal constitutions. Concluding that it was unconstitutional, the trial court granted summary judgment for plaintiff and permanently enjoined enforcement of the statute. The Court of Appeals affirmed. We now conclude the statute is constitutional and reverse.

On 1 July 1985 the North Carolina General Assembly enacted Chapter 522 of the 1985 Session Laws, codified as Chapter 127B of the General Statutes. Article 1 of Chapter 127B (hereinafter "the statute") creates a scheme of regulation over any person or business involved in the purchasing or selling of "military property." Section 1 of the statute denominates such persons or businesses as "military property sales facilities" (hereinafter "sales facilities") and section 2 defines "military property" as "property originally manufactured for the United States or State of North Carolina which is . . . use[d] in, or furnished and intended for, the military service of the United States or the militia of the State of North Carolina."

Section 3 of the statute provides that all sales facilities must obtain a license from the appropriate local government. Generally, all licensees must: (1) furnish the governing body with certain

personal information about the principals in the business; (2) post a one thousand dollar bond, payable to the state, to insure "the faithful performance of the requirements and obligations pertaining to the business licensed . . ."; and, (3) maintain certain records regarding acquisitions of military property, which must be kept open for inspection by law enforcement officers. Violation of the statute constitutes a misdemeanor.

The statute became effective on 1 October 1985. On 23 October 1985 plaintiff, a North Carolina corporation engaged in the business of retail sales, including sales of military property, filed this declaratory judgment action challenging the constitutionality of the statute under both the state and federal constitutions. Plaintiff's complaint also contained a motion for an order temporarily restraining enforcement of the statute. The trial court immediately granted this motion. The temporary restraining order was later converted to a preliminary injunction by consent of the parties.

On 7 March 1986 plaintiff moved for summary judgment and submitted affidavits from four different owners of retail stores which buy and sell military property. Each of the affidavits stated that compliance with the statute would cause them substantial and irreparable economic loss. Plaintiff and one other affiant stated that compliance would force them to abandon the part of their business dealing with military property.

On 17 March 1986 the trial court granted plaintiff's motion for summary judgment and permanently enjoined defendants from enforcing the statute. By consent of the parties and approval of the trial court the state was made a party defendant to the action and judgment was made to apply to all law enforcement agencies in the state. The state, as intervenor-defendant, appealed to the Court of Appeals. In an opinion filed 16 June 1987 the Court of Appeals, with Johnson, J. dissenting, affirmed the superior court's order, holding that the statute violated Article I, Sections 1 and 19 of the North Carolina Constitution. The state appeals from that decision.

It is well settled that an act passed by the legislature is presumed to be constitutional. *Roller v. Allen*, 245 N.C. 516, 96 S.E. 2d 851 (1975); *Ramsey v. North Carolina Veterans Commission*, 261 N.C. 645, 135 S.E. 2d 659 (1964). The legislature deter-

mines, within reasonable limits, what the public welfare requires; and the wisdom of its enactments is not the concern of the courts. *State v. Warren*, 252 N.C. 690, 696, 114 S.E. 2d 660, 666 (1960). "[W]hether an act is good or bad law, wise or unwise, is a question for the Legislature and not for the courts . . . ." *Id.*

[1] Plaintiff first contends the statute violates Article I, Sections 1 and 19 of the North Carolina Constitution in that it unreasonably obstructs plaintiff's fundamental right to earn a livelihood.

Article I, Section 1 of the North Carolina Constitution provides that "life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness" are among those rights of the people that are inalienable. Section 19 of the same Article provides that "[n]o person shall be . . . deprived of his . . . liberty, or property, but by the law of the land." The "law of the land," like "due process of law," serves to limit the state's police power to actions which have a real or substantial relation to the public health, morals, order, safety or general welfare. *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 258 S.E. 2d 444 (1979).

These constitutional protections have been consistently interpreted to permit the state, through the exercise of its police power, to regulate economic enterprises provided the regulation is rationally related to a proper governmental purpose. This is the test used in determining the validity of state regulation of business under both Article I, Section 1, and Article I, Section 19. *Treants Enterprises v. Onslow County*, 320 N.C. 776, 360 S.E. 2d 783 (1987). Inquiry is thus twofold: (1) is there a proper governmental purpose for the statute, and (2) are the means chosen to effect that purpose reasonable?

Considering the first prong of the test, we note that the state offers two possible justifications for the legislation: to stem the tide of thefts on military bases and the related purpose of limiting the opportunities for thieves to dispose of stolen goods. We are cognizant of the principle that the state may not undertake "by regulation to rid ordinary occupations and callings of the dishonest and morally decadent. Resort in that area must be had to the criminal laws." *State v. Warren*, 252 N.C. at 693, 114 S.E. 2d at 664. If the principle were otherwise, the state could regulate *any* business under the pretense of protecting the public

from potential dishonesty within the business or occupation. Otherwise lawful occupations may, however, be regulated when there is some "distinguishing feature in the business itself or in the manner in which it is ordinarily conducted, the . . . probable consequence of which, if unregulated, is to produce substantial injury to the public peace, health, or welfare." *State v. Harris*, 216 N.C. 746, 758-59, 6 S.E. 2d 854, 863 (1940).

In the past we have upheld regulatory business legislation so long as it was based on some distinguishing feature of the business itself which provided a rational basis for it and was, therefore, not irrational or arbitrary. *See, e.g., Smith v. Keator*, 285 N.C. 530, 206 S.E. 2d 203 (1974) (massage parlors); *State v. Greenwood*, 12 N.C. App. 584, 184 S.E. 2d 386 (1971), *rev'd on other grounds*, 280 N.C. 651, 187 S.E. 2d 8 (1972) (billiard halls); *Motley v. State Board of Barber Examiners*, 228 N.C. 337, 45 S.E. 2d 550 (1947) (barbers). On the other hand, we have not hesitated to strike down business regulation on grounds of arbitrariness when no distinguishing feature of the business rationally related to the regulation could be discerned. *See, e.g., Roller v. Allen*, 245 N.C. 516, 96 S.E. 2d 851 (1957) (ceramic tile contractors); *State v. Ballance*, 229 N.C. 764, 51 S.E. 2d 731 (1949) (photographers); *State v. Harris*, 216 N.C. 746, 6 S.E. 2d 854 (1940) (cleaners and pressers).

The question here is whether that portion of plaintiff's business which involves the buying and selling of military property has some feature which distinguishes it from other types of retail sales in a way which justifies its regulation.

We think it does. By definition, military property is originally manufactured for the state or federal government for use by their military services. It is neither manufactured for, nor intended for use by, civilian consumers. The question that immediately arises is how do goods manufactured solely for use by the military find their way into retail outlets and become readily available to civilian consumers? Inherent in this question is still another—have any unauthorized transfers of these goods taken place? These questions are peculiar to the sale of military property; and need for answers to these unique questions provides the constitutionally required rational basis for the legislation under attack.

The state is not required to come forward with evidence that military property in civilian retail outlets has been transferred without authorization at some point in the chain of distribution.

> If the constitutionality of a statute . . . depends on the existence or nonexistence of certain facts and circumstances, the existence of such facts and circumstances will generally be presumed for the purpose of giving validity to the statute, . . . if such a state of facts can reasonably be presumed to exist, and if any such facts may be reasonably conceived in the mind of the court. This rule does not apply if the evidence is to the contrary, or if facts judicially known or proved, compel otherwise.

Martin v. North Carolina Housing Corporation, 277 N.C. 29, 175 S.E. 2d 665 (1970) (*quoting* 16 C.J.S. Constitutional Law § 100b, pp. 454-455); *United States v. Carolene Products Co.*, 304 U.S. 144, 82 L.Ed. 1234 (1937).

The second inquiry is whether the means chosen to effect the proper governmental purpose are reasonable. This becomes a question of degree. The means used must be measured by balancing the public good likely to result from their utilization against the burdens resulting to the businesses being regulated. *In re Hospital*, 282 N.C. 542, 193 S.E. 2d 729 (1973). Here, the statute employs a commonly used licensing scheme which requires the licensees to furnish certain information about the principals in the business, to maintain certain records relating to its transactions involving military property and to execute a bond. While these requirements are not without their burdens for the sales facilities, we conclude that their tendency to help detect and protect the public from the consequences of unauthorized transfers of military property is constitutionally sufficient to justify them. Further, the statute does not seek to regulate all aspects of a sales facility. It regulates only those transactions which involve military property. We conclude, therefore, that the provisions of the statute are not unreasonably burdensome within the meaning of Article I, Sections 1 and 19 of the North Carolina Constitution.

Plaintiff next contends that the statute violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

In considering a due process claim under the federal constitution, the United States Supreme Court has stated that the Due Process Clause is no longer available to strike down regulatory laws because they may be unwise or out of harmony with a particular school of thought. *Williamson v. Lee Optical Co.*, 348 U.S. 483, 99 L.Ed. 5643, *reh'g denied*, 349 U.S. 925, 99 L.Ed. 1256 (1955). The Court refuses to sit as a "superlegislature to weigh the wisdom of legislation . . . ." *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423, 96 L.Ed. 469, 472, *reh'g denied*, 343 U.S. 921, 96 L.Ed. 1334 (1952). All that is required under federal due process is that the state measure bear a rational relation to a constitutionally permissible objective. *Ferguson v. Skrupa*, 372 U.S. 726, 10 L.Ed. 2d 93 (1963). For the reasons we have already given in our state constitutional analysis, we conclude that the statute bears a rational relation to a legitimate state objective; therefore it does not contravene the Due Process Clause of the Fourteenth Amendment.

[2] Plaintiff next argues that, because the retail sale of military property is an ordinary occupation requiring no more skill or education than other businesses, the statute creates a constitutionally impermissible classification and is violative of equal protection under the North Carolina Constitution.

Statutes are void as class legislation when persons who are engaged in the same business are subject to different restrictions or are treated differently under the same conditions. *Cheek v. City of Charlotte*, 273 N.C. 293, 160 S.E. 2d 18 (1968). However, a legislative classification is not prohibited per se. *Id.* Its validity depends upon its being reasonably related to a proper object of the legislation. Classifications are not offensive to the Constitution "when the classification is based on a reasonable distinction and the law is made to apply uniformly to all the members of the class affected." *Id.*

Classification is permitted when (1) it is based on differences between the business to be regulated and other businesses and (2) when these differences are rationally related to the purpose of the legislation. *State v. Harris*, 216 N.C. 746, 6 S.E. 2d 854. As we have already demonstrated, the distinguishing feature of plaintiff's business and other sales facilities is the nature of the property sold. Therefore, we conclude that the classification

created by the statute is not so arbitrary or unreasonable as to be violative of the equal protection requirement.

Plaintiff also argues that the statute violates the Equal Protection Clause of the Fourteenth Amendment. The United States Supreme Court has consistently recognized that the Equal Protection Clause does not deny states the power to create classifications. It mandates only that the classification be reasonable and rest upon some ground of difference having a fair and substantial relation to the object of the legislation. *Dunn v. Blumstein*, 405 U.S. 330, 31 L.Ed. 2d 274 (1972); *McLaughlin v. Florida*, 379 U.S. 184, 13 L.Ed. 2d 222 (1964); *Royster Guano Co. v. Virginia*, 253 U.S. 412, 64 L.Ed. 989 (1920). We conclude that the classification here is reasonably grounded on the inherent difference between military property and goods ordinarily sold to civilian consumers.

Plaintiff in its brief also calls to our attention the constitutional prohibitions against unlawful searches and seizures, excessive bail, cruel and unusual punishment and unlawful monopoly without demonstrating either by argument or authority how the statute implicates these provisions. Plaintiff also makes the bare assertion that the statute violates the Commerce Clause of the federal constitution. Again plaintiff makes no argument and provides us with no authority to support this assertion. These arguments are, therefore, deemed abandoned. N.C.R. App. P. 28(b)(5); *State v. West*, 317 N.C. 219, 345 S.E. 2d 186 (1986).

For the foregoing reasons we find no constitutional infirmity in the statute. The decision of the Court of Appeals to the contrary, affirming the decision of the trial court, must, therefore, be

Reversed.

STATE OF NORTH CAROLINA v. CLARENCE MELVIN BATTLE

No. 73A87

(Filed 6 April 1988)

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

There was sufficient evidence of a deliberate and premeditated killing so as to support a judgment of first degree murder where the evidence at trial showed that defendant did not like the victim because of the victim's prior relationship with the defendant's wife; defendant, after taking his gun from his truck and prior to entering the residence where the killing occurred, stated that the victim was trouble and that the victim should not be allowed to come to that house without his permission; defendant initially entered the house without his gun, made sure the victim was inside, and returned to the porch, positioning himself behind a clothes dryer; defendant waited for the victim and shot him in the back as the victim walked down the porch steps; defendant twice stated immediately after the killing that the victim was dead, showing no regret or remorse or inclination to seek medical aid; defendant ordered the two witnesses to aid him in disposal of the body by burning it in a car; and defendant hid his bloodstained clothes in various places to avoid detection.

2. **Homicide § 21.6— murder by lying in wait—evidence sufficient**

The evidence in a first degree murder prosecution clearly supported submitting murder by lying in wait to the jury where defendant brought a gun to a residence where he had previously seen the victim; defendant expressed animosity toward the victim and entered the residence without the gun to check on the victim's presence; defendant did not reveal the gun or indicate his plan of attack to the victim in any way; defendant then went out onto the porch, positioned himself behind a clothes dryer, and waited for the victim to come outside; when the victim entered the porch, defendant did not warn him of his presence but waited until the victim exited the porch area before shooting him in the back; and there was no evidence that the victim realized that defendant was about to shoot him.

3. **Homicide § 7— first degree murder—insanity—presumption of sanity and burden of proof**

The trial court did not err in a first degree murder prosecution by not directing a verdict of not guilty by reason of insanity where the State did not introduce evidence as to defendant's sanity and the defendant introduced evidence that he was insane. There is a presumption of sanity in North Carolina, and it is the defendant's burden to satisfy the jury of the existence of the insanity defense, even if the evidence of insanity presented by the defendant is uncontradicted by an offer of proof by the State.

4. **Homicide § 28.1— murder—instruction on voluntary manslaughter based on self-defense denied—no error**

The trial court did not err in a prosecution for first degree murder by not giving an instruction on voluntary manslaughter based on imperfect self-

defense where the record showed that defendant lay in wait for his victim, concealed by a clothes dryer, and shot the unarmed and unaware victim in the back as the victim walked away from the scene; there was no showing by defendant that his belief of a necessary killing, if any, was reasonable in any way; and the evidence showed that the victim was unaware of defendant's threat to kill him and that he did not in any way indicate an intent to harm defendant by any means.

5. Criminal Law § 102— insanity—opening and closing arguments

A defendant in a first degree murder prosecution was not improperly denied the right to the opening and closing arguments to the jury, despite having the burden of proof as to insanity, because defendant introduced evidence and the State therefore had the opening and closing arguments under Rule 10 of the General Rules of Practice for the District and Superior Courts.

6. Homicide § 7— murder—insanity defense—burden of proof

The State was not improperly relieved of proving all of the elements of the crime in a first degree murder prosecution by the placing of the burden of proof on defendant on the insanity issue.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a life sentence entered by *McClelland, J.*, at the 6 November 1986 Criminal Session of Superior Court, WAKE County. Heard in the Supreme Court 9 February 1988.

This case arises out of the 9 December 1985 shooting death of Billy Joe Ashe. The defendant was tried for first degree murder. The State relied on a killing with premeditation and deliberation and after lying in wait. The State presented evidence which tended to show that on the date in question several persons were attending a party at the residence of one Ronnie Kearney. Present at the party were Kearney, Billy Joe Ashe, Debra Poole, Carline Prince and Clarence Daniels. Around 4:30 p.m., defendant came to the house seeking help in pulling his car from a ditch. At that time defendant looked into the room where Billy Joe Ashe and the two women were sitting before leaving with Clarence Daniels to attend to his vehicle.

Shortly thereafter, defendant and Daniels were able to pull his car from the ditch and drive it to defendant's house. The defendant took his shotgun from his truck and carried it with him as he and Daniels walked back to Ronnie Kearney's residence. Daniels asked defendant at that time what he was going to do with the shotgun, to which defendant replied, "he had to get something straightened out." Defendant further stated that Billy Joe Ashe

"was trouble" and "should not have come" to the Kearney residence.

After Daniels and defendant arrived at Kearney's house the men went inside. Defendant went into Kearney's room where the victim was located and went back outside. Defendant did not have the shotgun with him at this time. Shortly thereafter, the two women present at the party left the house, speaking to defendant as they left the porch area of the home. Neither of the women saw defendant with a gun at that time. A few minutes later, Ronnie Kearney and Ashe prepared to leave. Clarence Daniels preceded the men onto the porch. He saw defendant take the gun and sit on the porch railing behind a clothes dryer that was located on the porch. Ashe then came out of the door talking to both Kearney and Daniels as he walked onto the porch. Defendant was positioned to the right and behind the victim as he exited the house, approximately fifteen feet away. At that time Kearney asked defendant what he was doing with that "cannon." Defendant told Kearney "not to worry about it." As Ashe walked down the front porch steps, defendant shot him in the back. The pellets punctured the victim's heart causing his death. There was no evidence Ashe ever saw the shotgun.

After the shooting, defendant twice stated "that mother-fucker is dead" as he attempted to enlist the aid of Kearney and Daniels in disposing of the body. Defendant told the men to put the victim in his car and to take the car and burn it with the body inside. Defendant threatened both men stating, "I don't want to shoot you but I will." When defendant put the shotgun down to pick up the body, Ronnie Kearney grabbed the gun and ran, throwing it into a nearby field. Authorities were called a short time thereafter and they subsequently arrested defendant. At the time of the arrest, defendant denied shooting Ashe. The blood-stained clothes of the defendant were found in a closet in his home as well as in the trunk of his car.

Defendant relied upon a defense of insanity, supporting this claim with the testimony of psychiatrists and psychologists. These experts testified the defendant manifested a psychotic disorder, specifically schizophrenia with disordered thinking and paranoid traits. One of them testified that in his opinion the defendant did not know the nature and quality of his act at the time he shot

Ashe or the difference between right and wrong in relation thereto.

The defendant was convicted of first degree murder. The State conceded there were no aggravating factors and did not seek the death penalty. The defendant appealed from the imposition of a life sentence.

Lacy H. Thornburg, Attorney General, by Ellen B. Scouten, Assistant Attorney General, for the State.

Purser, Cheshire, Parker, Hughes & Dodd, by Gordon Widenhouse and David M. Lomas, for defendant appellant.

WEBB, Justice.

By his first assignment of error, defendant contends that the trial court erred in denying his motion for dismissal of the charge of first degree murder. More specifically, defendant asserts that the evidence failed to establish that he intentionally caused the death of another after premeditation and deliberation or that he intentionally caused the death of another after lying in wait.

[1] Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. In support of a conviction for first degree murder based on premeditation and deliberation, it is incumbent upon the State to present substantial evidence that a defendant acted with willful and intentional malice in the killing of another after sufficient periods of premeditation and deliberation. The term "premeditation" means thought out beforehand for some length of time, however short. *State v. Myers*, 299 N.C. 671, 263 S.E. 2d 768 (1980). Similarly, the term "deliberation" means "an intention to kill, executed by the defendant in a cool state of blood, in furtherance of a fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose." *State v. Biggs*, 292 N.C. 328, 337, 233 S.E. 2d 512, 517 (1977).

Premeditation and deliberation essentially relate to one's mental processes; hence they are not readily susceptible to proof by direct evidence, instead requiring proof of circumstances surrounding the killing. In this case evidence of the manner in which the killing occurred, the defendant's pointing a shotgun at Ashe's back and shooting him, should support a finding that the killing

was with premeditation and deliberation. There is other evidence. In *State v. Calloway*, 305 N.C. 747, 291 S.E. 2d 622 (1982), this Court, citing other cases, stated that premeditation and deliberation may be inferred from evidence of one or more of the following circumstances: (1) want of provocation on the part of the deceased; (2) conduct and statements of defendant before and after the killing; (3) threats and declarations of the defendant before and after the killing; (4) ill-will or previous difficulty between the parties; (5) dealing of lethal blows after the deceased had been felled and rendered helpless; and (6) evidence that the killing was done in a brutal manner.

The evidence presented at trial shows that defendant did not like the victim because of the victim's prior relationship with the defendant's wife before they were married and did not want him at the Kearney residence. After taking his gun from his truck and prior to entering the Kearney residence, defendant stated that the victim "was trouble" and that he "should not be allowed to come to the house without his permission."

The evidence further showed that defendant initially entered the house without his gun, making sure the victim was inside, before returning to the porch, positioning himself behind a clothes dryer, waiting for the victim and shooting him in the back as he walked down the porch steps. Immediately after the killing, defendant twice stated "that mother-fucker is dead," showing no regret or remorse or inclination to seek medical aid. In fact, he ordered the two witnesses to aid him in disposal of the body by burning it in a car. Further evidence was taken showing defendant's actions after the crime, which consisted of the defendant's hiding his bloodstained clothes in various places to avoid detection.

The cumulative effect of these actions and statements by the defendant is more than sufficient evidence of a deliberate and premeditated killing so as to support a judgment of first degree murder. *State v. Mize*, 316 N.C. 48, 340 S.E. 2d 439 (1986).

[2] Defendant also contends there was not sufficient evidence to submit to the jury that the murder was perpetrated by lying in wait.

As previously recited, the evidence shows that defendant brought a gun to a residence where he had previously seen Mr.

Ashe. After expressing animosity toward Mr. Ashe, the defendant entered the residence without the gun, checking as to the victim's presence. Defendant did not reveal the gun or indicate his plan of attack to the victim in any way. The evidence further shows that the defendant then went out onto the porch, positioned himself behind a clothes dryer and waited for Mr. Ashe to come outside. When Ashe entered the porch area, defendant did not warn him of his presence, instead waiting until Mr. Ashe exited the porch area before shooting him in the back. There is no evidence Mr. Ashe realized that defendant was about to shoot him.

In *State v. Brown*, 320 N.C. 179, 358 S.E. 2d 1 (1987), this Court recently dealt with lying in wait. We said:

> Murder perpetrated by lying in wait "refers to a killing where the assassin has stationed himself or is lying in ambush for a private attack upon his victim." *State v. Allison*, 298 N.C. 135, 147, 257 S.E. 2d 417, 425 (1979).

This Court further stated that the assassin need not be concealed, nor need the victim be unaware of his presence as long as the victim does not know of the defendant's purpose to kill him. *Allison*, 298 N.C. at 148, 257 S.E. 2d at 425. The evidence of the defendant's action clearly supported the court's action in submitting murder perpetrated by lying in wait to the jury. This assignment of error is overruled.

[3] In his second assignment of error, the defendant argues the court should have directed a verdict of not guilty by reason of insanity. The State did not introduce evidence as to the defendant's sanity and the defendant, relying on *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983), argues that he introduced uncontradicted testimony which was manifestly credible as a matter of law that he was insane. For this reason, says the defendant, he was entitled to have the court direct a verdict in his favor on the insanity issue. *Jones* dealt with the finding of a mitigating factor. There was not a presumption involved. There is a presumption in this case which makes *Jones* inapplicable.

It is well settled in this jurisdiction that "every 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

(1987). The State may rebut a defendant's claim of insanity by such presumption of law, or by testimony of witnesses, or by both. *State v. Harris*, 223 N.C. 697, 28 S.E. 2d 232 (1943). It is the defendant's burden to satisfy the jury of the existence of the insanity defense, even in the instance where the evidence of insanity presented by the defendant is uncontradicted by an offer of proof by the State. *State v. Potter*, 285 N.C. 238, 204 S.E. 2d 649 (1974).

As recognized by the defendant, this Court has repeatedly declined to change the presumption of sanity or the rule that places the burden of proof on this issue on the defendant. *See Evangelista*, 319 N.C. 152, 353 S.E. 2d 375; *Mize*, 315 N.C. 285, 337 S.E. 2d 562; *State v. Leonard*, 296 N.C. 58, 248 S.E. 2d 853 (1978). We decline to change the rule in this case. This assignment of error is overruled.

[4] By his third assignment of error, defendant contends the trial court should have given an instruction on voluntary manslaughter based on imperfect self-defense.

A defendant is entitled to an instruction on voluntary manslaughter based on imperfect self-defense only if evidence is introduced from which the following may be found:

> (1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
>
> (2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness.

State v. Wallace, 309 N.C. 141, 147, 305 S.E. 2d 548, 552-53 (1983) (quoting *State v. Bush*, 307 N.C. 152, 158, 297 S.E. 2d 563, 568 (1982)).

We cannot find any evidence that would justify an instruction of imperfect self-defense. Rather, the record shows that defendant lay in wait for his victim, concealed by a clothes dryer, and shot an unarmed and unaware victim in the back as he walked away from the scene. There is no showing by defendant that his belief of a necessary killing, if any, was reasonable in

any way. The evidence showed that the victim was unaware of defendant's intent to kill him and that he did not in any way indicate an intent to harm defendant by any means. Evidence that defendant believed it necessary to kill the victim before the victim killed him is not sufficient to justify the proffered instruction as to voluntary manslaughter.

We conclude as a matter of law that there was no evidence of imperfect self-defense so as to justify a charge of manslaughter based thereon. The trial court did not err in failing to so instruct the jury. This assignment of error is overruled.

[5] In his fourth assignment of error the defendant contends that he was improperly denied the right to the opening and closing arguments to the jury. The defendant, relying on *Bowman v. Development Co.*, 183 N.C. 249, 111 S.E. 162 (1922); *Elks v. Hemby*, 160 N.C. 20, 75 S.E. 854 (1912); and *Love v. Dickerson*, 85 N.C. 5 (1881), argues that he had the burden of proof as to insanity and this gave him the right to open and close. The cases relied on by the defendant were decided before the adoption of the General Rules of Practice for the District and Superior Courts. Rule 10 of these Rules provides that if the defendant introduces evidence the State will have the opening and closing arguments. The defendant introduced evidence in this case. The State had the right to the opening and closing arguments.

[6] In his fifth assignment of error the defendant contends the State was relieved of proving all the elements of the crime by placing the burden of proof on the defendant on the insanity issue. He says this is so because proof of first degree murder requires proof of premeditation, deliberation and intent which is proof of a criminal intent. Defendant argues the insanity defense is directed at proving the lack of criminal intent and that by placing the burden of proof on a defendant who uses this defense, the State is relieved of proving essential elements of the crime in violation of *Francis v. Franklin*, 471 U.S. 307, 85 L.Ed. 2d 344 (1985); *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed. 2d 508 (1975) and *In re Winship*, 397 U.S. 358, 25 L.Ed. 2d 368 (1970). The defendant relies on a dissent by Justice Brennan in *Rivera v. Delaware*, 429 U.S. 877, 50 L.Ed. 2d 160 (1976), in which the United States Supreme Court dismissed for want of a substantial federal question an appeal which challenged a Delaware statute

which placed the burden of proving insanity on the defendant. We have rejected this argument by the defendant in *Evangelista*, 319 N.C. 152, 353 S.E. 2d 375; *Mize*, 315 N.C. 285, 337 S.E. 2d 562; and *State v. Heptinstall*, 309 N.C. 231, 306 S.E. 2d 109 (1983). We decline to overrule these cases. This assignment of error is overruled.

No error.

ST. PAUL FIRE & MARINE INSURANCE COMPANY AND CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY, PLAINTIFFS v. FREEMAN-WHITE ASSOCIATES, INC. AND WILLIAM FUNDERBURK, DEFENDANTS, AND THIRD-PARTY PLAINTIFFS v. McCARTHY BROTHERS COMPANY, THIRD-PARTY DEFENDANT

No. 462A87

(Filed 6 April 1988)

Architects § 3— collapse of building—alleged negligence by architect—all risk insurance—whether owner waived claim against architect

In an action alleging negligence and breach of contract in providing architectural services for a hospital which collapsed during construction, the trial court erred in dismissing the complaint by finding that, as a matter of law, the owner had waived any claim it may have had against the architect for property damage resulting from alleged negligence to the extent the owner had obtained all risk coverage for property damage during construction where the pertinent provisions in the contract between the owner and the architect are conflicting and ambiguous as to whether the owner waived all claims against the architect for all damage against which the owner had insured itself or whether waiver was negated by a provision requiring the architect to provide its own insurance coverage for damages caused by its own errors and omissions.

Justice WEBB dissenting.

Chief Justice EXUM joins 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, 86 N.C. App. 431, 358 S.E. 2d 99 (1987). That decision reversed and remanded an Order entered 20 May 1986 in MECKLENBURG Superior Court, by *Saunders, J.*, granting defendants' N.C.R. Civ. P. 12(b)(6) motion and dismissing plaintiffs' complaint which al-

leged defendants' negligence and breach of contract in providing architectural services during construction of plaintiff's hospital building. Heard in the Supreme Court 11 February 1988.

Yates, Fleishman, McLamb & Weyher, by Barbara B. Weyher and Gary R. Poole, for plaintiff-appellees.

Griffin, Cochrane, Marshall & Elger, by Luther P. Cochrane, Jeanette R. Hait, and John Dean Marshall, Jr., and Jones, Hewson & Woolard, by Robert G. Spratt, III, for defendant-appellants.

MEYER, Justice.

This contract issue comes before us in the setting of the construction industry. The question with which the Court is presented is whether certain provisions concerning insurance coverage in the contract between plaintiffs and defendants are ambiguous. The majority in the Court of Appeals concluded that they were. We affirm.

On 26 April 1983 defendant Freeman-White ("Architect") entered into a contract with plaintiff Charlotte-Mecklenburg Hospital ("Owner") to design a 130-bed hospital and medical center. Defendant Funderburk, who had consulted with Freeman-White on structural matters for many years, assisted in designing the project.

On 21 November 1983, while subcontractors of the construction manager were pouring concrete to form the project's south-wing roof, the south-wing collapsed, causing property damage in excess of $10,000.00. The Owner received compensation for damage to the project, which was covered by the Owner's Builders' Risk insurance policy, issued by plaintiff St. Paul Fire & Marine Insurance Company ("St. Paul").

The Owner and St. Paul as insurer-subrogee filed a complaint against the Architect, asserting two theories of recovery: (1) the Architect's negligence caused the collapse, and (2) the Architect had breached its contract with the Owner. The Architect moved for a Rule 12(b)(6) dismissal, alleging that the contract documents showed that the Owner had agreed to waive its rights of recovery against the Architect for this property damage. The trial court

granted the Architect's motion and on 20 May 1986 entered an order dismissing the Owner's complaint.

The Owner appealed to the Court of Appeals. The majority of the panel in that court concluded that the contract provisions at issue appeared inconsistent with each other, or at least susceptible to more than one interpretation; thus, the case should have gone to the jury and dismissal on the Rule 12(b)(6) motion was error. The trial court's order was reversed and the case remanded. One judge dissented, stating that when the contract is construed as a whole, the provisions relating to insurance coverage are unambiguous, so that the waiver provisions of the policy prevented the Owner from bringing the action.

The contract between the Owner and the Architect was the 1980 Edition of the American Institute of Architects, AIA Document B141/CM, Standard Form Agreement Between Owner and Architect, Construction Management Edition, with some modifications. This contract incorporated by reference, in part, the 1980 Edition of the American Institute of Architects, AIA Document A201/CM, General Conditions of the Contract for Construction, Construction Management Edition. The contract is lengthy and detailed, but our perusal of the pertinent provisions that follow convinces us that the Court of Appeals' decision was correct.

Paragraph 11.4 of the contract between the Owner and the Architect (AIA Document B141/CM) provides:

> The Owner and the Architect waive all rights against each other and against the contractors, consultants, agents and employees of the other, for damages covered by any property insurance during construction, as set forth in the 1980 Edition of AIA Document A201/CM, General Conditions of the Contract for Construction, Construction Management Edition. The Owner and the Architect shall each require appropriate similar waivers from their contractors, consultants and agents.

The applicable waiver provisions in the General Conditions incorporated by reference in the preceding paragraph constitute subparagraph 11.3.6:

> The Owner and the Contractor waive all rights against (1) each other and the Subcontractors, Sub-subcontractors,

agents and employees of each other, and (2) the Architect, the Construction Manager and separate contractors, if any, and their subcontractors, sub-subcontractors, agents and employees, for damages caused by fire or other perils to the extent covered by insurance obtained pursuant to this Paragraph 11.3 or any other property insurance applicable to the Work, except such rights as they may have to the proceeds of such insurance held by the Owner as trustee. The foregoing waiver afforded the Architect, the Construction Manager, their agents and employees shall not extend to the liability imposed by Subparagraph 4.18.3. The Owner or the Contractor, as appropriate, shall require of the Architect, the Construction Manager, separate contractors, Subcontractors and Sub-subcontractors by appropriate agreements, written where legally required for validity, similar waivers each in favor of all other parties enumerated in this Subparagraph 11.3.6.

Paragraph 11.3.1 of the General Conditions of the Contract for Construction (AIA Document A201/CM) provides in part:

> Unless otherwise provided, the Owner shall purchase and maintain property insurance upon the entire Work at the site to the full insurable value thereof. This insurance shall include the interests of the Owner, the Construction Manager, the Contractor, Subcontractors and Sub-subcontractors in the Work, and shall insure against the perils of fire and extended coverage and shall include "all risk" insurance for physical loss or damage including, without duplication of coverage, theft, vandalism and malicious mischief.

By separate document, the parties added a paragraph numbered 11.5 to the contract between the Owner and the Architect (AIA Document B141/CM). Paragraph 11.5 provides:

> The Architect shall maintain in force an Architects and Engineers Professional Liability Insurance Policy providing coverage for errors and omissions of professional services in architecture, building design, HVAC, electrical, mechanical, structural engineering, that might be made pursuant to this Agreement and protecting the Owner from the direct and consequential results of such errors or omissions. Such insurance shall provide coverage on an occurrence and ag-

gregate basis in amounts not less than $1,000,000 and $1,000,000 respectively. This insurance shall be maintained in force during the life of the Project and for that period of time following the date of final completion during which an action for professional liability on the part of the Architect for this Project may be brought by the Owner under North Carolina Law. The Architect may provide such insurance protection to the Owner through commercial insurance or other financial mechanisms acceptable to the Owner, and the Owner's acceptance shall not be unreasonably withheld.

The precise question with which the Court is presented is whether the contract documents clearly establish that the Owner agreed to waive its rights against the Architect, looking only to the Builders' Risk insurance policy it agreed to procure to cover damage to the project itself. Close examination of the pertinent contract provisions reveals, as the Court of Appeals majority pointed out, that they appear to be susceptible to more than one interpretation: (1) that the true intent of the parties was that the Owner would waive all claims against the Architect for damage against which the Owner had insured itself, or (2) that the Architect would provide its own insurance coverage for damage caused by its own errors and omissions, thereby negating waiver as to such losses. This conclusion is illustrated by the parties' contentions.

Plaintiffs contend that the provisions of the Owner-Architect Agreement and the General Conditions reveal an intent by the parties that defendants, or their liability insurer, would bear the risk of loss for any property damage resulting from defendants' negligence in rendering architectural services to the Owner. They point to Paragraph 11.5, set out above, which requires the Architect to obtain professional liability insurance to protect the Owner from the direct and consequential results of the Architect's errors and omissions arising out of professional services to the Owner. Paragraph 11.5 also provides that the insurance will be maintained for the period of time "during which an action for professional liability on the part of the architect for this Project may be brought by the Owner under North Carolina Law." Plaintiffs argue that this language demonstrates the parties' intention that the Owner and St. Paul, through subrogation, could pursue a negligence claim against the Architect.

Paragraph 11.3, set out above, requires the Owner to purchase and maintain property insurance on the project, including "all risk" coverage. The provision includes a list of the parties to be covered by this insurance, but, as plaintiffs point out, the Architect is not one of them. Finally, plaintiffs contend that the waiver in Subparagraph 11.3.6, set out above, is modified because it does not extend to liability imposed by a further subparagraph 4.18.3 relating to:

> (1) the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, designs or specifications, or (2) the giving or the failure to give directions or instructions by the Architect or the Construction Manager, their agents or employees, provided such giving or failure to give is the primary cause of the injury or damage.

Defendants, on the other hand, contend that plaintiffs' interpretation of the contract gives no meaning to Paragraph 11.4 which contains the waiver language upon which this controversy centers. Paragraph 11.3, in conjunction with Paragraph 11.4, they argue, specifically shifts the risk of loss to the Owner's insurer, while simultaneously insuring the project and waiving all rights to subrogation. Defendants contend that the professional liability insurance policy that Paragraph 11.5 requires the Architect to maintain is not a substitute for the Owner's Builders' Risk policy. Instead, it signifies the parties' intent that the Architect would bear the risk of loss due to damage other than to the work itself which resulted from its negligence.

Defendants point to subparagraph 4.18.3 which incorporates by reference the entire Paragraph 4.18, and provides, in subparagraph 4.18.1, that the Contractor shall indemnify the Owner for its negligent action resulting in "claims, damages, losses or expenses . . . attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including the loss of use resulting therefrom." They argue that since the indemnity provision applies to damages other than to the work itself, it applies to claims other than those that are covered by the Owner's property insurance. Therefore, the indemnity provision does not affect the waiver in Paragraph 11.4.

The fact that a dispute has arisen as to the parties' interpretation of the contract is some indication that the language of the contract is, at best, ambiguous. *Mazza v. Medical Mut. Ins. Co.*, 311 N.C. 621, 630, 319 S.E. 2d 217, 223 (1984). "An ambiguity exists where, in the opinion of the court, the language of the policy is fairly and reasonably susceptible to either of the constructions asserted by the parties." *Maddox v. Insurance Co.*, 303 N.C. 648, 650, 280 S.E. 2d 907, 908 (1981). We conclude that the contract language is conflicting and ambiguous as to the parties' intent regarding whether the Owner waived all claims against the Architect for property damage resulting from its alleged negligence in rendering architectural services.

By allowing defendants' motion to dismiss plaintiffs' complaint, the trial court found that, as a matter of law, plaintiffs had waived any claim they may have had against defendants for their negligence to the extent plaintiffs had obtained all risk insurance coverage for property damage during construction. This was error. A motion to dismiss a complaint for failure to state a claim upon which relief can be granted, pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) of the Rules of Civil Procedure, should not be granted unless it appears to a certainty that the plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. *Snyder v. Freeman*, 300 N.C. 204, 266 S.E. 2d 593 (1980); *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970).

Because of the ambiguity apparent in the contract's insurance coverage provisions as to plaintiffs' waiver, we affirm the Court of Appeals' majority holding that the trial court erred in dismissing plaintiffs' action against defendants.

Affirmed.

Justice WEBB dissenting.

I dissent from the majority. I agree with Judge Arnold's dissenting opinion in the Court of Appeals. I believe Paragraphs 11.3.6 and 11.4 clearly and unambiguously provide that the owner waives all rights against the architect for damages covered by property insurance during construction. Paragraph 11.5 does not say it negates this waiver and I do not believe we should read it so that it may do so. I believe a contract should be read so that if possible all its provisions have meaning.

> "A contract must be construed as a whole, and the intention of the parties is to be collected from the entire instrument and not from detached portions, it being necessary to consider all of its parts in order to determine the meaning of any particular part as well as of the whole. Individual clauses in an agreement and particular words must be considered in connection with the rest of the agreement, and all parts of the writing, and every word in it, will, if possible, be given effect. The foregoing rules are applicable in the interpretation of building and construction contracts." 17 C.J.S., Contracts, § 297.

Robbins v. Trading Post, 253 N.C. 474, 477, 117 S.E. 2d 438, 440-41 (1960). A contract must be construed as a whole, considering each clause and word with reference to other provisions and giving effect to each if possible by any reasonable construction. *Marcoin, Inc. v. McDaniel*, 70 N.C. App. 498, 320 S.E. 2d 892 (1984). *See generally* 4 S. Williston, *A Treatise on the Law of Contracts*, § 618(3) (3d ed. 1961).

Paragraph 11.5 provides the architect shall maintain liability insurance for errors and omissions to protect the owner "from the direct and consequential results of such errors and omissions." This insurance can protect the owner in ways that are not covered by Paragraphs 11.3.6 and 11.4. One example is protection from liability to third parties. I believe we should interpret Paragraph 11.5 to say it requires insurance by the architect to protect the owner for risks not covered by Paragraphs 11.3.6 and 11.4. In that way we can give effect to all provisions of the contract.

When a provision of a contract deals specifically with a subject, I do not believe we should say that provision may be cancelled by a second provision of the contract when the second provision is not necessarily contrary to the first provision. Construing the contract according to defendants' contentions gives effect to all provisions of the agreement, including the waiver provisions and, therefore, comports with these well established canons of construction. Construing it according to plaintiffs' contentions does not, since this construction nullifies the waiver provisions. Since the contract may be construed so as to give effect to all provisions, it must be so construed if the Court is to follow

its precedents. In such a case there is no ambiguity in the contract. Applying appropriate canons of construction resolves whatever doubt there may be as to the contract's meaning.

Chief Justice EXUM joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. JOHN RICHARD SUTCLIFF

No. 382A87

(Filed 6 April 1988)

1. **Kidnapping § 1— first degree kidnapping—failure to release victim in safe place—evidence sufficient**

The evidence was sufficient to permit a jury reasonably to infer that the victim was not released by defendant in a safe place within the meaning and intent of N.C.G.S. § 14-39(b) where the evidence tended to show that the victim was released at approximately 5:00 a.m. on a mid-January morning at an intersection nine-tenths of a mile from a shopping mall; the victim was relatively new to the area, was very disoriented, and did not know where she was; the victim saw car headlights indicating that it was dark at the time; she found no protective shelter or source of assistance until she reached the mall almost a mile away, and then had to wait alone until an officer arrived several minutes later; and, while en route to the mall, the victim feared for her safety and thus hid whenever she saw headlights or heard cars.

2. **Robbery § 4.3— armed robbery—idea originating with victim—evidence sufficient**

The trial court did not err in a prosecution for armed robbery, kidnapping, and first degree sexual offense by denying defendant's motions to dismiss the armed robbery charge despite evidence that, after defendant initially dragged the victim to his truck, the victim said to defendant, "Do you want to get the money? You can get the money and go." The evidence tended to show a continuous transaction in which defendant committed a sexual offense upon the victim and robbed the victim's employer; both offenses were effectuated by the use of a dangerous weapon, a knife; the jury could reasonably infer that defendant intended permanently to deprive the victim's employer of the bills he took from the cash register; and a rational factfinder could conclude from the evidence presented that the victim parted with her employer's property only because she believed her life was in danger or threatened and that the victim suggested the robbery as a diversionary tactic designed to save herself from death or bodily harm.

APPEAL of right pursuant to N.C.G.S. § 7A-27(a) (1986) from a judgment of life imprisonment entered by *Tillery, J.*, on 2 April

1987 in Superior Court, NEW HANOVER County. On 22 September 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 14 March 1988.

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

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

WHICHARD, Justice.

Defendant was charged with first degree sexual offense, first degree kidnapping, and armed robbery. The jury returned verdicts of guilty on all charges. The verdict on the first degree kidnapping charge was grounded on "[f]ailure to release [the victim] in a safe place and sexual assault on [the victim]." In entering judgment, the trial court considered only the finding that the victim was not released in a safe place. The court sentenced defendant to life imprisonment on the sexual offense charge, thirty years imprisonment (consecutive) on the kidnapping charge, and twenty years imprisonment (consecutive) on the armed robbery charge.

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

On 14-15 January 1987, the twenty year old female victim was working the night shift at the Scotchman Store in Wrightsville Beach. She had only lived in Wrightsville Beach since late August 1986.

At about 4:15 a.m. defendant entered the store. The victim asked if he needed anything, and he "sort of shook his head."

A short while later defendant purchased some cigarettes and left the store. He soon returned and asked the victim if she had a box. The victim gave him a box. She then turned her back to make coffee, and when she turned around again she was startled to find defendant "right there." She walked up to a counter, and defendant grabbed her from behind. He said: "Be quiet; don't scream; don't struggle; I am crazy or [sic] I will hurt you if you don't do what I say." At this point defendant had in his hand a

knife with a blade approximately four inches long. The victim grabbed defendant's hand, and the handle of the knife broke off.

Defendant then dragged the victim to his truck. She said to him: "Do you want to get the money? You can get the money and go." They went back inside, and the victim opened the cash register. The register receipt indicated that this occurred at 4:19 a.m. Defendant grabbed all the bills out of the drawer and put them in his pocket. He held the knife against the victim throughout this endeavor.

Defendant then dragged the victim back to his truck. He made her get in, and he locked the door on the passenger's side. The knife was "poking . . . against" the victim's side under her arm. Defendant kept the knife in her side while he was driving. He told the victim that he was crazy and she should do what he said.

Eventually the truck stopped. Defendant told the victim to turn on her stomach and "do to me what you do to your boyfriends." At the time he "was pulling down, unzipping his pants." He had the knife in the victim's back. At defendant's insistence, the victim "gave him oral sex."

After some conversation, defendant started the truck. When the victim sat up, she was very disoriented and did not recognize anything. When defendant let her out of the truck, she did not know in which direction she should go. She later identified the place where defendant let her off as "Rogersville Road and Wrightsville Avenue."

The victim ran until she reached a shopping mall nine-tenths of a mile away. She stopped to hide whenever she saw headlights or heard a car, because she did not know whether defendant was coming back to get her. When she reached the mall, she called the 911 emergency number, and the operator sent an officer from the sheriff's department. The officer arrived at approximately 5:15 a.m. The victim told the officer that defendant had "made [her] suck him." The victim went to a hospital for an examination, which revealed a scratch under her right arm where she testified defendant had held the knife.

When the investigating officers showed the victim defendant's truck, she identified it as the vehicle in which she was

taken from the store. She also identified defendant as the driver.

In the early morning hours of 15 January, Thomas Joseph Whitmore, an employee of the New Hanover County Sheriff's Department, received a call from his supervisor describing the vehicle involved in the foregoing incident. He later observed a vehicle fitting that description. When he caught up with the vehicle and turned on his blue lights and siren, the vehicle "just accelerated and sped and continued on." Whitmore gave chase, and ultimately the vehicle collided with another vehicle. When Whitmore approached the wrecked vehicle, no one was there. A license check revealed that defendant owned the vehicle.

When defendant was taken into custody the night of 15 January, he told the arresting officer that he had never done "anything like this" before, that he had a "real bad drug problem," and that "anybody in their right mind that would have done anything like that would have worn a mask." He subsequently told investigating officers that he "would not have hurt the girl," that he did not know why he had done what he did, and that he "was doing a bunch of crazy things at that time because he was on drugs."

The Wrightsville Beach Chief of Police, who had special training and experience in fingerprint lifting and comparison, testified that a latent right thumb print on a knife handle found on the floor of the store matched defendant's right thumb print. He also testified that the victim was able to indicate the place to which she thought defendant had taken her, and that tire impressions at that locale appeared similar to the tread on the tires of defendant's truck.

[1] Defendant contends that the trial court erred in denying his motions to dismiss the first degree kidnapping charge. He does not argue that the evidence was insufficient to permit a finding that he kidnapped the victim; instead, he contends that the State failed to prove that he did not release the victim in a safe place, which was the sole basis on which the trial court entered judgment for first degree, rather than second degree, kidnapping. *See* N.C.G.S. § 14-39(b) (1986).

"In resolving this question, we must be guided by the familiar rule that the evidence must be considered in the light

most favorable to the State, giving the State every reasonable inference which may be drawn therefrom." *State v. Jerrett*, 309 N.C. 239, 263, 307 S.E. 2d 339, 352 (1983). So considered, evidence relevant to the question presented tends to show that at approximately 5:00 o'clock on a mid-January morning the victim was released at an intersection located nine-tenths of a mile from a shopping mall. She was relatively new to the area, was very disoriented, and did not know where she was. She saw car headlights, thus indicating that it was dark at the time. She found no protective shelter or source of assistance until she reached a shopping mall almost a mile away, and even then had to wait alone until an officer arrived several minutes later. While en route to the mall, she feared for her safety and thus hid whenever she heard cars or saw headlights.

We hold that this evidence permits a jury reasonably to infer that the victim was not "released by the defendant in a safe place" within the meaning and intent of that phrase as used in N.C.G.S. § 14-39(b). This assignment of error is thus overruled.

[2] Defendant further contends that the trial court erred in denying his motions to dismiss the armed robbery charge. The evidence showed that after defendant initially dragged the victim to defendant's truck, the victim said to defendant: "Do you want to get the money? You can get the money and go." Defendant argues from this evidence that the "idea of taking the money originated with [the victim] and that she voluntarily consented to giving the money to the defendant."

State v. Siler, 292 N.C. 543, 234 S.E. 2d 733 (1977), also presented facts suggesting that the idea of a robbery originated with the victim rather than the defendant. The defendant there was convicted of first degree rape and armed robbery. After completion of the rape, but while defendant was still armed with a gun, the victim told the defendant that her money was on her desk. Subsequently, the victim's pocketbook and billfold were found lying on the floor, and her money was missing. We held these facts, and the inferences arising therefrom, sufficient to withstand a motion for nonsuit of an armed robbery charge. *Id.* at 555-56, 234 S.E. 2d at 741-42.

Our Court of Appeals also faced similar facts in *State v. Martin*, 47 N.C. App. 223, 267 S.E. 2d 35, *appeal dismissed and disc.*

rev. denied, 301 N.C. 238, 283 S.E. 2d 134 (1980). There, when the victim saw that the defendant had a gun, he offered the defendant his money and his car. He "kept telling him to take the money." *Id.* at 226, 267 S.E. 2d at 37. After the victim placed a wallet containing money on the seat of his car, defendant forced the victim into the trunk. He drove for a distance, then put the victim out. When the car was found, the wallet was gone. The court held that the elements of armed robbery of the wallet were satisfied. *Id.* at 228-29, 267 S.E. 2d at 38-39.

The fact that the idea of taking money from the victim's employer may have originated with the victim rather than the defendant thus does not necessarily remove the armed robbery issue from the jury.

> Armed robbery is the taking of personal property from the person or presence of another, by the use or threatened use of a dangerous weapon, whereby the victim's life is endangered or threatened. . . .
>
> . . . .
>
> . . . [W]hen the circumstances of the alleged armed robbery reveal an intent to permanently deprive the owner of his property and a taking effectuated by the use of a dangerous weapon, it makes no difference whether the intent to steal was formulated before the use of force or after it, so long as the theft and the use of force can be perceived by the jury as constituting a single transaction.

State v. Rasor, 319 N.C. 577, 587, 356 S.E. 2d 328, 334-35 (1987) (citations omitted). The evidence here, viewed in the light most favorable to the State as required, *State v. Jerrett*, 309 N.C. 236, 263, 307 S.E. 2d 339, 352, tended to show a continuous transaction in which the defendant committed a sexual offense upon the victim and robbed her employer. Both offenses were effectuated by the use of a dangerous weapon, a knife. The jury could reasonably infer that defendant intended permanently to deprive the victim's employer of the bills he took from the employer's cash register. A rational factfinder could conclude from the evidence presented that the victim parted with her employer's property only because she believed her life was endangered or threatened, and that she suggested the robbery as a diversionary tactic designed to save

her from death or bodily harm. Surrender of property under such circumstances is not consensual. This assignment of error is thus overruled.

No error.

STATE OF NORTH CAROLINA v. JAMES EARL WILSON

No. 468A87

(Filed 6 April 1988)

1. **Criminal Law § 75.2— rape—custodial statements—admissible**

The trial court did not err in a prosecution for the first degree rape of defendant's eight-year-old sister by denying defendant's motion to suppress inculpatory statements made after an officer asked defendant "If he did it," told defendant to "look into his eyes," and told defendant that "you're going to have to tell us what happened." Defendant was made aware of his constitutional right to remain silent and to have an attorney present before questioning; defendant understood those rights and chose to speak; there was nothing to suggest that there were any actions on the part of the investigating officer that would have provoked fright in the defendant and overborn his will; nor was there any indication that defendant's statements were the products of threats or promises of reward.

2. **Criminal Law § 87.2— nine-year-old witness—leading questions—no abuse of discretion**

The trial court did not abuse its discretion by allowing leading questions to be asked of a nine-year-old rape victim where the subject matter was undoubtedly of a delicate nature and the situation was made more delicate by the fact that the child was having to testify against her older brother, not only in his presence, but in the presence of many strangers. There was nothing in the record to demonstrate that the prosecutor overstepped his bounds or badgered the young witness or succeeded in coercing her to say anything she was not prepared to say on her own.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment, entered by *Fountain, J.*, at the 27 April 1987 Criminal Session of Superior Court, MARTIN County. Heard in the Supreme Court 9 February 1988.

Lacy H. Thornburg, Attorney General, by Laura E. Crumpler and David M. Parker, Assistant Attorneys General, for the State.

Daniel A. Manning, for defendant-appellant.

FRYE, Justice.

Defendant raises three assignments of error on this appeal. After a thorough review of the record and the arguments made, we find no error in the trial of defendant and therefore will not disturb the ruling of the lower court.

The State's evidence tended to show that on an afternoon in January 1986, the twenty-one-year-old defendant, while his parents were away from the house, asked his eight-year-old sister to get on his bed, pull down her panties, and pull up her dress. Defendant then applied hair grease on the front and back sides of his sister and proceeded to have vaginal intercourse with her. Defendant admonished his sister not to tell anyone about the incident and if she ignored his admonition, he would whip her.

After receiving an anonymous call concerning the child on or about 21 January 1986, the Martin County Department of Social Services sent a representative to the young victim's school. There, the representative interviewed the child, and the child relayed to the agent the events that had transpired between herself and defendant. The agent received two other reports on 22 July 1986 and on 18 August 1986 and interviewed the child again on the later date in Robersonville where the child's family was then living. On 19 August 1986, SBI Agent Kent Inscoe accompanied the social services representative to conduct a follow-up interview with the child. The child relayed the same story to both adults. On this occasion, the child, using anatomically correct dolls, was asked to recreate what had occurred between the child and defendant. The child positioned the dolls so as to depict the act of vaginal intercourse.

The following day, Agent Inscoe "picked up" defendant at noon as he was coming in from a tobacco field for lunch and transported defendant to the Robersonville Police Department. After being advised of his *Miranda* rights, defendant was interrogated by law enforcement officials. During the course of this interrogation, defendant made incriminating statements. On 15 September

1986, defendant was indicted for the first degree rape of his sister.

At trial before a jury, defendant testified and admitted that in January 1986 at the family's home, he placed his young sister on her stomach and placed his penis between her legs. He denied, however, either vaginal or anal penetration. Defendant was convicted of first degree rape and sentenced to the mandatory term of life imprisonment. He now appeals to this Court as a matter of right.

[1] By his first assignment of error, defendant contends that the trial court erred in denying his motion to suppress inculpatory statements. The State's evidence revealed that the investigating officer, after advising defendant of his rights, told defendant that the young victim had informed him that defendant had "messed" with her. The officer then asked defendant "if he did it." Defendant answered in the affirmative. The officer further asked defendant to "look into [his] eyes" and stated to defendant that "you're going to have to tell us what happened." Defendant then made further incriminating remarks. Defendant argues that he was commanded by the officer to tell what had transpired between defendant and his sister and that such a command violated his right to choose between silence and speech under the fifth amendment.

After hearing all the testimony at the suppression hearing, the trial judge made the following findings of fact:

> 2. That the defendant was advised of his constitutional rights, to-wit: that he had the right to remain silent, that anything . . . he said could be used against him in a court of law; that he had a right to have an attorney; that he had a right to have an attorney present during questioning; that if he could not afford an attorney, an attorney would be appointed to represent him at no expense; if he decided to answer questions that he could stop answering questions at any time.
>
> 3. That the defendant was asked if he understood the rights read to him by Agent Inscoe and the defendant replied that he did understand his rights.

4. That he was asked if he wanted a lawyer present during questioning; that he stated that he did not want a lawyer during questioning; that the defendant at the time of the interrogation was twenty-one years of age and informed . . . Agent Inscoe that he was able to read.

5. That the defendant was not suffering from any physical abnormality at the time of the interrogation and was sober.

6. That the defendant did not exhibit any of the traits of mental confusion of being incoherent or complained [sic] of any physical malady and presented an air of understanding to Agent Inscoe.

7. That Agent Inscoe made no promises, offers of reward or inducement to the defendant to get him to make a statement.

8. That no threats or suggestions of violence were made against the defendant; that the defendant at no time indicated he desired to stop talking or answering questions; that the defendant did make an oral waiver of his right to an attorney to be present during questioning.

Based upon these findings of fact, the trial court concluded that no constitutional rights of defendant were violated. We agree.

We have rejected the use of any *per se* rule in resolving issues surrounding the voluntariness and admissibility of confessions by defendants. *State v. Corley*, 310 N.C. 40, 311 S.E. 2d 540 (1984). Rather, we look to the totality of the circumstances to determine whether a confession was in fact voluntarily and understandingly made. The test is whether the confession at issue was the product of "improperly induced hope or fear." *Id.* at 48, 311 S.E. 2d at 545.

In the case *sub judice*, there is nothing to suggest that there were any actions on the part of the investigating officer that would provoke fright in the defendant and overbear his will. Nor was there any indication that his statements were the product of threats or promises of reward.

Defendant argues that this Court has held confessions similarly induced to be involuntary. Defendant cites *State v. Livingston*, 202 N.C. 809, 164 S.E. 337 (1932) (officers told defendant that it looked like defendant "had about as well tell it"); *State v. Davis*, 125 N.C. 612, 34 S.E. 198 (1899) (the investigating officer stated that he had worked up the case and that defendant "had as well tell all about it"); *State v. Whitfield*, 70 N.C. 356 (1874) (defendant's employer stated to defendant that he believed defendant was guilty, and if defendant was guilty he "had better say so"). However, the circumstances under which these statements were made are vastly different from the present case.

In *Whitfield*, decided in 1874, this Court held defendant's confession of larceny to be involuntary. There, the black defendant was confronted by his white employer, escorted by white law enforcement officers, and accused of stealing hogs. The confession was held involuntary not merely because of the single statement that elicited the confession, but because of the coercive circumstances resulting from racial tension manifest in the confrontation. *State v. Whitfield*, 70 N.C. at 357. Similarly, in *Davis* the confession was involuntary not merely because of the statement made by officers that defendant had as well tell about the incident, but because defendant, interrogated in a post-arrest situation, was led to believe that his admission would mitigate punishment. *State v. Davis*, 125 N.C. at 614, 34 S.E. at 199. In *Livingston*, not only did the investigating officer state to defendant that he ought to tell what had occurred, he also told defendant that he would be "lighter" on defendant if he did confess. *State v. Livingston*, 202 N.C. at 810, 164 S.E. at 337. These cases reaffirm our view that the totality of the circumstances must be considered in determining the voluntariness of a confession. In each of the cases cited by defendant, it was the totality of the circumstances that dictated the result, not single remarks that served as improper inducements.

In the instant case, none of the improper inducements found in the cases cited by defendant were present. Moreover, and perhaps most importantly, defendant was made aware of his constitutional right to remain silent and to have an attorney present before questioning. He understood these rights and chose to speak. Viewing the totality of the circumstances surrounding defendant's statements, we find no evidence of coercion, and there-

fore find no error in the trial judge's decision to deny defendant's motion to suppress these statements. *See State v. Corley*, 310 N.C. 40, 311 S.E. 2d 540.

[2] Defendant next argues that the trial court abused its discretion by allowing leading questions to be asked of the prosecuting witness. He contends that the prosecutor was permitted to continue questioning the witness until she gave the desired answer that vaginal penetration had occurred. After reviewing the record, we find no abuse of discretion.

This Court has held that it is within the sound discretion of the trial judge to allow the use of leading questions on direct examination. *State v. See*, 301 N.C. 388, 271 S.E. 2d 282 (1980). We have allowed wide latitude in the questioning of a witness of tender years or when the subject concerns a delicate matter such as sexual conduct. *State v. Payne*, 280 N.C. 150, 185 S.E. 2d 116 (1971). Defendant apparently recognizes the discretion of the trial judge but argues that the rule ought not be limitless before an abuse of discretion is found. Our decision in this case does not allow trial judges to wield unbridled discretion and in no way depreciates the general rule prohibiting leading questions on direct examination.

The subject matter to which the nine-year-old witness was asked to testify was undoubtedly of a delicate nature. The substance of her testimony centered on whether defendant did penetrate her vaginally on the date in question. This situation was made more delicate by the fact that the child was having to testify against her older brother, not only in his presence but in the presence of many strangers. It is precisely this type of case that may require, in the trial judge's discretion, a certain degree of probing by the prosecutor and a certain latitude in questioning to allow for the full development of testimony. The trial judge's decision to allow this additional latitude to the prosecutor was not an abuse of discretion. There is nothing in the record to demonstrate that the prosecutor overstepped his bounds or badgered the young witness or succeeded in coercing her to say anything she was not prepared to say on her own. For these reasons, we find no abuse of discretion by the trial judge.

Last, defendant argues that the trial court erred in denying his motion to dismiss the charge of first degree rape. We find the evidence amply sufficient to support the charge.

No error.

STATE OF NORTH CAROLINA *v.* GARY LEE WEATHERS

No. 253A87

(Filed 6 April 1988)

1. Rape and Allied Offenses § 5— sexual offense—cunnilingus—sufficient evidence

Testimony by the nine-year-old victim that defendant "had his tongue—not in [her] vagina, but he was going around it" constituted sufficient evidence of cunnilingus to support a conviction for a first degree sexual offense.

2. Criminal Law § 88.4— cross-examination of defendant—failure to appear—knowledge of order for arrest

Where defendant testified at some length about his absence from the state for two years while rape, incest and sexual offense charges were pending against him, defendant opened the door to cross-examination about whether he knew that an order for his arrest had been issued. Moreover, the prosecutor's questions did not amount to asking defendant if he had been accused or charged with some other offense since the order issued for defendant's arrest was for his failure to appear for trial on the charges for which he was presently being tried, and the prosecutor's questions related to those crimes.

BEFORE *Owens, J.*, and a jury at the 5 January 1987 Criminal Session of Superior Court, MECKLENBURG County, defendant was convicted of two counts of incest, two counts of first-degree rape and one count of first-degree sexual offense. Judgment was entered on 7 January 1987 sentencing defendant to three terms of life imprisonment for the two counts of first-degree rape and the one count of first-degree sexual offense, of which the first two terms were to run consecutively and the third concurrently with the first. In addition, defendant was sentenced to a total of nine years for the two counts of incest, to run concurrently with the first life sentence. Defendant appeals pursuant to N.C.G.S. § 7A-27(a). Decided on the briefs pursuant to N.C.R. App. P. 30(d).

Lacy H. Thornburg, Attorney General, by James Peeler Smith, Special Deputy Attorney General, for the State.

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

MEYER, Justice.

Defendant was convicted of the crimes of incest, rape and sexual offense, all of which he perpetrated upon his young daughter (hereinafter referred to as the victim so as not to disclose her name on the record). On appeal, he argues that the evidence relating to the charge of first-degree sexual offense was insufficient, and that he was improperly cross-examined about his failure to appear in court when his case was first called for trial. We find no error.

The State's evidence tended to show the following events. The victim lived with her mother and sister in Charlotte, North Carolina. Defendant, who is the victim's father, lived with several relatives, including the victim's aunt and cousin, in another part of town. The victim frequently visited defendant at her aunt's house. When she spent the night there, she slept with her aunt and cousin. Her father had a separate bedroom.

In the summer of 1983, when the victim was nine years old, she made a two-week visit to her aunt's house. During this visit, three sexual incidents occurred. On the first occasion, defendant took the victim from her aunt's bedroom to the living room, where he placed her on the couch and inserted his penis into her vagina. The second time, he took the victim to his own bed where he once again inserted his penis into her vagina. On the third occasion, defendant took the victim to the living room, where he rubbed his tongue around her vagina. After each incident, the victim returned to her aunt's bedroom, locking the door. At this time, she told nobody about what had happened because she was frightened and ashamed and thought it was her fault.

In January 1984 the victim revealed the incidents to her school guidance counselor. Several days later, in the presence of the counselor, the victim told her mother of the incidents. She subsequently described the incidents to personnel at the Department of Social Services and the Youth Bureau of the Charlotte Police Department.

At trial, defendant took the stand and denied having had any sexual relations with his daughter. His sister and niece, with whom the victim slept, testified that they were both unaware of defendant's entries into the bedroom. The victim had never said anything to either of them about the sexual incidents. Defendant had never made any sexual advances towards his niece, even though she was often left with him.

[1] Defendant first contends that the State failed to produce substantial evidence showing that he engaged in a sexual act with the victim. Specifically, he argues that insufficient evidence of cunnilingus existed, because the State failed to show that he in fact touched the victim's vagina with his tongue.

We find *State v. Ludlum*, 303 N.C. 666, 281 S.E. 2d 159 (1981), to be dispositive of this issue. There, the question presented was whether testimony by a four-year-old girl that defendant had touched her with his tongue between her legs, while indicating the place of touching to the jury, constituted sufficient evidence of cunnilingus to support a conviction for a first-degree sexual offense. After reviewing the dictionary definitions of cunnilingus and the medical definitions of the external genital organs of the female, this Court stated:

> We are satisfied the Legislature did not intend that the vulva in its entirety or the clitoris specifically must be stimulated in order for cunnilingus to occur. To adopt this view would saddle the criminal law with hypertechnical distinctions and the prosecution with overly complex and in some cases impossible burdens of proof. We think, rather, that given the possible interpretations of the word as ordinarily used, the Legislature intended to adopt that usage which would avoid these difficulties. We conclude, therefore, that the Legislature intended by its use of the word cunnilingus to mean stimulation by the tongue or lips of *any part of a woman's genitalia.*
>
> . . . .
>
> . . . The degradation to the person of . . . a small girl incapable of consenting is complete in the case of cunnilingus once the perpetrator's lips or tongue have touched *any* part of her genitalia whether or not any actual "penetration" of the genitalia takes place.

. . . .

. . . Whatever "stimulation" is required is accomplished for purposes of Article 7A prosecutions when there has been the slightest touching by the lips or tongue of another to *any* part of the woman's genitalia.

Ludlum, 303 N.C. at 672, 673-74, 281 S.E. 2d at 162, 163 (emphasis added). In the case *sub judice*, the victim's testimony that defendant "had his tongue—not in [her] vagina, but he was going around it" was sufficient to establish that defendant placed his tongue on her *mons pubis*, which is a part of the external female genitalia. *Id.* The act of cunnilingus was thus complete. Defendant's argument is without merit.

[2] Defendant next complains that he was unfairly prejudiced by the following questions asked of him during cross-examination.

Q. Isn't it a fact and isn't it true, Mr. Weathers, that you—well, STRIKE THAT. Isn't it true, Mr. Weathers, that when these same five cases were called for trial the week of September the 10th, 1984, you were called and failed and there was an Order issued for your arrest for that failure to appear? Isn't that true, sir?

MR. GRONQUIST: OBJECTION. How would he know if he was called.

THE COURT: OBJECTION OVERRULED.

He can say whether he knows or not.

A. No, sir, I didn't know.

Q. You know that now, though, don't you?

A. Yes, sir.

Q. And isn't it true, Mr. Weathers, that that Order for Arrest for your failure to appear that week was only served upon you the week of September the 10th, 1986? Isn't that true?

A. Of this year?

Q. Yes, sir, 1986.

A. Yes, sir.

Defendant contends that this exchange was improper because it exceeded the bounds of proper cross-examination and it amounted to asking him if he had been accused or charged with some other offense. We find no merit in this contention.

On direct examination defendant testified about his two-year disappearance from Mecklenburg County, North Carolina. He testified that he was arrested there in January 1984 on the charges for which he was presently being tried. Some time before Christmas of that year he was employed with a trucking company, unloading trucks. He went to Virginia to unload a truck, but because the company had no return shipment to North Carolina, he remained in Virginia even though he knew he was under indictment in North Carolina. He worked in Virginia and then went to Maryland where he also found employment. He subsequently returned to Marion, North Carolina, where he was arrested for drunken driving, for which he was convicted and placed on two years' probation. Defendant told his probation officer that a warrant on him might be outstanding. He eventually returned to Charlotte, North Carolina in 1986. On cross-examination defendant acknowledged that during the period he was out-of-state, he was represented by a Charlotte attorney. Although he had the attorney's telephone number, he did not keep her advised of his whereabouts. Defendant was then asked the questions about which he now complains.

We conclude that defendant was not prejudiced by the district attorney's cross-examination because he "opened the door" to the questions. Even though defendant's testimony on direct examination as to his out-of-state activities may have been given in an effort to forestall the State's possible contention that his absence amounted to flight to avoid prosecution, we have said that "when a defendant in a criminal case offers evidence which raises an inference favorable to his case, the State has the right to explore, explain or rebut that evidence. *State v. Albert*, 303 N.C. 173, 277 S.E. 2d 439 (1981)." *State v. Brown*, 310 N.C. 563, 571, 313 S.E. 2d 585, 590 (1984). *See also State v. Gappins*, 320 N.C. 64, 357 S.E. 2d 654 (1987) (a defendant may not deliberately elicit testimony and then later complain of its admission). Defendant had testified at some length about his absence from the county for two years while charges were pending against him. Defendant having thus opened the door, the district attorney could

properly delve further into defendant's knowledge, if such he had, of any measures taken to secure his attendance at trial.

Defendant's contention that the district attorney's questions showed that defendant had been accused or charged with another offense is similarly unpersuasive. Defendant draws our attention to *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971), wherein we stated that a defendant in a criminal case may not be cross-examined as to whether he has been indicted or is under indictment for a criminal offense other than that for which he is then on trial. Defendant overlooks the fact that here the prosecutor's questions related to the offenses for which defendant was presently being tried. The order issued for defendant's arrest was for his failure to appear for trial on *these* crimes. Moreover, defendant himself had testified on direct that he knew he was under indictment and thought that a warrant for his arrest might be outstanding. We fail to see how defendant could have been prejudiced by a question asking him if he knew that an order for his arrest had actually been issued. Defendant's arguments as to his cross-examination are without merit.

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

No error.

STATE OF NORTH CAROLINA v. TRAVIS ROGERS

No. 316A87

(Filed 6 April 1988)

Rape and Allied Offenses § 5— sexual offense—penetration of genital opening—sufficient testimony by child victim

Testimony by the six-year-old victim that defendant placed his hand between her legs and put his finger in her "private spot," "cootie" and "pee-pee" constituted sufficient evidence of penetration of the victim's genital opening to support defendant's conviction of a first degree sexual offense.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a life sentence entered by *Helms, J.*, at the 9 February 1987 Criminal Session of Superior Court, CABARRUS

County, where defendant was convicted by a jury of first degree sexual offense. Heard in the Supreme Court 9 February 1988.

Lacy H. Thornburg, Attorney General, by Francis W. Crawley, Assistant Attorney General, for the state.

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

EXUM, Chief Justice.

In this appeal defendant's one assignment of error challenges the sufficiency of the evidence to support the verdict of guilty of first degree sexual offense. We conclude the evidence was sufficient to support the verdict and that defendant had a fair trial free from reversible error.

At trial the state's evidence tended to show that on 7 September 1986 defendant, age thirty-eight, was babysitting the six-year-old victim. The victim testified that on that day she went into defendant's bedroom and lay down beside him on the bed. Shortly after the victim had fallen asleep, defendant woke her and, using his hand to open her legs, "went inside" her "pee-pee" with his finger. She testified that defendant said "it felt good" and continued to penetrate her with his finger for approximately one minute. Later that afternoon defendant took the victim back to her home.

The victim's mother testified that when she got home the victim told her that defendant had put his finger inside her "cootie."

On 9 September Dr. Douglas Clark, a pediatrician, performed a pelvic exam on the victim. He testified the exam was normal, but that he did not expect to find any physical injury or tear in the victim's genital area because it was doubtful the insertion of a finger would cause much damage or injury.

The state also offered as corroborative evidence the testimony of Detective W. L. Arthur of the Concord Police Department, and Mrs. Kathy Shackleford, a worker at the Piedmont Area Mental Health Center. Detective Arthur testified that he interviewed the victim on 9 September 1986, and she told him defendant had "put his finger inside her cootie." Mrs. Shackleford testified that the victim told her defendant had put his hand in

her "cootie." Mrs. Shackleford also testified that the victim demonstrated what had occurred using anatomically correct dolls.

Defendant offered evidence and testified in his own behalf. Essentially defendant denied committing the offense charged against him.

Defendant contends the trial court erred by denying his motion to dismiss for insufficient evidence at the close of all the evidence. We disagree.

In ruling on a motion to dismiss for insufficient evidence the trial court must consider the evidence in the light most favorable to the state, which is entitled to every reasonable inference which can be drawn from that evidence. *State v. Bell*, 311 N.C. 131, 138, 316 S.E. 2d 611, 615 (1984). There must, however, be substantial evidence of each essential element of the offense charged together with evidence that defendant was the perpetrator of the offense. *State v. Gardner*, 311 N.C. 489, 510-11, 319 S.E. 2d 591, 605 (1984).

N.C.G.S. § 14-27.4 defines first degree sexual offense in pertinent part as follows:

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

For a charge of first degree sexual offense to withstand a motion to dismiss for insufficient evidence, there must be evidence, among other things, that defendant committed a "sexual act" upon the victim. *State v. Gardner*, 311 N.C. 489, 319 S.E. 2d 591. N.C.G.S. § 14-27.1(4) defines a "sexual act" as the "penetration, however slight, by any object into the genital or anal opening of another person's body." Defendant argues that the victim's testimony was ambiguous on the issue of penetration of the genital or anal opening of the victim's body and thus insufficient to show that penetration of one of these areas occurred. We disagree.

The evidence introduced by the state tending to establish penetration was the victim's testimony. She testified that defend-

ant placed his hand between her legs and put his finger in her "private spot," "cootie" and "pee-pee." On cross-examination she testified as follows:

> Q. Now . . . you said something about some circles. Where were these circles?
>
> A. Inside me.
>
> Q. All right. Inside you? Now, is it right—exactly was it right exactly where you pee-pee?
>
> A. Yes.
>
> Q. Was it on the outside of that hole or was it in the hole?
>
> A. In the hole. . . .
>
> Q. In fact, he really didn't put his finger in any private part inside of you did he?
>
> A. Only where I pee-pee at.

Although the victim did not use the word "vagina," or "genital area," when describing the sexual assault perpetrated upon her, she did employ words commonly used by females of tender years to describe these areas of their bodies, of which they are just becoming aware. Other cases have come before this Court in which young children have used words similar or identical to those used by the victim to describe the male and female sex organs, and the children's testimony was found to be sufficient to prove the essential elements of a sexual offense. *See, e.g., State v. Griffin*, 319 N.C. 429, 355 S.E. 2d 474 (1987) (nine-year-old victim testified defendant touched her on her "private parts"); *State v. Watkins*, 318 N.C. 498, 349 S.E. 2d 564 (1986) (seven-year-old victim testified defendant placed his finger in her "coodie cat" and used dolls to indicate the vaginal area); *State v. Smith*, 315 N.C. 76, 337 S.E. 2d 833 (1985) (four-year-old victim testified defendant touched her "project" with his "worm" and pointed to her vaginal area).

We conclude the evidence is ample to support the verdict of guilty of first degree sexual offense. Accordingly, in defendant's trial we find

No error.

Hardy v. Brantley Construction Co. and Wells v. Brantley Construction Co.

JOHN H. HARDY, PLAINTIFF v. BRANTLEY CONSTRUCTION COMPANY, EMPLOYER, NATIONWIDE MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANT; JOHN ROGER McKINNEY, THIRD PARTY TORT-FEASOR (8710IC26)

ALBERT R. WELLS, EMPLOYEE, PLAINTIFF v. BRANTLEY CONSTRUCTION COMPANY, EMPLOYER, NATIONWIDE MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANT; JOHN ROGER McKINNEY, THIRD PARTY TORT-FEASOR (8710IC27)

No. 650A87

(Filed 6 April 1988)

APPEAL by plaintiffs from a decision of a divided panel of the Court of Appeals reported at 87 N.C. App. 562, 361 S.E. 2d 748 (1987), which affirmed in part, and vacated and remanded in part, an opinion and award of the North Carolina Industrial Commission entered 3 October 1986. We allowed defendants' petition for discretionary review on 14 January 1988. Heard in the Supreme Court 17 March 1988.

Connor, Bunn, Rogerson & Woodard, P.A., by James F. Rogerson, and Allen G. Thomas and Charles P. Farris, Jr., P.A., by Allen G. Thomas, for plaintiffs.

LeBoeuf, Lamb, Leiby & MacRae, by Jane Flowers Finch and Albert D. Barnes, for defendants.

Taft, Taft & Haigler by Thomas F. Taft, Kenneth E. Haigler and James M. Stanley, Jr., for North Carolina Academy of Trial Lawyers, amicus curiae.

PER CURIAM.

The portion of the Court of Appeals opinion which vacates in part the opinion and award of the Industrial Commission is before us by virtue of the dissenting opinion of Phillips, J. For the reasons stated in the dissenting opinion, that portion of the Court of Appeals opinion is reversed.

We conclude that defendants' petition for discretionary review was improvidently allowed. The result is that the opinion and award of the Industrial Commission remains in full force and effect.

In plaintiffs' appeal, reversed.

In defendants' appeal, discretionary review improvidently allowed.

HOME ELECTRIC CO. OF LENOIR, INC., A NORTH CAROLINA CORPORATION, PLAINTIFF v. HALL AND UNDERDOWN HEATING AND AIR CONDITIONING COMPANY, A NORTH CAROLINA PARTNERSHIP, DEFENDANT

No. 487PA87

(Filed 6 April 1988)

ON plaintiff's petition for discretionary review of a decision of the Court of Appeals, 86 N.C. App. 540, 358 S.E. 2d 539 (1987), which affirmed the dismissal of plaintiff's complaint by *Sitton, J.*, at the 29 September 1986 session of Superior Court, CALDWELL County. Heard in the Supreme Court 15 March 1988.

Delk, Swanson & Einstein, by Joseph C. Delk, III, David A. Swanson, and Edwin S. Hartshorn, III, for plaintiff-appellant.

Whisnant, Simmons, Groome, Tuttle & Pike, by H. Houston Groome, Jr. and Vanessa Barlow, for defendant-appellee.

Miller, Johnston, Taylor & Allison, by James W. Allison and John B. Taylor, for The Associated General Contractors of America, Carolinas Branch, amicus curiae.

Foster, Conner, Robson & Gumbiner, P.A., by Eric C. Rowe, Allen Holt Gwyn, and Richard D. Conner, for American Subcontractors Association of The Carolinas, Inc., amicus curiae.

PER CURIAM.

Affirmed.

STATE OF NORTH CAROLINA v. JOSEPH MIDYETTE

No. 577A87

(Filed 6 April 1988)

APPEAL by defendant pursuant to N.C.G.S. § 7A-30(2) from a decision of a divided panel of the Court of Appeals, 87 N.C. App. 199, 360 S.E. 2d 507 (1987), which found no error in the trial of defendant before *Farmer, J.*, at the 21 July 1986 Criminal Session of Superior Court, WAKE County. Heard in the Supreme Court 17 March 1988.

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

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

PER CURIAM.

Affirmed.

STATE OF NORTH CAROLINA v. EDGAR ROYCE PERRY

No. 410PA87

(Filed 6 April 1988)

ON discretionary review of an unpublished decision of the Court of Appeals reported at 86 N.C. App. 233, 357 S.E. 2d 186 (1987). The Court of Appeals found no error in defendant's trial before *Gray, J.*, in Superior Court, WATAUGA County, in which the defendant was convicted and sentenced for conspiracy to traffic in cocaine, trafficking in cocaine, and possession of a firearm by a convicted felon.

Lacy H. Thornburg, Attorney General, by Michael Rivers Morgan, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Mark D. Montgomery, Assistant Appellate Defender, for the defendant-appellant.

PER CURIAM.

After hearing oral arguments and considering the new briefs of counsel, the Court concludes that discretionary review was improvidently allowed.

Discretionary review improvidently allowed.

EBB CORPORATION (DARE CONCRETE, INC.) v. NANCY GLIDDEN AND NANCY GLIDDEN T/A FIRST FLIGHT CONCRETE

No. 601A87

(Filed 6 April 1988)

APPEAL by defendant 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. 366, 360 S.E. 2d 808 (1987), which affirmed the judgment of *Llewellyn, J.*, at the 2 September 1986 Session of Superior Court, DARE County. Heard in the Supreme Court 16 March 1988.

Aycock, Spence & Graham, by W. Mark Spence, for plaintiff appellee.

Trimpi, Thompson & Nash, by C. Everett Thompson, II and John G. Trimpi, for defendant appellant.

PER CURIAM.

For reasons stated in the dissenting opinion of Becton, Judge, the decision of the Court of Appeals is reversed. The case is remanded to that court for remand to the Superior Court, Dare County, for further proceedings consistent with this opinion.

Reversed and remanded.

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

BURROW v. WESTINGHOUSE ELECTRIC CORP.

No. 68P88.

Case below: 88 N.C. App. 347.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 6 April 1988.

CHOLETTE v. TOWN OF KURE BEACH

No. 31P88.

Case below: 88 N.C. App. 280.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 6 April 1988. Motion by defendants to dismiss appeal for lack of substantial constitutional question allowed 6 April 1988.

HIGH v. FERGUSON

No. 35P88.

Case below: 88 N.C. App. 311.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 6 April 1988.

HINCHER v. HINCHER

No. 626P87.

Case below: 87 N.C. App. 509.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 April 1988.

IN RE FORECLOSURE OF BEAN

No. 42P88.

Case below: 88 N.C. App. 312.

Notice of appeal by John W. Bean pursuant to G.S. 7A-30 dismissed 6 April 1988. Petition by John W. Bean for discretionary review pursuant to G.S. 7A-31 denied 6 April 1988.

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

IN RE MANUS v. MULLIS

No. 103P88.

Case below: 88 N.C. App. 612.

Petition by respondent for discretionary review pursuant to G.S. 7A-31 denied 6 April 1988.

IN THE MATTER OF THE WILL OF EVERHART

No. 78P88.

Case below: 88 N.C. App. 572.

Petition by caveators for discretionary review pursuant to G.S. 7A-31 denied 6 April 1988.

McLEAN v. McLEAN

No. 55A88.

Case below: 88 N.C. App. 285.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and App. Rule 16(b) as to additional issues allowed 6 April 1988.

MATTHEWS v. JAMES

No. 15P88.

Case below: 88 N.C. App. 32.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 6 April 1988.

MERRITT v. EDWARDS RIDGE

No. 12PA88.

Case below: 88 N.C. App. 132.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 6 April 1988.

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

METTS v. PIVER

No. 664PA87.

Case below: 87 N.C. App. 509.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 6 April 1988. Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 6 April 1988.

N.C. BAPTIST HOSPITALS, INC. v. MITCHELL

No. 34PA88.

Case below: 88 N.C. App. 263.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 6 April 1988.

PARDUE v. PARDUE

No. 36P88.

Case below: 88 N.C. App. 312.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 April 1988.

RALEIGH-DURHAM AIRPORT AUTHORITY v. HOWARD

No. 32P88.

Case below: 88 N.C. App. 207.

Petition by defendant (Howard) for discretionary review pursuant to G.S. 7A-31 denied 6 April 1988.

SEAFARE CORP. v. TRENOR CORP.

No. 79P88.

Case below: 88 N.C. App. 404.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 6 April 1988.

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

SMART v. EQUITABLE LIFE INS. SOCIETY OF U.S.

No. 44P88.

Case below: 88 N.C. App. 312.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 6 April 1988.

STATE v. BATTLE

No. 4P88.

Case below: 87 N.C. App. 680.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 April 1988.

STATE v. HAYES

No. 105PA88.

Case below: 88 N.C. App. 749.

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 24 March 1988. Petition by Attorney General for writ of supersedeas and temporary stay allowed 24 March 1988.

STATE v. NORCUTT

No. 71P88.

Case below: 88 N.C. App. 482.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 April 1988.

STATE v. PHILLIPS

No. 139PA88.

Case below: 88 N.C. App. 526.

Petition by Attorney General for writ of supersedeas allowed 6 April 1988. Petition by Attorney General for writ of certiorari to the North Carolina Court of Appeals allowed 6 April 1988.

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

STATE v. WORTHINGTON

No. 108A88.

Case below: 89 N.C. App. 88.

Petition by defendant for writ of supersedeas and temporary stay denied 6 April 1988. Motion by the State to dismiss appeal for lack of substantial constitutional question allowed 6 April 1988.

WARD v. WARD

No. 5P88.

Case below: 88 N.C. App. 267.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 April 1988.

WELLMON v. HICKORY CONSTRUCTION CO.

No. 13P88.

Case below: 88 N.C. App. 76.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 April 1988.

WEST v. GAITHINGS

No. 52P88.

Case below: 88 N.C. App. 483.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 April 1988.

WHITTAKER GENERAL MEDICAL CORP. v. DANIEL

No. 6PA88.

Case below: 87 N.C. App. 659.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 6 April 1988.

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

WOOD v. WOOD

No. 70P88.

Case below: 88 N.C. App. 483.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 April 1988.

YORK v. NORTHERN HOSPITAL DISTRICT

No. 43P88.

Case below: 88 N.C. App. 183.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 6 April 1988.

PETITIONS TO REHEAR

HIGGINS v. HIGGINS

No. 486A87.

Case below: 321 N.C. 482.

Petition by defendant denied 6 April 1988.

MUSSALLAM v. MUSSALLAM

No. 702PA86.

Case below: 321 N.C. 504.

Petition by defendant denied 6 April 1988.

YOUNGBLOOD v. NORTH STATE FORD TRUCK SALES

No. 517A87.

Case below: 321 N.C. 380.

Petition by defendants denied 6 April 1988.

STATE OF NORTH CAROLINA v. MICHAEL RAY WILSON

No. 654A84

(Filed 5 May 1988)

1. **Criminal Law § 89.7; Witnesses § 1— psychiatric evaluation of witness—denial of motion**

The trial court properly denied defendant's motion for a psychiatric evaluation of a State's witness.

2. **Constitutional Law § 31— denial of funds for experts**

The trial court did not err in denying defendant's motions for funds with which to hire experts in pathology, fingerprints and psychology where defendant failed to show a particularized need for such expert assistance but merely indicated that assistance in looking for fingerprints and a pathologist and psychologist might be helpful to him in preparing his defense.

3. **Criminal Law § 101.4— executions of others—refusal to sequester jurors**

The trial court did not abuse its discretion in denying defendant's request to sequester the impaneled jurors in his first degree murder trial because his trial occurred at the time of the execution of Velma Barfield in this state and executions in other states, since the effects of executions on capital trials cannot be calculated. N.C.G.S. § 15A-1236(b).

4. **Jury § 7.11; Criminal Law § 135— nature of capital sentencing—refusal to instruct**

The trial court did not err in refusing to give defendant's requested instructions to prospective jurors on the nature of capital sentencing.

5. **Jury § 6.4— capital case—prospective juror—question about parole from life sentence—instruction by court—exclusion of further questions about parole**

When a prospective juror in a capital case asked the court whether it had any responsibility for parole from life sentences, the trial court properly instructed all the jurors that "life means life" and they should not concern themselves with any other definition of the term; moreover, the court's refusal to permit defense counsel to question the prospective juror further about her views of parole was not error where there was no indication that the juror's views about parole in any way influenced her decision in the present case; defense counsel was able to elicit from the juror, in the context of her concern about parole from a life sentence, that she would be able to follow the law on sentencing as stated by the judge, regardless of her own feelings; and defendant did not challenge this juror for cause or peremptorily.

6. **Criminal Law § 34.3— evidence of defendant's prior incarceration—error cured by court's actions**

Any prejudice to defendant from a statement by a witness that he and defendant had "done time together" was cured by the prompt corrective action by the trial court in sustaining defendant's objection, striking the testimony, and instructing the jury not to consider it.

7. Criminal Law § 77.3— declaration against penal interest—inclusion of collateral statements

Remarks taken out of a general statement which as a whole is against the penal interest of the declarant need not themselves, standing alone, be against the declarant's penal interest in order to be admitted; rather, collateral statements are admissible even though they are neutral as to defendant's interests if they are integral to a larger statement which is against the declarant's interest.

8. Criminal Law § 77.3— statements by murder victim—declarations against penal interest

Statements made by a murder victim to a deputy sheriff that he participated in stealing property from a farm, that defendant also participated, and that defendant and others had threatened to kill him if he told anyone were admissible under N.C.G.S. § 8C-1, Rule 804(b)(3) (1986), as statements against penal interest, although only the statement that defendant participated in the crime was a disserving statement, since the two collateral statements concerning defendant's participation and the threats against the victim are essential to an understanding of the victim's motivation in making the disserving statement and therefore became a part of the disserving statement.

9. Criminal Law § 77.3— declarations against penal interest—indications of trustworthiness

Corroborating circumstances indicated the trustworthiness of a murder victim's statements against penal interest that he and defendant participated in larceny at a farm and defendant threatened his life if he told anyone so as to render them admissible where the statements led to the discovery of stolen items, and the victim was found murdered within one day of the arrest of defendant's brother based on the victim's statements.

10. Criminal Law § 89.8— accomplice testimony—plea bargain—exclusion of questions concerning effect of life sentence

Where a witness in a first degree murder case had already testified that he was motivated to testify for the State because of a plea bargain reducing the charge against him to second degree murder with a sentence of life imprisonment, the trial court did not abuse its discretion in refusing to permit defense counsel to ask the witness whether he was "aware that a life sentence would mean that you could get out in less time than a fifty-year sentence" since the witness had previously given testimony more probative of bias than the legal distinction asked of him by defense counsel.

11. Criminal Law § 35— evidence of motive by others to commit crime charged

The trial court in a first degree murder case did not err in restricting defendant's cross-examination of a State's witness concerning a motive by the witness and others to kill the victim because the victim knew about a break-in they had committed where it is clear from *voir dire* testimony that defendant could not establish through this witness that the victim knew about the results of the alleged break-in or was known by the witness and others to be talking to law officers about the crime, and defendant was thus unable to produce

evidence that did more than create an inference or conjecture of another's guilt of the crime charged.

12. Criminal Law § 73.2— affidavit for search warrant—statement not hearsay

An affidavit for a search warrant that identified a murder victim as the source of information concerning stolen property on a farm owned by defendant's brother was not inadmissible hearsay since it was not offered to prove the truth of the matter asserted therein but was offered to show that defendant had information that the victim was informing on him and his brother.

13. Criminal Law § 89.6— cross-examination—knowledge of sequestration of other witnesses

Where defendant's mother remained in the courtroom during the State's presentation of the testimony of an accomplice and thereafter offered testimony directly contradicting the accomplice, it was appropriate for the prosecution to impeach the credibility of defendant's mother by asking her whether she knew that the witnesses in the case were being sequestered; however, assuming *arguendo* that it was error to ask such a question, the error was not prejudicial since the trial judge sustained defendant's objection and did not permit the witness to answer.

14. Homicide § 21.5— first degree murder by choking—premeditation and deliberation

There was sufficient evidence of premeditation and deliberation to support defendant's conviction for first degree murder where there was substantial evidence that defendant choked the victim to death; the medical examiner testified that ligature strangulation was a cause of death and that abrasions on the victim's neck could have been caused by a rope; the State's key witness testified that defendant tied up the victim with a rope before killing him; and a portion of the rope was introduced into evidence.

15. Kidnapping § 1.2— first degree kidnapping—murder—restraint and serious injury—same evidence not used for both crimes

Defendant was not entitled to have a charge of first degree kidnapping dismissed on the ground that there was insufficient evidence of restraint and serious injury separate from the evidence used for a charge of premeditated and deliberated murder since (1) restraint is not essential to a charge of premeditated and deliberated murder, and (2) the serious injury element which elevated the kidnapping to first degree was not limited to the fatal injury, and any of 39 stab wounds and several ligature abrasions found on the victim's body might have satisfied the injury element of first degree kidnapping.

16. Criminal Law § 102.8— jury argument—State's evidence uncontradicted—no comment on defendant's failure to testify

The prosecutor's jury argument that no defense witnesses impeached the State's evidence was not an improper comment on defendant's failure to testify.

17. Criminal Law § 102.6— jury argument—reason for failure to fingerprint car—supporting evidence

The prosecutor's jury argument that the State failed to examine defendant's car for evidence of a kidnapping and murder victim's fingerprints

because the car had been in defendant's possession for some time after the crimes and defendant had had many opportunities to remove any fingerprints was supported by competent evidence and was not improper.

18. Criminal Law § 113.7— instructions on acting in concert—sufficiency of evidence

The trial court properly instructed the jury on acting in concert as a permissible basis for finding defendant guilty of first degree murder where there was evidence tending to show: an accomplice, not defendant, located the victim on the evening of the murder; when the victim was in defendant's car, the accomplice hit the victim in the face for denying that he had told the police about a theft of farm property; while defendant threatened the victim with his knife in the back seat of the car, the accomplice got rope out of the trunk so that defendant could bind the victim; while forcing the victim into the woods, defendant held the rope that bound the victim and the accomplice held the victim by the trousers; and fibers found on the accomplice's knife were consistent with the fibers in the sleeves of the shirt the victim was wearing when he was murdered.

19. Constitutional Law § 80— death penalty—Enmund rule inapplicable

The rule in *Enmund v. Florida*, 458 U.S. 782 (1982), was not violated by the imposition of the death penalty for first degree murder after the court had instructed on acting in concert where all the evidence shows that defendant, himself, struck the fatal blow to the victim.

20. Criminal Law § 135.9— capital case—mitigating circumstance—no significant history of criminal activity—evidence requiring submission of issue

The trial court in a first degree murder case erred in refusing to submit the mitigating circumstance that defendant has no *significant* history of prior criminal activity where the State presented evidence that defendant had a prior felony conviction for the second degree kidnapping of his wife, that defendant had stored illegal drugs in his shed, and that he had participated in the theft of farm machinery, since a finding of no evidence of prior criminal activity is not required before this mitigating circumstance must be submitted for the jury's consideration, and the evidence in this case did not amount to such a *significant* history of prior criminal activity that no rational jury could find the existence of this mitigating circumstance. N.C.G.S. § 15A-2000(f)(1) (1983).

21. Criminal Law § 135.9— capital case—erroneous failure to submit statutory mitigating circumstance—standard for determining prejudice

Since the failure to submit a statutory mitigating circumstance supported by the evidence in a first degree murder case has federal constitutional underpinnings, the standard for determining prejudice is N.C.G.S. § 15A-1443(b) rather than § 15A-1443(a).

22. Criminal Law § 135.9— capital case—erroneous failure to submit mitigating circumstance—Pinch test of prejudice no longer used

The three-prong test set forth in *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203 (1982), for determining whether the trial court's failure in a capital case to

submit a statutory mitigating circumstance supported by the evidence is harmless beyond a reasonable doubt will no longer be used since that test improperly shifts the burden from the State to defendant.

23. Criminal Law § 135.9— capital case—failure to submit statutory mitigating circumstance—prejudicial error

The State failed to carry its burden of proving that the trial court's erroneous failure in a capital case to submit the statutory mitigating circumstance as to whether defendant had no significant history of prior criminal activity was harmless beyond a reasonable doubt since it cannot be stated affirmatively that the jury would still have returned a sentence of death if this one mitigating circumstance had been found and balanced against the four aggravating circumstances found by the jury. Therefore, the death penalty is vacated and the case is remanded for a new sentencing hearing.

Justice MARTIN concurring.

Justice MEYER dissenting.

APPEAL by defendant from a sentence of death for a conviction of first degree murder pursuant to a jury recommendation and forty years imprisonment for a conviction of first degree kidnapping, imposed by *Hobgood (Robert H.), J.*, after trial at the 29 October 1984 Criminal Session of Superior Court, GRANVILLE County. Heard in the Supreme Court 9 September 1987.

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

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

FRYE, Justice.

After a thorough review of the record and all the assignments of error made by defendant, we find no error in the guilt phase of the trial. Because we find error in the sentencing phase, we vacate defendant's sentence of death and remand to the trial court for a new sentencing hearing.

Upon pleas of not guilty, defendant was tried by jury on indictments charging murder and first degree kidnapping of Larry Grant Walker.

The State's evidence tended to show that Dr. A. J. Coppridge, a Durham doctor, owned a farm in Person County and that he had discovered that someone had broken into three barns

on his farm some time in January 1984 and had stolen some farm equipment. Deputy Sheriff Dennis Oakley had seen defendant, his brother Larry Wilson and Larry Walker in defendant's pickup truck on a dirt road near the Coppridge farm on or about 19 January 1984.

Deputy Oakley testified at trial that on 10 February 1984, Larry Walker came to the sheriff's office to see him. When they went outside to talk, Larry Walker told the deputy that he knew all about the break-in at the Coppridge farm, indicating that he had been involved in the break-in with defendant, defendant's brother Larry Wilson and Woody Blalock. Walker also told the deputy that defendant, defendant's brother and Blalock had beaten him and threatened to kill him two to three weeks earlier if he told anyone about the break-in. Walker told the deputy that Larry Wilson had one of the tractors from the break-in, but that the others had moved the remainder of the farm equipment so he would not know its whereabouts.

On 11 February 1984, using the information given to him by Walker, Deputy Oakley went out to view Larry Wilson's yard from the road and observed a Ford tractor there. The deputy also took Dr. Coppridge out to Larry Wilson's home to see the tractor in the yard, and the doctor identified the tractor as his own.

On 12 February 1984, Deputy Oakley obtained a search warrant for Larry Wilson's farm, based on the information he had received from Larry Walker and from his own observations. Some of Dr. Coppridge's stolen property was identified by the doctor and seized from Larry Wilson's property. Larry Wilson was arrested later by Oakley for possession of stolen property. The affidavit attached to the application for the search warrant disclosed that the deputy had obtained his information about the Coppridge break-in from a confidential informant and identified the informant as Larry Walker. The deputy testified that when Larry Wilson was in the back seat of the patrol car after his arrest, Wilson read the application and made a comment when he read the part of the affidavit naming Walker.

Oakley testified that on 13 February 1984, he went to see Larry Walker at his place of employment after the arrest of Larry Wilson to advise Walker that he would be charged with the Coppridge break-in. Oakley agreed not to arrest Walker for a few

days because Walker wanted to work. Oakley told Walker that both he and defendant would be charged as soon as he gathered more evidence. That evening Walker was picked up at work by defendant and Woody Blalock.

At the trial of defendant, Woody Blalock became a witness for the State and testified against defendant on the basis of a plea bargain reducing the charge against him to second degree murder with a sentence of life imprisonment. Blalock testified that on the evening of 13 February 1984, defendant told him that he had received word from defendant's brother that Larry Walker was "snitching on him" and that he wanted to see Walker. The two then telephoned Walker at work and rode in defendant's car to the parking lot at Walker's workplace.

Blalock further testified that when they arrived at Walker's place of employment, Walker was standing there waiting for them and got into the back seat of defendant's car. Walker asked what was the problem and said that he only had a few minutes. Defendant handed him a beer and said "let's ride down the road and talk." Walker acted as if he wanted to leave, but defendant shut the door and called Walker a snitch, saying he snitched on his brother Larry Wilson, and "they needed to go get this thing taken care of." Defendant told Walker that Blalock had a gun and Blalock took his Swiss army knife out of his pocket and placed it next to his leg. Defendant then backed out of the parking lot and headed south on Old Durham Road.

Defendant continued driving and asked Walker whether he had gone to the sheriff's department and informed on defendant's brother for having stolen property at his house. Walker denied doing so and turned to Blalock saying, "you know I wouldn't do that." Defendant then drove along several back roads and kept asking Walker about informing to the police and Walker kept denying it. Blalock further testified that at one point Walker told him that the only thing he had told one of the sheriff's deputies was about some tools that he had carried to Durham. Blalock testified that was when he turned around and hit Walker with his fist in the jaw.

After driving a series of back roads, the car approached a stop sign. When it had slowed to about ten or fifteen miles an hour, Walker tried to open the door to jump out. However, de-

fendant grabbed him with his right hand, pulled him back in the car and sped through the stop sign without stopping. Blalock testified that after crossing the intersection and going onto a dirt road, the right rear tire went flat. Defendant stopped, crossed over the seat into the back with Walker, and handed Blalock the car keys.

Defendant then turned Walker onto his stomach, tied Walker's hands behind his back, looped the rope around Walker's neck and body, and pulled the loose end under Walker's groin area. Defendant pulled Walker out of the car and told Blalock to get a flashlight. With defendant holding the loose end of the rope and Blalock holding Walker's belt from behind, they walked about 100 to 150 yards into the woods to a small clearing. Defendant then hit Walker on the head with a tree limb and knocked him onto his back. Blalock further testified that defendant straddled Walker's chest and stabbed him several times. Blalock stated that he started looking around for lights in the area when he heard a gurgling sound. Defendant then stood up, folded his knife and handed it to Blalock saying "the son of a bitch won't talk any more. I cut his throat." Blalock then covered Walker's body with an old car seat and the two walked back to the road.

Defendant did not testify. The defense presented evidence tending to establish that defendant was elsewhere at the time of the homicide.

On 13 November 1984, the jury convicted defendant of the first degree murder of Larry Grant Walker on the basis of malice, premeditation and deliberation, as well as under the felony murder rule. Defendant was also convicted by the jury of first degree kidnapping. At the sentencing phase of the trial, the jury returned its verdict recommending that defendant be sentenced to death, having found four factors in aggravation and having rejected six factors tendered as mitigation.

On 15 November 1984, the trial court sentenced defendant to death for the murder conviction. In sentencing defendant for kidnapping, the trial court found factors in aggravation and sentenced defendant to a consecutive term of forty years. Defendant now appeals his murder conviction and sentence of death to this Court as a matter of right. An order staying execution of the death sentence was entered on 27 November 1984. On 13 March

1986, an order was entered allowing defendant to bypass the Court of Appeals for review of his conviction and sentence for kidnapping.

GUILT-INNOCENCE PHASE

Defendant raises numerous assignments of error in connection with all phases of his trial. He brings forward as his first assignment of error that the trial court abused its discretion by denying his request for a pretrial psychiatric evaluation of Woody Blalock to determine Blalock's competency to testify. We find no abuse of discretion.

[1] Prior to trial, defendant moved for a psychiatric evaluation of the State's witness Woody Blalock, alleging that Blalock had been hospitalized in psychiatric hospitals a number of times within the past ten years and that defendant had "reason to believe that the State's witness, Charles Woody Blalock, may be incompetent to testify as a witness or possibly may have been incompetent at the time of the transactions giving rise to these indictments." Through this assignment of error, defendant invites this Court to reexamine its previous ruling that trial judges do not have the discretionary power to compel an unwilling witness to submit to a psychiatric examination. *See State v. Clontz*, 305 N.C. 116, 286 S.E. 2d 793 (1982); *State v. Looney*, 294 N.C. 1, 240 S.E. 2d 612 (1978). We decline the invitation and adhere to our previous rulings on this question.

[2] Defendant next assigns as error the denial of his requests for expert assistance, contending that he showed a specific need for such to prepare and present his defense. Prior to trial, defendant moved for funds with which to hire expert assistance in the fields of pathology, hair examination, fingerprints, and psychology. The trial judge allowed only defendant's request for a hair examination expert. We find no error.

In order to be entitled to the appointment of such experts at State expense or to the payment of such experts, defendant is required to make a particularized showing that (1) he will be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood that it would materially assist him in the preparation of his case. *State v. Johnson*, 317 N.C. 193, 344 S.E. 2d 775 (1986), construing *Ake v. Oklahoma*, 470 U.S. 68, 84 L.Ed.

2d 53 (1985); N.C.G.S. § 7A-450(b) (1986). In *State v. Penley*, we stated that:

> The Supreme Court explicitly limited the holding in *Ake* to cases in which the defendant made a threshold showing of specific necessity for the assistance of the expert he sought to have appointed by the court. This requirement was subsequently reaffirmed in *Caldwell v. Mississippi*, [citation omitted] and is consistent with decisions of this Court holding that the denial of a motion for appointment of an expert is proper where the defendant has failed to show a particularized need for the requested expert.

Penley, 318 N.C. 30, 51, 347 S.E. 2d 783, 795 (1986), citing *State v. Johnson*, 317 N.C. 193, 344 S.E. 2d 775.

The focus in determining whether the trial court erred, then, must be upon what was before the trial court at the time of the motions. An examination of the record shows that at the time the trial court denied these motions, defendant had merely indicated that assistance in looking for fingerprints and the need for a pathologist and psychologist might be helpful to him in preparing his defense. As *Johnson* and its progeny clearly dictate, a more particularized showing than this is required before a defendant is entitled to the appointment of experts or payment of their collateral expenses. Therefore, we find that the trial court did not err here. *See State v. Johnson*, 317 N.C. 193, 344 S.E. 2d 775.

[3] Next, defendant assigns as error the denial of his request to sequester empaneled jurors because of the massive publicity surrounding the execution of Velma Barfield, the first woman executed in the country in twenty-two years. On 1 August 1984, defendant moved for sequestration of the jury for his trial. Defendant's jury selection began on 29 October 1984, the Monday preceding the execution of Velma Barfield. Defendant renewed this motion at the outset of the trial, arguing that there was a strong likelihood that during the course of the trial people would discuss the case with the jurors outside the courtroom. The prosecutor joined in the motion to sequester the jury, adding that the impending execution of Mrs. Barfield, and the large amount of publicity associated with that, would very likely have an improper influence on the jury. During the course of the trial, how-

ever, the jury was not sequestered until after it returned a verdict in the guilt phase. This, defendant assigns as error.

Pursuant to N.C.G.S. § 15A-1236(b), "[t]he judge in his discretion may direct that the jurors be sequestered." However, a motion for individual jury selection and jury segregation or sequestration are matters addressed to the trial court's sound discretion and its exercise of discretion will not be disturbed absent a showing of an abuse of discretion. *State v. Artis*, 316 N.C. 507, 342 S.E. 2d 847 (1986); *State v. Stokes*, 308 N.C. 634, 304 S.E. 2d 184 (1983); *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981).

Here, defendant merely asserts that his trial occurred at a time when other executions were occurring in this State and in other states across the country. Defendant suggests that the publicity and notoriety of other executions, particularly the one of Velma Barfield in this State, prejudiced his chance of receiving a fair and impartial trial. We reject this argument.

The effect of executions on capital trials cannot be calculated. It would be pure speculation to suggest whether such publicity would tend to favor the State or defendant. Consequently, a decision whether to sequester is best left with the trial judge. Only he can determine the climate surrounding a trial and it is he who is in the best position to determine if a shield is necessary to protect jurors, and thus the defendant, from extraneous influences. There being no evidence or showing by defendant to the trial court suggesting the possibility of jury contamination in this case because of the execution of Velma Barfield and others across the country, we find no abuse of discretion on the part of the trial court in denying defendant's motion for sequestration.

[4] Defendant also challenges the trial court's decision denying his request for instructions to prospective jurors on the nature of capital sentencing. Prior to trial, defendant requested in writing that the prospective jurors be instructed about the general issues arising in a capital sentencing proceeding and that their duty in such a proceeding would be "to follow conscientiously the instructions of the Court regarding sentence [sic] and to consider fairly both the penalties provided by law—the death penalty and life imprisonment." The request continued: "The law would require that you give consideration to both penalties notwithstanding your personal views regarding capital punishment, just as it

is a juror's duty to apply the law as the court explains it to you, not as you think it is or think it should be." The trial judge denied the request, instead instructing the jurors simply on the nature of the issues in capital sentencing. We hold that this was not error.

This question was addressed in *State v. Maynard*, 311 N.C. 1, 316 S.E. 2d 197, *cert. denied*, 469 U.S. 963, 83 L.Ed. 2d 299 (1984). There, this Court held that it was not necessary for jurors to be given a basic understanding of the death penalty process before they may be challenged for cause as a result of their answers to certain questions concerning the death penalty. Specifically, the Court said that "[a]n understanding of the *process* under which the ultimate conclusion is reached should not affect one's *beliefs* as to whether he or she can, under any circumstances, vote to impose the death penalty." *Maynard*, 311 N.C. at 9, 316 S.E. 2d at 202 (emphases in original). Consequently, we find no merit to defendant's argument.

[5] Defendant also asserts that he was denied a fair and impartial trial because the trial court refused to allow the defense attorney to question a prospective witness further on her concerns about parole from a life sentence. Upon examination of prospective jurors by the defense, one juror stated that she thought she could vote for life imprisonment for a murderer if convinced the death penalty was not warranted by the evidence, but then asked the court whether it had any responsibility for parole from life sentences. The trial judge instructed her and the other jurors that "life means life" and they should not concern themselves with any other definition of that term. Following these questions, defense counsel was permitted to ask whether the juror thought she could consider the evidence presented on sentencing and follow "the law and only the law as the Judge gives it to [her], irrespective of [her] own feelings?" The juror replied, "I think so." Defendant argues that the trial judge abused his discretion by failing to permit defense counsel to pose questions to the prospective juror that were proper for ascertaining her fitness and ability to serve and for the intelligent exercise of peremptory challenges.

It is a well-recognized principle in this State that eligibility for parole is not a proper matter for consideration by the jury.

State v. Johnson, 298 N.C. 355, 259 S.E. 2d 752 (1979); *State v. Jones*, 296 N.C. 495, 251 S.E. 2d 425 (1976); *State v. McMorris*, 290 N.C. 286, 225 S.E. 2d 553 (1976). Therefore, the trial judge properly instructed the jury panel in this case that they were not to consider anything to the contrary that a life sentence meant life. There is no indication that the trial court's failure to allow counsel for defendant to follow up and ask the juror additional questions about parole or her views of parole in any way tended to prejudice the juror. Nor is there any indication that the juror's views about parole in any way influenced her decision in the present case. Important is the fact that defendant, despite his concern for potential prejudice, did not challenge this juror for cause or peremptorily. Moreover, and perhaps most importantly, defense counsel was able to elicit from the juror, in the context of her concern about parole from a life sentence, that she would be able to follow the law on sentencing as stated by the judge, regardless of her own feelings. Certainly this response satisfied the trial court that the juror could sit impartially and apply the law as stated. We, therefore, find no error.

[6] Next, defendant argues that the trial court erred in failing adequately to cure the prejudice from Woody Blalock's testimony that he had met defendant in prison. Prior to trial defendant twice moved *in limine* to restrict evidence that defendant had been previously convicted of kidnapping his wife. At the outset of the trial, defendant also moved *in limine* to have witnesses instructed not to refer to defendant's prior incarceration. His motion concerning the prior kidnapping offense was granted.

After testifying on direct examination about a number of convictions and sentences, including his plea bargain with the State concerning the murder of Larry Walker, Woody Blalock testified about his acquaintance with the murder victim Larry Walker. Blalock was then questioned about how long he had known defendant. When asked to describe when Blalock next saw defendant, or what relationship he had with him, Blalock stated that "we done time together." The trial court immediately sustained defendant's objection, instructed the jury to disregard the statement of the witness that they had "done time together," and asked them to raise their hands if they could follow his instructions and dismiss the witness' statement from their minds. All of the jurors raised

their hands. Defendant made no request to poll the jury nor did he move for a mistrial.

In *State v. McCraw*, we held that "[w]hen a jury is instructed to disregard improperly admitted testimony, the presumption is that it will disregard the testimony. Lacking other proof . . . a jury is presumed to be rational." *McCraw*, 300 N.C. 610, 620, 268 S.E. 2d 173, 179 (1980). Assuming, *arguendo*, that the statement was prejudicial to defendant, it was cured by the prompt corrective action of the trial court in sustaining the objection, striking the testimony, and instructing the jury not to consider it.

[8] Defendant argues that the trial court erred in overruling his objection to testimony of a State's witness relating to statements made by the victim. At trial, the prosecution was allowed to introduce testimony of Deputy Dennis Oakley concerning statements made to him by the victim Larry Walker on 10 February 1984, three days prior to Walker's murder. Walker told the deputy that: (1) he had been involved in stealing property from the Coppridge farm; (2) defendant, defendant's brother, and Woody Blalock also participated; and (3) defendant, defendant's brother, and Woody Blalock had beaten him up and all three had told him that if he ever said anything about the break-in or the whereabouts of the stolen tractor they would kill him. Walker, nevertheless, informed the deputy that a Ford tractor stolen from the break-in was sold by him and defendant to Larry Wilson.

The trial court allowed the statements into evidence over the objections of defendant and concluded as a matter of law:

> 1. That the evidence offered by the State of the statements made to Deputy Sheriff Dennis Oakley by Larry Walker on the night of February 10, 1984, are relevant as defined by Rule 401 to show motive, premeditation, deliberation, malice and intent of the defendant.
>
> 2. That the declarant, Larry Walker, is dead, and is, therefore, unavailable as a witness, as set forth in Rule 804(a)(4).
>
> 3. That the statement of Larry Walker is admissible as an exception to the rule against hearsay evidence, as set forth in Rule 804(b)(3), as a statement against penal interest in that it subjected him to criminal liability in a breaking or entering and larceny to such an extent that a reasonable man in his

position would not have made the statement unless he believed it to be true.

4. Corroborating circumstances clearly indicate the trustworthiness of the statement in that it led to the discovery within two days of a substantial amount of items stolen from the farm of Dr. Coppridge and at a later time the discovery of two tape measures in a specified location; that within one day of the arrest of Larry Wilson, Larry Walker was murdered, to which act Michael Wilson has been implicated by the testimony of Woody Blalock.

5. That these conclusions of law meet the test of admissibility, as set forth in *State versus Vestal*, 278 N.C. 561 (1971); *State versus Alston*, 307 N.C. 321, at page 326 (1983); and *State versus Maynard*, (1984), in that the State has shown (1) necessity; and (2) a reasonable probability of truthfulness.

6. That the statement is admissible pursuant to Rule 804(b)(5) in that the declarant is unavailable, there are circumstantial guarantees of trustworthiness . . . .

Defendant does not dispute the fact that the first portion of Walker's statement to the deputy was against Walker's penal interest—that Walker took part in the Coppridge theft. Defendant, however, argues that the remark that defendant was Walker's accomplice in the Coppridge theft does not amount to a declaration against interest and therefore lacked sufficient indicia of reliability under the right of confrontation. Defendant further argues that the remark that defendant and others beat and threatened the victim also was not against the victim's penal interest, and thus fails under 804(b)(3). Defendant apparently argues that the trial court must dissect a general statement into individual pieces so that the clearly disserving portions are separated from all others and only the clearly disserving are admitted at trial. We find such surgical manipulation unnecessary and not warranted under the facts of the instant case.

The trial judge allowed the deputy sheriff to repeat statements made to the deputy by the victim. The trial judge found all of the statements admissible under, *inter alia*, Rule 804(b)(3) of the North Carolina Rules of Evidence as an exception to the hearsay rule. Hearsay testimony is not admissible except

as provided by statute or by the North Carolina Rules of Evidence. 1 Brandis on North Carolina Evidence § 138 (Cum. Supp. 1986). Our rules of evidence provide for certain exceptions to the hearsay rule, including an exception for statements against penal interest. Rule 804 provides in pertinent part:

> (b) *Hearsay exceptions.*—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> * * *
>
> (3) Statement against interest.—A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability is not admissible in a criminal case unless corroborating circumstances clearly indicate the trustworthiness of the statement.

N.C.G.S. § 8C-1, Rule 804(b)(3) (1986).

The circumstantial guaranty of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reasons that they are true. *See* N.C.G.S. § 8C-1, Rule 804(b)(3) (1986), comment. Succinctly, defendant argues that the only portion of the statement made to the deputy that was truly against Walker's penal interest was the remark that Walker participated in the Coppridge robbery, not the portions stating that defendant also participated in the robbery and later threatened to kill Walker if he told anyone. Defendant, therefore, challenges the admissibility of these latter two collateral statements. Since the case law concerning collateral statements under this rule of evidence in this State is negligible, we shall look to the federal courts for guidance on this point in interpreting its federal counterpart.[1]

1. Rule 804(b)(3) of the North Carolina Rules of Evidence is identical to Rule 804(b)(3) of the Federal Rules of Evidence with the exception of the last sentence. The federal rule requires corroborating circumstances only where the statement exposes the declarant to criminal liability and is offered to exculpate the accused. The

[7] The fact that statements by Walker have dual inculpatory aspects does not take the statements outside the range of Rule 804(b)(3). Although a hearsay statement inculpating a third party must be scrutinized carefully, courts generally agree that the relevant standard requires corroborating circumstances which clearly indicate the trustworthiness of the statement. *See* N.C.G.S. § 8C-1, Rule 804(b)(3) (1986); *United States v. Katsougrakis*, 715 F. 2d 769 (2d Cir. 1983); *United States v. Garris*, 616 F. 2d 626 (2d Cir.), *cert. denied*, 447 U.S. 926, 65 L.Ed. 2d 1119 (1980). Furthermore, there is no requirement under the rules that a single remark taken out of a general statement which as a whole is against the penal interest of the declarant must itself, standing alone, be against the declarant's penal interest in order to be admitted. Rather, we adopt the view of several federal courts that such collateral statements are admissible even though they are themselves neutral as to the declarant's interest if they are integral to a larger statement which is against the declarant's interest. *See United States v. Barrett*, 539 F. 2d 244 (1st Cir. 1976).

[8] Applying this rule to the facts before us, we find that the collateral statements made by the victim-declarant were part and parcel of the disserving statement and were integral to the larger statement made by the victim to the deputy. The collateral statements are essential to an understanding of the victim's motivation in making the disserving statement to the deputy. Though arguably neutral on their face, the collateral statements give meaning to the disserving statement and therefore become part of the disserving statement. Consequently, we will not require that they be dissected from the text. Other courts have tended to grant at least a certain latitude as to contextual statements, neutral as to interest, giving meaning to the declaration against interest. *Barrett*, 539 F. 2d 244 (1st Cir.). We find their reasoning persuasive and therefore find that the trial judge

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North Carolina rule requires corroboration where the statement exposes the declarant to criminal liability without regard to whether it exculpates or inculpates the accused. This distinction is unimportant in formulating a rule regarding the admissibility of collateral statements since the federal courts have required corroboration when a third party is inculpated by a declaration against penal interest even though not required by their rules. The federal courts dealing with the issue have found that the confrontation clause requires such. *See United States v. Alvarez*, 584 F. 2d 694 (5th Cir. 1978). Therefore, the two rules, though facially dissimilar, are functionally identical.

was correct in admitting this collateral material since it actually tended to fortify the initial statement's disserving aspects.

[9] Rule 804(b)(3) requires a two-pronged analysis. Once a statement is deemed to be against the declarant's penal interest, the trial judge must be satisfied that corroborating circumstances clearly indicate the trustworthiness of the statement if it exposes the declarant to criminal liability. N.C.G.S. § 8C-1, Rule 804(b)(3) (1986). We agree with the finding of the trial judge that the trustworthiness of the statements was clearly indicated by the many corroborating circumstances.

As found by the trial judge, the statement of the victim led to the discovery of two tape measures in a specified location apparently thrown aside during the robbery of the Coppridge farm. Moreover, many of the farming items stolen from the Coppridge farm were found where the victim said they would be found. Indeed, this information led to the arrest of defendant's brother for possession of this stolen property. Perhaps most indicative of the truthfulness of Walker's statement and most unfortunate is the fact that he told the deputy that defendant would kill him if he told anyone about the robbery. Within a few days of making the statement and within one day of the arrest of defendant's brother based on Walker's statements, Walker was in fact found murdered. We are satisfied that these corroborating circumstances adequately clothe the statements of the declarant with trustworthiness and therefore find no error in the ruling of the trial judge. Because we find this testimony admissible under Rule 804(b)(3), we need not address its admissibility under Rule 804(b)(5).

[10] Defendant argues next that the trial court erred by limiting his right to confront and cross-examine Woody Blalock by sustaining the State's objections to questions soliciting testimony about parole eligibility under the witness' guilty plea and about the possible motive of third parties to kill the victim Larry Walker. Through these assignments of error, defendant contends that his right to cross-examine Woody Blalock was improperly curtailed in two instances. First, the court sustained the State's objection to the statement of defense counsel, "[a]re you aware that a life sentence would mean that you could get out in less time than a fifty year sentence?" Second, after cross-examining Blalock at

some length concerning a break-in he participated in on Friday, 10 February 1984, the district attorney eventually interposed an objection on the grounds of relevancy, indicating that defense counsel had gone too far astray.

After an extensive *voir dire*, the trial court sustained the State's objections to the admission of speculative evidence on the motive of third parties to commit the crime for which defendant was charged. The trial judge, however, also ruled that defendant was free to cross-examine Blalock in the presence of the jury on several statements made by Blalock on *voir dire* where defendant wished to test the credibility of the witness.

The right of cross-examination is very broad. However, the right is not without limitation. Trial courts may limit cross-examination to prohibit inquiry into irrelevant or incompetent matter or matters of only tenuous relevance, or to ban repetitious or argumentative questions. 1 Brandis on North Carolina Evidence § 35 (1982). The legitimate bounds of cross-examination are largely within the discretion of the trial judge. *State v. Chance*, 279 N.C. 643, 185 S.E. 2d 277 (1971).

This Court acknowledges and supports the established principle that cross-examination is a proper method of testing a witness as to bias concerning a promise of or his just expectation of reward, pardon, or parole as the result of his testifying for the State. *State v. Mason*, 295 N.C. 584, 248 S.E. 2d 241 (1978). Here, defendant had full opportunity to show bias, interest, and prejudice of the witness to testify against him. The record, in fact, shows that on more than one occasion the defense was able to elicit from the witness his motivation for turning State's evidence.

In *Mason*, the defense attorney attempted to question the witness about his understanding of the laws concerning parole. We held there that such a question calls for the legal knowledge of a lay witness and it was proper for the trial court, in his discretion, to sustain the State's objection. *Mason*, 295 N.C. at 592, 248 S.E. 2d at 246. Similarly, defense counsel here was attempting to elicit testimony from Blalock on the complexities of sentencing and parole eligibility which might make a life sentence shorter than a fifty year sentence. It was not an abuse of discretion to prohibit the witness from answering since the witness had al-

ready stated that he was motivated to testify for the State because of a plea bargain arrangement—testimony more probative of bias than the legal distinction asked of him by the defense.

[11] Defendant also asserts that the trial judge chilled his right of confrontation by restricting the cross-examination of Blalock concerning the activity of others in a crime in Orange County that the victim Larry Walker knew about. Apparently, defendant attempted to establish the motive of Blalock and others to murder Larry Walker because of Walker's knowledge about their criminal activities. The trial judge sustained the State's objection, disallowing further inquiry on this point by the defense. The judge found that the inquiry lacked relevance.

The general rule followed by this Court has been that:

> A defendant may introduce evidence tending to show that someone other than defendant committed the crime charged, but such evidence is inadmissible unless it points directly to the guilt of the third party. Evidence which does no more than create an inference or conjecture as to another's guilt is inadmissible.

State v. Hamlette, 302 N.C. 490, 501, 276 S.E. 2d 338, 346 (1981); *State v. Stanfield*, 292 N.C. 357, 233 S.E. 2d 574 (1977); *State v. Jenkins*, 292 N.C. 179, 232 S.E. 2d 648 (1977); *State v. Shinn*, 238 N.C. 535, 78 S.E. 2d 388 (1953); *State v. Smith*, 211 N.C. 93, 189 S.E. 175 (1937).

Applying this rule to the case before us, we cannot say that the trial judge erred in ruling on the question of relevancy or abused his discretion in restricting defendant's cross-examination of this witness. Blalock denied the factual allegations by defendant that Larry Walker had come to his trailer on the afternoon or evening after the alleged Orange County break-in, or that Larry Walker was involved in a discussion with others concerning guns and other articles from the break-in. Based on the testimony that Blalock gave on *voir dire*, it is clear that defendant could not establish through this witness that Larry Walker knew about the results of the Orange County break-in, had seen the stolen property from the break-in, or was known by Blalock or others to be talking to law enforcement officers about the crime. Defendant was unable to produce evidence that did more than create an in-

ference or conjecture of another's guilt. The evidence was therefore inadmissible. *See State v. Hamlette*, 302 N.C. 490, 276 S.E. 2d 338.

[12] Defendant also argues that the trial court erred in overruling his objections to evidence read to the jury from the application for the search warrant and its supporting affidavit. Defendant asserts that that evidence was hearsay. The State's evidence in this case tended to show that defendant's brother was arrested and stolen property was seized from his property based on information contained in the warrant. The affidavit identified the victim, Larry Walker, as the source of Deputy Oakley's information against defendant's brother. A copy of the warrant was served on defendant's brother. There was also testimony from Blalock that the motive for Larry Walker's murder was to stop him from "snitching."

Generally, the allegations in an affidavit for a search warrant and the contents of the warrant itself are inadmissible at trial because of their hearsay nature. *State v. Edwards*, 315 N.C. 304, 337 S.E. 2d 508 (1985); *State v. Jackson*, 287 N.C. 470, 215 S.E. 2d 123 (1975); *State v. Spillars*, 280 N.C. 341, 185 S.E. 2d 881 (1972); *State v. Oakes*, 249 N.C. 282, 106 S.E. 2d 206 (1958). However, evidence is only hearsay if it is offered into evidence to prove the truth of the matter asserted therein. *See* N.C.G.S. § 8C-1, Rule 801(c) (1986). Here, the affidavit and warrant were not introduced in order to prove the truth of the matters stated therein, but rather to prove the existence of the statements. Regardless of whether the matters therein were true, the affidavit and warrant were probative in showing that defendant had information—correct or incorrect—that the victim was informing on him and his brother. Therefore, it was not error for the trial judge to admit this evidence.

[13] Defendant next contends that the trial court erred in allowing the prosecutor to question his mother about her failure to leave the courtroom as other witnesses had done following the judge's order that the witnesses be sequestered. Apparently, the defense did not initially plan to call defendant's mother as a witness, but changed its mind after reformulating its trial strategy. Upon that change of strategy, the day before she was to take the stand, the defense sequestered defendant's mother.

When the witness was called, the State objected and moved for a *voir dire* examination of the witness' testimony since she had not been sequestered throughout the State's evidence and was present in the courtroom during the entire testimony of Woody Blalock.

On cross-examination before the jury, the State questioned defendant's mother about the fact that she had been sitting in the courtroom for parts of the trial including the time when Woody Blalock had testified. The prosecutor continued and asked whether Mrs. Wilson knew that the witnesses in the case were being sequestered. This question was objected to by defendant and sustained by the court. Defendant now argues that this line of cross-examination was unfair and suggested that defendant's mother was testifying falsely after hearing earlier testimony. We find no error.

As a general rule, the truthfulness of any aspect of a witness' testimony may be attacked on cross-examination. *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982). Under the circumstances of this case, where defendant's mother remained in the courtroom and then offered testimony directly contradicting the State's version of the case, it was appropriate for the prosecution to impeach the credibility of this witness. Assuming, *arguendo*, that it was error to ask such a question, the error was not prejudicial since the trial judge sustained the objection of the defendant and the witness was not allowed to answer the question posed.

[14] Defendant assigns as error the failure of the trial court to grant his motion to dismiss because of the insufficiency of the evidence that defendant choked Larry Walker to death with premeditation and deliberation. This argument has no merit. The trial court must determine from all the evidence, taken in the light most favorable to the State, whether there is substantial evidence that the crime as charged has been committed and that the offense was committed by the person accused. *State v. Smith*, 307 N.C. 516, 299 S.E. 2d 431 (1983).

We agree with the trial court that substantial evidence was offered tending to show that defendant choked Larry Walker to death. The testimony of the medical examiner was that a cause of Walker's death was ligature strangulation. The medical examiner

also found abrasions on the victim's neck that could have been caused by a rope. Moreover, the State's key witness testified that defendant had tied Walker up before murdering him and a portion of this rope was offered as State's exhibit 18. We find this evidence to be substantial and, therefore, will not disturb the decision of the trial court.

[15] Defendant also argues that the trial court erred in denying his motion to dismiss based on insufficient evidence to support a charge of kidnapping. Defendant was indicted for the kidnapping of Larry Walker based on his "unlawfully confining him, restraining him and removing him from one place to another without his consent." The charge was elevated to first degree kidnapping on the grounds that Larry Walker was not released in a safe place and was seriously injured. Defendant argues that there was insufficient evidence of restraint and injury separate from the evidence used to indict for first degree murder. We disagree.

First, defendant argues that the restraint integral to the kidnapping was not separate from the choking in the premeditated murder offense. This argument fails because restraint is not essential to a charge of premeditated and deliberated murder. *See State v. Prevette*, 317 N.C. 148, 345 S.E. 2d 159 (1986). Second, defendant asserts that the serious injury element of his kidnapping charge was not separate from the fatal wound in the murder. This contention is also meritless. Expert testimony at trial showed that there were some thirty-nine stab wounds on the victim's body along with several ligature abrasions. Any of these injuries might satisfy the serious injury element of first degree kidnapping. Certainly, this elevating element of first degree kidnapping is not limited to a fatal injury. We, therefore, reject this assignment of error.

[16] Defendant next argues that the prosecution violated his fifth amendment right to remain silent at trial by commenting on his failure to testify. Defendant's contention is that by arguing to the jury that the State's evidence is uncontradicted, the prosecutor was indirectly commenting on defendant's failure to testify in this case. We disagree.

This Court has held in *State v. Tilley*, 292 N.C. 132, 232 S.E. 2d 433 (1977):

> The State may fairly draw the jury's attention to the failure of the defendant to produce exculpatory evidence or to contradict the State's case. [W]hile the defendant's failure to testify is not the subject of comment or consideration, the jury in weighing the credibility of the evidence offered by the State may consider the fact that it is uncontradicted . . . or unrebutted by evidence available to the defendant.

Tilley, 292 N.C. at 143, 132 S.E. 2d at 410 (citations omitted).

Here, the district attorney merely argued that no one had contradicted the testimony of Blalock. The statement made by the prosecutor that led to the objection by defendant was, "How many defendant's [sic] witnesses have you heard on this witness stand to tell you and impeach any of the evidence that the State of North Carolina has presented?" We agree with the trial court that this statement was sufficiently innocuous so as not to serve as a comment on defendant's failure to testify.

[17] Next, defendant argues under this same assignment of error that the trial court erred in allowing improper arguments by the State to explain the State's failure to examine defendant's car for fingerprint evidence. Defendant had emphasized the fact that the victim's fingerprints were not found on defendant's car. The prosecutor merely argued that the car had been in defendant's possession for some time after the crimes were committed and that defendant had many opportunities to remove any fingerprints. This testimony amounted to nothing more than an argument by the prosecutor that the absence of the victim's fingerprints was not very probative of anything. Since the argument was supported by competent evidence, we find no error. *See State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203.

Defendant alleges that the trial court erred in its summary of the evidence by stating that Larry Walker said he was beaten two weeks before 10 February 1984, because the testimony of Deputy Oakley was that Walker told him he was beaten "two to three weeks" before. Defendant asserts this misstatement was crucial, and therefore prejudicial, because Blalock was only discharged from the Veteran's Hospital on 21 January 1984. Defendant did not call this error to the attention of the trial judge.

The judge cautioned the jury in summarizing the evidence that "[i]f your recollection of the evidence differs from mine or the attorneys in their speeches to you, you are to rely solely on your recollection of the evidence in your deliberations." This instruction was repeated at the end of the trial judge's summary of the evidence. Under these circumstances we are convinced that this characterization of the witness' testimony had no impact on the jury's verdict. Thus, we reject this assignment of error.

[18] Over defendant's objection, the trial court instructed the jury on acting in concert as a permissible basis for finding defendant guilty of first degree murder. Defendant contends that this was an "abstract" theory not supported by any evidence. We find an abundance of evidence in support of the instruction.

Under the principle of acting in concert, a person may be found guilty of an offense if he is present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime. *State v. Miller*, 315 N.C. 773, 340 S.E. 2d 290 (1986). The record of this case shows numerous instances that support an acting in concert theory.

Blalock, not defendant, located the whereabouts of the victim on the evening of the murder. When Walker was in defendant's car, Blalock hit Walker in the face for denying that Walker had reported the Coppridge incident to the police. While defendant threatened Walker with his knife in the back seat of the car, Blalock got the rope out of the trunk of the car so that defendant could bind Walker. While forcing Walker into the woods, defendant held the rope that bound Walker, and Blalock held Walker by the seat of his trousers. Moreover, a forensic fiber analyst testified that fibers found on Blalock's knife were consistent with the fibers in the shirt sleeves of the shirt Walker was wearing when he was murdered. The cumulative effect of this testimony clearly shows that the acting in concert theory was properly given.

[19] Defendant also argues under this assignment of error, that by allowing him to be sentenced to death for first degree murder under the instruction given for acting in concert, the court has violated the rule set forth in *Enmund v. Florida*, 458 U.S. 782, 73 L.Ed. 2d 1140 (1982). In *Enmund*, the United States Supreme

Court, in construing the eighth amendment, held that before a participant may be sentenced to death, he must have killed or attempted to kill or intended or contemplated that life would be taken. The United States Supreme Court later extended the rule to include those participants in a murder who intended that a killing take place or that *lethal force be used. Cabana v. Bullock*, 474 U.S. 376, 88 L.Ed. 2d 704 (1986). Since all the evidence shows that defendant, himself, struck the fatal blow to the victim, no *Enmund* issue arises.

SENTENCING PHASE

[20] Both the State and defendant stipulated that defendant had a prior felony conviction for the second degree kidnapping of defendant's former wife on 18 June 1980, which involved the threat of violence to the person. Defendant was twenty years old at the time of this offense and, upon a plea of guilty, he was sentenced to serve from three to five years in prison. Defendant now challenges the refusal of the trial court to submit, upon his motion, the statutory mitigating circumstance that defendant has no significant history of prior criminal activity. *See* N.C.G.S. § 15A-2000(f)(1) (1983).

We hold that it was prejudicial error for the trial court to reject defendant's motion to have submitted as a mitigating circumstance that defendant has no significant history of prior criminal activity.

We recently held that N.C.G.S. § 15A-2000(b), requiring the submission of mitigating and aggravating circumstances to the jury, does not require a finding of *no* evidence of prior criminal activity before this mitigating circumstance must be submitted for the jury's consideration. *State v. Lloyd*, 321 N.C. 301, 364 S.E. 2d 316 (1988). In *Lloyd*, we said:

> 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. . . .

> 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 and 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 may be imposed from those in which it may not be imposed.

State v. Lloyd, 321 N.C. at 311-12, 364 S.E. 2d at 323-324.

As stated in *Lloyd*, the trial court is required to determine whether a rational jury could conclude that defendant had no *significant* history of prior criminal activity. If the trial court makes such a determination, the mitigating circumstance must then be submitted to the jury. Then, whether the evidence is sufficient to constitute a *significant* history of criminal activity, thereby precluding a finding of this factor, is for the jury to decide. *See State v. Gladden*, 315 N.C. 398, 340 S.E. 2d 673 (1986); *State v. Noland*, 312 N.C. 1, 320 S.E. 2d 642 (1984).

Though defendant did not offer evidence supporting the submission of this mitigating circumstance, such evidence was in fact present in the record. In this case, the record disclosed evidence, offered by the State, that defendant had a prior felony conviction for the second degree kidnapping of his wife, testimony that defendant had stored illegal drugs in his shed, and evidence of his complicity in the Coppridge farm theft. In *State v. Stokes*, 308 N.C. 634, 652, 304 S.E. 2d 184, 195-96 (1983), we said that "[e]ven when a defendant offers no evidence to support the existence of a mitigating circumstance, the mitigating circumstance must be submitted when the State offers or elicits evidence from which the jury could reasonably infer that the circumstance exists." We cannot say that the evidence disclosed by the record in this case amounted to such a *significant* history of prior criminal activity that no rational jury could find the existence of this mitigating circumstance. *See State v. Lloyd*, 321 N.C. 301, 364 S.E. 2d 316;

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) (where this Court approved the submission of this mitigating circumstance to the jury, over defendant's objection, notwithstanding a record showing eighteen felony convictions). We therefore hold that it was error not to submit this mitigating circumstance to the jury.

We must now determine whether this error was prejudicial. N.C.G.S. § 15A-1443, entitled "Existence and showing of prejudice," provides:

> (a) A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant. Prejudice also exists in any instance in which it is deemed to exist as a matter of law or error is deemed reversible per se.
>
> (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 (1983).

[21] The rights guaranteed by N.C.G.S. § 15A-2000 are anchored in the eighth amendment prohibition against cruel and unusual punishment in that the statute "requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304, 49 L.Ed. 2d 944, 961 (1976). Moreover, the General Assembly, in its wisdom, has determined that certain circumstances, as a matter of law, have mitigating value and has expressly provided by statute for their submission to the jury under appropriate circumstances. The legislature having so provided, if the jury is not permitted to consider a mitigating circumstance supported by the evidence by having it submitted, a defendant's due process rights are im-

plicated. *See Lockett v. Ohio*, 438 U.S. 586, 57 L.Ed. 2d 973 (1978). Since the failure to submit the statutory mitigating circumstance in the instant case has federal constitutional underpinnings, the standard for determining prejudice is N.C.G.S. § 15A-1443(b) rather than § 15A-1443(a).

N.C.G.S. § 15A-1443(b) provides the applicable standard for determining whether a violation of a defendant's rights under the United States Constitution is prejudicial so as to require corrective action by an appellate court. Such a violation *is* prejudicial "unless the appellate court finds that it was harmless beyond a reasonable doubt," and the burden is upon the State to so prove. N.C.G.S. § 15A-1443(b); *see also State v. Edwards*, 315 N.C. 304, 337 S.E. 2d 508 (1985); *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, *cert. denied*, 459 U.S. 1189, 74 L.Ed. 2d 1031 (1982); *State v. Maher*, 305 N.C. 544, 290 S.E. 2d 694 (1982).

[22] Our decision today reaffirms this Court's position taken in *Pinch*, that the applicable standard to determine prejudice in situations where the trial court has failed to submit a statutory mitigating circumstance supported by the evidence is whether the error is harmless beyond a reasonable doubt under N.C.G.S. § 15A-1443(b). In *Pinch*, however, this Court proceeded to announce a three-prong test which could be read to be at odds with this standard.[2] Since that three-prong test shifts the burden improperly from the State to the defendant, it will no longer be used by this Court in determining the existence of prejudice under the constitutional standard.

[23] Applying N.C.G.S. § 15A-1443(b) to the case *sub judice*, we must determine whether the State has carried its burden of proving that the error was harmless beyond a reasonable doubt. We of

2. We said in *Pinch*:

> a defendant demonstrates reversible error in the trial court's omission or restriction of a statutory or timely requested mitigating circumstance in a capital case *only if he affirmatively establishes* three things: (1) that the particular factor was one which the jury could have reasonably deemed to have mitigating value (this is presumed to be so when the factor is listed in G.S. 15A-2000(f); (2) that there was sufficient evidence of the existence of the factor; and (3) that, considering the case as a whole, the exclusion of the factor from the jury's consideration resulted in ascertainable prejudice to the defendant.

State v. Pinch, 306 N.C. 1, 27, 292 S.E. 2d 203, 223-24 (emphasis added).

course have no way of knowing whether the failure to submit this statutory mitigating circumstance to the jury may have tipped the scales in favor of the jury determination that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty. This is especially true here since the jury found no mitigating circumstances. "We have also recognized that common sense, fundamental fairness, and judicial economy require that any reasonable doubt regarding the submission of a statutory or requested mitigating factor be resolved in favor of the defendant." *State v. Brown*, 315 N.C. 40, 62, 337 S.E. 2d 808, 825, *citing State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203.

The record shows that the jury was aware of the prior criminal activity of defendant, yet the jury was not allowed to consider the quality of this activity in its deliberations because this statutory mitigating circumstance was not submitted. We cannot state that had this mitigating circumstance been submitted to the jury, the jury would not have found its existence. *See State v. Brown*, 315 N.C. 40, 337 S.E. 2d 808. We have emphasized that the deliberative process of the jury envisioned in N.C.G.S. § 15A-2000 is not a mere counting process and that nuances of character and circumstance cannot be weighed in a precise mathematical formula. *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979). Consequently, we cannot state affirmatively that had this one mitigating circumstance been found and balanced against the four aggravating circumstances, the jury would still have returned a sentence of death. We therefore are unable to say that the failure to submit this mitigating circumstance was harmless beyond a reasonable doubt.

For all the reasons discussed above, we find no prejudicial error in the trial or sentencing of defendant for kidnapping nor do we find prejudicial error in the guilt-innocence phase of defendant's trial for murder; however, we vacate defendant's sentence of death and remand to the trial court for a new sentencing hearing.

84CRS4559—Kidnapping—no error.

84CRS839—Murder—no error in guilt phase; death sentence vacated and remanded for new sentencing hearing.

Justice MARTIN concurring.

Although I concur in the well-reasoned majority opinion, it is appropriate to discuss the meaning of "significant" as used in N.C.G.S. § 15A-2000(f)(1). The majority opinion emphasizes "significant" without any explanation. "Significant" means "having or likely to have influence or effect." *Rutledge v. Tultex Corp.*, 308 N.C. 85, 101, 301 S.E. 2d 359, 370 (1983). Here, "significant" means that the activity is likely to have influence or effect upon the determination by the jury of its recommended sentence.

Why did the legislature restrict the prior criminal activity to "significant" activity? Simply answered, the legislature could envision cases in which a defendant had a history of criminal activity but it was of such a nature that it would not be likely to influence or affect the jury's decision of whether to recommend a life or death sentence. In other words, the prior criminal activity could be found by the jury to be completely irrelevant to the issue of sentencing. The prior activity of the defendant could be found by the jury to be completely unworthy of consideration in arriving at its decision. There could be evidence of prior criminal activity in one case that would have no influence or effect on the jury's verdict, which, in another case, could be the pivotal evidence.

Although the requested mitigating circumstance depended upon evidence that the jury ultimately found supported an aggravating circumstance, had the mitigating circumstance been presented to the jury it could have found that the criminal activity described by such evidence was not significant to its decision. Arguably, the submission of the mitigating circumstance could have affected the jury's finding with respect to the aggravating circumstance. Any aspect of defendant's character, record, or other circumstance, supported by evidence by either defendant or the state, or both, should be considered by the jury. *State v. Irwin*, 304 N.C. 93, 282 S.E. 2d 439 (1981).

Justice MEYER dissenting.

I dissent from the majority's holding that defendant is entitled to a new sentencing hearing in the murder case for error in failing to submit the mitigating circumstance of "no significant

history of prior criminal activity." I am of the opinion, first, that the trial judge did not err in refusing to submit that mitigating circumstance and, second, that even if the judge erred in refusing to submit it, such error was harmless.

I

First, I believe that the trial judge acted properly in refusing to submit the mitigating circumstance in question. At a capital sentencing hearing, it is the duty of the defendant to present evidence of any circumstances in mitigation of sentence. Our analysis in *State v. Hutchins* is particularly instructive for the case at bar. There, we stated as follows:

> The State does not have the burden of proof that in a given capital case no mitigating circumstances exist. It is the responsibility of the defendant to go forward with evidence that tends to show the existence of a given mitigating circumstance and to prove its existence to the satisfaction of the jury.

Hutchins, 303 N.C. 321, 355-56, 279 S.E. 2d 788, 809 (1981) (citation omitted), *cert. denied*, 464 U.S. 1065, 79 L.Ed. 2d 207 (1984).

The trial court must include on the written list of statutory mitigating circumstances submitted to the jury any enumerated circumstance *if* it is supported by the evidence. The trial court is not required to instruct upon a statutory mitigating circumstance unless defendant, who has the burden of persuasion, brings forward sufficient evidence of the existence of the specified circumstance. *State v. Hutchins*, 303 N.C. 321, 355-56, 279 S.E. 2d 788, 809. *See also State v. Taylor*, 304 N.C. 249, 277, 283 S.E. 2d 761, 779 (1981), *cert. denied*, 463 U.S. 1213, 77 L.Ed. 2d 1398 (1983). As we said in *Taylor*, "If the defendant does not offer any evidence to show the existence of a mitigating circumstance, it is clear *a fortiori* that he does not carry this burden, and thus is not entitled to an instruction on a mitigating circumstance." *Taylor*, 304 N.C. at 277, 283 S.E. 2d at 779.

In the case at bar, defendant Wilson simply presented no evidence that he had no significant history of prior criminal activity. Instead, he relied entirely on the evidence the State had offered to prove the statutory aggravating factor that defendant had been convicted of a felony involving the threat of violence.

Not only did the defendant in this case not present any personal testimony that he had no other convictions, not one of the witnesses for the defendant or for the State testified that defendant had no other convictions or that defendant had not been involved in any other criminal activities. There was never any attempt by the defendant or the State to disclose the defendant's entire criminal record or lack thereof. There was no evidence offered as to the number or type of defendant's convictions, except for the single conviction of second-degree kidnapping.

The evidence concerning this single conviction of second-degree kidnapping came into the case when the State established one of the aggravating factors which was submitted to and found by the jury, to wit, that defendant had previously been convicted of a felony involving the threat of violence to the person. In order to prove this aggravating factor, the State simply put on one conviction—that of the second-degree kidnapping. The defendant, apparently in order to forestall the State from presenting additional evidence concerning the nature of this kidnapping, stipulated that the prior kidnapping was a felony involving the threat of violence to the person. The stipulation was to the effect that the defendant had been so convicted, that there was a threat of violence employed, and that defendant had received a sentence of three to five years. There was no stipulation that defendant had only one prior felony conviction and no evidence offered by either the defendant or the State to that effect.

In addition, there was evidence in the record of the defendant's theft of property from a farm and of defendant's concealing drugs in a shed. Indeed, when the defendant requested the instruction concerning his lack of any significant history of prior criminal activity, the State argued to the trial judge that there had been no attempt by either party to establish any record of the existence or nonexistence of the defendant's criminal record. The State thus had no opportunity to develop defendant's record concerning other felonies, misdemeanors, or criminal activity. There is simply no evidence in the record before us from either defendant or the State that defendant's conviction of second-degree kidnapping is the *only* felony conviction on his record, or that he has been convicted of no other crimes of any degree of seriousness, or that defendant was guilty of no other criminal activity. The only evidence of other "criminal activity" was that de-

fendant was deeply involved with his brother and others in the theft of major farm equipment from the Coppridge Farm and that defendant stored drugs in a shed.

That defendant made no attempt to introduce evidence that he had not been convicted of any other crime or committed any other criminal activity is not at all surprising. By not attempting to establish this mitigating circumstance, the defendant effectively prohibited the State from establishing defendant's history of convictions and criminal activities. Had the defendant offered evidence of the requested mitigating circumstance, the State could, of course, have offered evidence in rebuttal. In the case at bar, it was particularly important to the defendant to foreclose the prosecution from presenting any available evidence which might have established his involvement in what was obviously an ongoing theft ring.

I find it exceedingly strange that the very evidence which was adequate to support the aggravating factor that defendant had been convicted of a felony involving a threat of violence, which was submitted and found by the jury, is now characterized by the majority as possibly not a "significant" history. The seriousness of the felony of which defendant had previously been convicted, which was stipulated by him to have involved the threat of violence to the person, was such that it was submitted, as required by statute, as an aggravating factor which could be used to support the imposition of the death penalty. No rational jury could reasonably infer from the commission of this serious felony of violence, so recent in time to this murder, that defendant did not have a significant history of prior criminal activity. I am satisfied to a certainty that the court did not err in failing to submit the requested mitigating circumstance of "no significant history of prior criminal activity."

II

Second, even if I agreed with the majority that the trial judge erred in failing to submit to the jury the mitigating circumstance in question, I believe that the error was harmless. I do not now address the question of whether the majority has employed the proper test for prejudice. Here, the error was harmless whether it is analyzed under N.C.G.S. § 15A-1443(*a*) or (*b*).

The majority's conclusion that this "error" cannot be said to be harmless is especially surprising in view of the facts in this case. The defendant kidnapped the victim, accused him of "snitching" on the defendant, took him to a remote area, choked him, threatened him with a knife for a long period of time, struck him in the face, tied a rope around his neck, hit him in the head with a tree limb, stabbed him as he pled with him, beat him, garroted him, stabbed him numerous times, covered his body, and bragged that "the son of a bitch won't talk any more. I cut his throat." The victim here was strangled and stabbed to death. His body had thirty-nine stab wounds, thirty-one of which were in the back. There were additionally three defensive-type incised wounds on his arm and hand. In addition to abrasions from the rope on his neck, there were stab wounds on the left and right sides of his neck, as well as in the back of his neck. There were lacerations on his chin, right forehead, right ear, and hand. Both sides of his lower jaw were fractured, as was a finger on his right hand. There were blunt force injuries and contusions, abrasions, and bruises to his head, face, neck, arms, and legs, and there was hemorrhaging in the brain.

The jury found no mitigating circumstances although six of them, including the statutory mitigating circumstance of defendant's age at the time of the crime, were submitted for the jury's consideration. Among those submitted to the jury and which the jury refused to find were that "[p]rior to June 18, 1980, Michael Ray Wilson had no prior history of assaultive behavior" and "[a]ny other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value." On the other hand, four aggravating factors were submitted to the jury, and the jury found all four of them to exist. These included that the defendant had been previously convicted of a felony involving the threat of violence to the person and that the defendant committed the murder while engaged in the commission of a kidnapping. The other two aggravating factors found by the jury were that the murder was committed to disrupt or hinder the enforcement of the laws and that the murder was especially heinous, atrocious, or cruel. The jury further unanimously found beyond a reasonable doubt that the aggravating factors were sufficiently substantial to call for the imposition of the death penalty. It is particularly significant that the jury was instructed that it could

evaluate any other circumstance or circumstances arising from the evidence which it deemed to have mitigating value. It found none.

It simply defies reason that the jury, having found the aggravating factor that defendant had committed a prior felony involving the use of violence (for which defendant was sentenced to three to five years in prison), would then turn around and find, upon the very same evidence, that he had no significant history of prior criminal activity.

The amount of psychological and physical torture present in this case, the atrocious nature of the killing, and the jury's finding of the aggravating factors and its failure to find any of the mitigating circumstances submitted convince me that even if it was error to fail to submit the requested factor of no significant history of criminal activity, and it was not, it was harmless beyond a reasonable doubt.

I vote no error in the sentencing phase as well as the guilt-innocence phase.

STATE OF NORTH CAROLINA v. TERRY WAYNE WEEKS

No. 777A85

(Filed 5 May 1988)

1. **Jury § 6— murder prosecution—individual voir dire denied—no error**

The trial court did not abuse its discretion in a murder prosecution by denying defendant's motion for individual *voir dire* and sequestration of potential jurors, and the Supreme Court declined defendant's invitation to adopt the rule that judges in criminal cases should always exercise their discretion in favor of selecting jurors one at a time with jurors being sequestered, unless there is some reason for not doing so. N.C.G.S. § 15A-1214(j).

2. **Jury § 6.3; Criminal Law § 5— voir dire—prosecution's comment on insanity—objection not sustained—no expression of opinion**

The trial judge in a murder prosecution did not impermissibly express an opinion by failing to sustain defendant's objection to a comment by the prosecutor during *voir dire* questioning of jurors which, defendant contended, was a statement that a plea of insanity was an attempt by defendant to escape the consequences of unlawful conduct. A contextual reading of the comment indicates that the district attorney was simply telling the panel that the burden

of proof on insanity rests with defendant; furthermore, there was no impermissible expression of opinion by the court. N.C.G.S. § 15A-1222.

3. **Jury § 5— murder—juror excused for cause—admonished in presence of other jurors—no error**

There was no error in a murder prosecution where the judge excused a prospective juror for cause, then admonished her in the presence of other prospective jurors for taking a position against the death penalty based solely upon her apparent desire to avoid having to serve upon the jury.

4. **Jury § 6.3— voir dire—pregnant juror—questions as to medical condition not allowed**

There was no prejudice in a murder prosecution from the trial court's refusal to allow defendant to examine a pregnant potential juror about her medical condition, forcing defendant to use a peremptory challenge, where defendant did not exhaust all of his peremptory challenges.

5. **Jury § 7.11— murder—juror excused for cause for opposition to death penalty—no error**

The trial court in a murder prosecution did not err by excusing for cause a juror whose answers, in context, showed that she could not under any circumstances vote to impose the death penalty against anyone.

6. **Jury § 7.11; Constitutional Law § 63— murder—death qualified jury—no error**

The trial court did not err in a murder prosecution by permitting the district attorney to death qualify the jury.

7. **Jury § 6.4— murder—defendant's questions as to death penalty beliefs—excluded—no error**

The trial court did not abuse its discretion in a murder prosecution by not permitting prospective jurors to answer defendant's questions as to whether they believed the death penalty was imposed too often or whether it should be imposed for crimes other than murder.

8. **Criminal Law § 5.1— murder—insanity raised—pretrial order for psychiatric examination—objection waived by introduction of testimony**

In a prosecution for first degree murder where defendant raised insanity, the defendant waived any right to object to the trial court's order to undergo a psychiatric examination to determine his mental state at the time of the crimes where defendant called the psychiatrist to testify on his own behalf and tendered him as an expert witness.

9. **Criminal Law § 50.2— murder—lay testimony concerning defendant's relationship with parents excluded—no prejudice**

The defendant in a murder prosecution was not prejudiced by the court's refusal to allow lay testimony concerning his relationship with his parents during early childhood where defendant presented the same evidence through his expert witnesses.

10. Homicide § 15.4— expert testimony—defendant's state of mind at time of homicides

The trial court did not err in a first degree murder prosecution in which malice was an issue by not permitting defendant's experts to testify that at the time of the killings, defendant did not act in a cool state of mind, that he was acting under a suddenly aroused violent passion, that he did not act with deliberation, and that his ability to conform his behavior to the requirements of the law was impaired. The trial court admitted a substantial portion of the proffered expert testimony related to defendant's mental condition at the time of the homicides; the excluded testimony embraced precise legal terms, definitions of which are not readily apparent to medical experts; and having the experts testify as requested would have confused rather than helped the jury.

11. Criminal Law § 77.2— oral statement by defendant—subsequent written statement—excluded—no error

The trial court in a murder prosecution did not err by excluding a written statement by defendant where defendant made oral statements to an officer, an SBI agent asked defendant to write out a statement later that afternoon, the agent left town for a few hours, defendant told him on his return that he had given the statement to his lawyer, the State introduced the oral statements, and defendant attempted to introduce the written statement as a part of the whole confession. The written statement was not made at the same time as the oral statements and the State did not open the door.

12. Criminal Law § 87.4— redirect examination—evidence excluded—no error

The trial court did not err in a prosecution for first degree murder by sustaining the State's objections to defendant's redirect questions concerning whether a psychiatrist's diagnosis of defendant's mental condition was substantially the same as an Air Force diagnosis. Defendant's Air Force medical records were not discussed either on direct or on cross-examination of the witness, so that no clarification of testimony was needed, and the testimony that defendant attempted to elicit was substantially the same testimony that was previously admitted through another expert witness.

13. Criminal Law § 73— hearsay—victim's state of mind—excluded—no prejudicial error

The trial court did not err in a murder prosecution by refusing to admit evidence of the mental status of the victim under N.C.G.S. § 8C-1, Rule 803(3) where the very same testimony was elicited from various witnesses throughout the trial. N.C.G.S. § 15A-1443(a).

14. Constitutional Law § 30— defendant's statements—not disclosed within statutory time frame—admissible

The trial court did not err in a murder prosecution by admitting statements made by defendant where, although certain statements were not disclosed within a time frame provided by N.C.G.S. § 15A-903(a)(2) (1983), they were disclosed within a reasonable time of the State's learning of the statements, and defendant was given a synopsis of other oral statements.

15. Homicide § 30.2— first degree murder—failure to submit manslaughter—no error

The trial court did not err in a murder prosecution by failing to submit the possible verdict of voluntary manslaughter where neither the State's evidence nor the evidence offered by defendant supports defendant's assertions that the killings were done in a heat of passion provoked by the victims; the State's evidence tended to show an intentional killing with a deadly weapon, thereby raising the presumption of malice; while defendant did present some evidence that his parents were concerned about an excessive phone bill, there was no evidence of any confrontation on the night of the killings or that the killings were provoked by either victim; and, although a gun other than the murder weapon was found on the floor of defendant's father's bedroom, there was no evidence tending to show that either of the victims was the aggressor and had confronted defendant with the gun prior to the killings.

16. Homicide § 25.1— double murder—felony murder submitted to jury—no error

The trial court did not err by submitting to the jury the possible verdict of guilty of first degree murder of his stepmother under the felony murder rule where the underlying felony was the murder of his father. N.C.G.S. § 14-17.

17. Criminal Law § 112.6— insanity—burden of proof—failure to define satisfaction—no error

The trial court did not err in a murder prosecution by instructing the jury that defendant must prove insanity to the jury's satisfaction without defining satisfaction.

18. Criminal Law § 135.4— double murder—felony murder—judgment on underlying murder arrested

Judgment on defendant's conviction for the second degree murder of his father was arrested where defendant was also found guilty of the felony murder of his stepmother, using his father's murder as the underlying felony.

APPEAL by defendant from judgment imposing two sentences of life imprisonment entered by *Brown, J.*, at the 18 September 1985 Criminal Session of Superior Court, WAYNE County, upon jury verdicts of first degree murder and of second degree murder. Heard in the Supreme Court 15 October 1987.

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

R. Michael Bruce, for defendant-appellant.

FRYE, Justice.

Defendant brings forward nineteen assignments of error, seven of which involve court rulings concerning jury *voir dire*. De-

fendant contends also that the trial court violated his right to due process when it ordered him to submit to a second psychiatric evaluation. He next assigns error to six evidentiary rulings made during the trial. Defendant contends also that the trial court erred by refusing to permit the jury to consider possible verdicts of voluntary manslaughter. Next, he argues that the trial court erred in submitting the possible verdict of first degree murder under the felony murder rule. Defendant then argues that the jury instructions concerning his insanity defense were erroneous.

Defendant's eighteenth and nineteenth assignments of error relate to the sentencing phase. First, he contends that the evidence does not support the trial court's finding of the aggravating factor that the murder of defendant's father was especially heinous, atrocious or cruel. Defendant then argues that the court erred in imposing judgment on him for the second degree murder of Jerry Weeks, because this felony was used as the underlying felony for the conviction of defendant for the first degree murder of Peggy Weeks. In this final assignment of error we agree with defendant. This makes it unnecessary to consider his contention regarding the aggravating factor and we express no opinion thereon. Otherwise, we hold that defendant received a fair trial free of prejudicial error.

Defendant was charged with first degree murder, N.C.G.S. § 14-17, of his father, Jerry Weeks, and with first degree murder of his stepmother, Peggy Price Weeks. The jury found defendant guilty of the second degree murder of Jerry Weeks. The jury also found defendant guilty of the first degree murder of Peggy Weeks, specifically finding him guilty under the felony murder rule, but making no finding as to whether he was also guilty on the basis of malice, premeditation, and deliberation.

The court ruled there was no evidence of aggravating circumstances with respect to the conviction of defendant for the first degree murder of Peggy Weeks and sentenced him to the mandatory term of life imprisonment. The court found that the second degree murder of Jerry Weeks was especially heinous, atrocious, or cruel and sentenced defendant to life imprisonment, said sentence to begin at the expiration of the life sentence imposed on the first degree murder conviction. Defendant appealed as of right to this Court. N.C.G.S. § 7A-27(a) (1986).

The evidence at trial was essentially uncontradicted. It established that defendant was the son of Jerry Weeks and the stepson of Peggy Price Weeks. On 17 February 1985, a fire was discovered in the dwelling of the victims by William Weeks, brother of the deceased Jerry Weeks. Peggy Weeks was found outside the dwelling and firemen discovered the body of Jerry Weeks inside. Peggy Weeks died before medical assistance arrived. The evidence showed that the fire had been intentionally set and that both victims died from multiple gunshot wounds. A handgun that was subsequently identified as having been in the possession of defendant was found in a ditch near the dwelling. It was determined that this handgun was the weapon used to kill the victims. The evidence showed that defendant made inculpatory statements and was arrested on the morning of the offenses. The defendant entered pleas of not guilty and not guilty by reason of insanity to two counts of first degree murder. Other evidence pertinent to this appeal is set forth during the discussion of defendant's assignments of error.

[1] Defendant assigns error to seven rulings made by the trial court during jury *voir dire*. First, he contends that the trial court erred in denying his motion for individual *voir dire* and sequestration of prospective jurors. Defendant argues that because of his insanity defense the *voir dire* required asking prospective jurors sensitive and potentially embarrassing questions exploring possible areas of bias or prejudice with respect to their experiences with mental illness.

Upon a showing of good cause, a trial judge, in a capital case, may permit individual juror selection and sequestration of jurors before and after selection. N.C.G.S. § 15A-1214(j) (1983). 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 abuse of discretion. *State v. Brown*, 315 N.C. 40, 337 S.E. 2d 808 (1985). To reverse a decision of the trial court defendant must show that the "ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Barts*, 316 N.C. 666, 679, 343 S.E. 2d 828, 839 (1986).

Defendant concedes that he cannot show an abuse of judicial discretion, but instead asks this Court to adopt the rule that the

judge in a criminal case should always exercise his discretion in favor of selection of the jurors one at a time with jurors being sequestered unless there is some reason, such as a lack of physical facilities, for not doing so. We decline defendant's invitation to so drastically redefine our prior holdings interpreting this statute since to do so would constitute an unwarranted judicial revision of N.C.G.S. § 15A-1214(j).

[2] Defendant next assigns as error the trial court's failure to sustain defendant's objection to a comment made by the prosecutor during *voir dire* questioning of a juror in which defendant contends the prosecutor stated that a plea of insanity is an attempt by defendant to escape the consequences of his unlawful conduct. Defendant argues that by failing to sustain his objection, the trial court impermissibly indicated approval of the prosecutor's proposition, thus violating N.C.G.S. § 15A-1222.

An accused who is legally insane at the time he commits a criminal act is exempt from criminal responsibility for the act committed. *State v. Swink*, 229 N.C. 123, 47 S.E. 2d 852 (1948). In the presence of the jury, a trial judge is precluded from expressing an opinion "on any question of fact to be decided by the jury." N.C.G.S. § 15A-1222 (1983). However, a trial court generally is not impermissibly expressing an opinion when it makes ordinary rulings during the course of the trial. *State v. Welch*, 65 N.C. App. 390, 308 S.E. 2d 910 (1983). Also, an alleged improper statement will not be reviewed in isolation, but will be considered in light of the circumstances in which it was made. *State v. Howard*, 320 N.C. 718, 360 S.E. 2d 790 (1987). Furthermore, defendant must show that he was prejudiced by a judge's remark. *Id.*

During *voir dire* examination of a prospective juror, the following occurred:

> Q: Now, generally in a criminal case, the burden of proof, all the burdens of proof are on the State. It means that we have got to prove everything in the case. It just so happens in this case the young man set up what is called commonly a defense of insanity; do you understand that?
>
> A: Yes.
>
> Q: And that means that he was not of sufficient mind to commit the criminal offense and the law says in that regard he

has the burden to prove that to your satisfaction; do you understand that?

A: Yes, I do.

Q: We have the burden to prove the conduct was unlawful and if he wants to escape the consequences, he has the burden to prove that he didn't have the mind sufficient to commit the conduct; do you understand that?

Mr. Bruce: Objection.

Trial Judge: Objection is overruled.

While not technically correct, a contextual reading of the district attorney's challenged comment suggests that he was simply telling the panel that the burden of proof as to the affirmative defense of insanity rests with defendant. In any event we do not find any impermissible expression of opinion by the trial court and defendant has failed to show any prejudice.

[3] In his third assignment of error relating to *voir dire*, defendant argues that the trial court improperly admonished a prospective juror after excusing her for cause. Defendant argues that this admonition, conducted in the presence of other prospective jurors, effectively prevented them from giving honest responses, out of fear of incurring the wrath of the trial court.

During *voir dire*, prospective juror Campbell, in responding to questions posed by the prosecutor, the trial court, and by defense counsel, gave conflicting and confusing answers to questions relating to her ability to be impartial, and to her belief in the death penalty. After excusing Campbell for cause, the trial court admonished her for taking a position against the death penalty based solely upon her apparent desire to avoid having to serve on the jury.

Defendant contends that this admonition by the trial court was improper, arguing that it inhibited other prospective jurors from being candid in their responses. We disagree. It is not improper for a judge to admonish a prospective juror for taking a position solely for the purpose of being excused from jury duty. First, a trial court has a duty to ensure that a competent, fair, and impartial jury is empanelled. *State v. Atkinson*, 275 N.C. 288, 167 S.E. 2d 241 (1969), *death sentence vacated*, 403 U.S. 948, 29

L.Ed. 2d 851 (1971). Second, jury service is a public duty from which a qualified citizen can be excused "only for reasons of compelling personal hardship or because requiring service would be contrary to the public welfare, health, or safety." N.C.G.S. § 9-6(a) (1986).

Our review of the trial judge's statements reveals no impropriety. It is obvious that this juror was changing her answers in an attempt to avoid jury service. Furthermore, we find nothing in the trial judge's statements that would induce any prospective juror to give less than candid responses. On the contrary, if the admonition conveyed any message to the other prospective jurors it would be for them to be honest in their responses. Defendant's assignment of error is rejected.

[4] Defendant next assigns as error the trial court's refusal to allow defendant to examine a pregnant juror about her medical condition, after the trial court refused to excuse this juror for cause. Defendant argues that he was forced to utilize a peremptory challenge to excuse this juror in order to prevent defendant from being tried by a juror who might not give her full attention to defendant's case, or who might not be able to complete the trial.

The law is well-settled in this jurisdiction that when a defendant has failed to exhaust all of his peremptory challenges he has suffered no prejudice in having to use a peremptory challenge to excuse a juror whom the trial court has refused to excuse for cause. *State v. Avery*, 315 N.C. 1, 337 S.E. 2d 786 (1985). Defendant did not exhaust all his peremptory challenges; therefore he has failed to show any prejudice entitling him to a new trial.

[5] In his next assignment of error defendant contends that the trial court erroneously excused for cause prospective juror Singleton. Defendant argues that the statements made by this prospective juror, while revealing a reluctance on her part to vote for the death penalty, do not show that she would be unable to follow the law of North Carolina.

The proper standard for determining whether a prospective juror may be excused for cause was first espoused in *Witherspoon v. Illinois*, 391 U.S. 510, 20 L.Ed. 2d 776 (1968), in which the Supreme Court held that prospective jurors could not be excused

for cause simply because they voiced objections to capital punishment. However, the Court went on to say that prospective jurors could be excused for cause if they express an unmistakable commitment to automatically vote against the death penalty, regardless of the facts and circumstances which might be presented, or if they clearly indicate that their attitudes against the death penalty would prevent them from making an impartial decision as to the defendant's guilt. 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 excused 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.' " *Id.*, 469 U.S. at 424, 83 L.Ed. 2d at 851-52. This standard is consistent with that set forth in N.C.G.S. §§ 15A-1212(8)-(9). *See State v. Reese*, 319 N.C. 110, 353 S.E. 2d 352 (1987).

A contextual reading of prospective juror Singleton's responses on *voir dire* shows that she could not, under any circumstances, vote to impose the death sentence against anyone. Therefore, the trial court did not err in excusing this prospective juror for cause.

[6] Next, defendant argues that the trial court erred in permitting the prosecutor to death qualify the jury, contending that the death qualified jury deprived him of his right to a fair and impartial trial. As defendant concedes, this Court has consistently rejected arguments that the current jury selection process is unconstitutional. *State v. Avery*, 315 N.C. 1, 337 S.E. 2d 786. Defendant has presented no new arguments that would merit reconsideration of this question. This assignment of error is rejected.

[7] In his final assignment of error relating to jury *voir dire*, defendant argues that the trial court erred in refusing to allow defendant to examine prospective jurors as to their beliefs on capital punishment. Defendant contends that this prevented him from making an intelligent exercise of his peremptory challenges, a right granted by N.C.G.S. § 15A-1214(c).

It is well established that both the defendant and the State have the right to question prospective jurors as to their views concerning capital punishment in order to ensure a fair and im-

partial verdict. *State v. Wilson*, 313 N.C. 516, 320 S.E. 2d 450; N.C.G.S. § 15A-1214(c) (1983). However, this right is not unbridled, *State v. Wilson*, 313 N.C. 516, 320 S.E. 2d 450, and the manner and extent of the inquiry is left in the discretion of the trial court, and these rulings will not be disturbed absent a showing of abuse of discretion. *State v. Adcock*, 310 N.C. 1, 310 S.E. 2d 587 (1984).

Here, defendant sought to inquire as to whether prospective jurors believed that the death penalty was imposed too often or whether it should be imposed for crimes other than first degree murder. These questions are in the legislative or policy arena rather than relevant questions for the jury as a fact finder. Therefore, we find no abuse of discretion on the part of the trial judge in not permitting prospective jurors to answer these questions.

[8] Defendant next contends he was denied his fundamental right to due process when the trial court ordered him to undergo a psychiatric examination to determine his mental state at the time of the homicides. Defendant argues that a trial court has no authority to issue such an order. Alternatively, defendant contends that if a trial court does have such authority, the manner in which the order was entered in this case failed to give him adequate notice and was based on an inadequate evidentiary hearing.

After defendant was arrested he was evaluated at Dorothea Dix Hospital, at the request of his counsel, for the purpose of determining his competency to proceed to trial. At this point in the proceedings defendant had pleaded not guilty to the crimes charged. Subsequently, defendant filed notice of Defense of Insanity, N.C.G.S. § 15A-959, indicating his intent to rely on this defense and to introduce expert testimony on the issue of whether he had the requisite mental state to commit the offenses charged. The State then moved the trial court to order that defendant be transported to Dorothea Dix Hospital for evaluation on the question of his mental status at the time of the alleged offenses. After a hearing on the State's motion, the trial court granted the State's request over defendant's objection. Defendant assigns error to the entering of this order.

While defendant was examined by a psychiatrist pursuant to a court order made at the request of the State, the defendant, not

the State, called the psychiatrist to testify on his behalf. Further, defendant tendered the psychiatrist as an expert witness, and examined him concerning his second examination of defendant made pursuant to the court order. Any error, therefore, in the trial court's order allowing the second examination was cured by defendant's own action in calling the psychiatrist as a witness. Thus, defendant has waived any right to object to the trial court's order. This assignment of error is rejected.

Defendant next brings forward six assignments of error involving evidentiary rulings by the trial court. Each assignment of error is addressed separately.

[9] In his first assignment of error pertaining to evidentiary rulings, defendant argues that the trial court should have allowed lay testimony concerning defendant's relationship with his parents during his early childhood. Defendant contends that this evidence was necessary to lay a foundation for expert witness testimony. He contends that evidence of his troubled life during early childhood was critical to his insanity defense and therefore relevant under the definition of Rule 401 of the N.C. Rules of Evidence, thus admissible under Rule 402.

All relevant evidence generally is admissible, N.C.G.S. § 8C-1, Rule 402, and relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1986). When relevant evidence not involving a right arising under the Constitution of the United States is erroneously excluded, a defendant has the burden of showing that the error was prejudicial. This burden may be met by showing that there is a reasonable possibility that a different result would have been reached had the error not been committed. N.C.G.S. § 15A-1443(a) (1983).

Defendant called three expert witnesses for the purpose of testifying as to defendant's mental and emotional condition at the time the offenses were committed. Prior to calling these witnesses, defendant sought to introduce testimony from various family members and friends or acquaintances of the family regarding his upbringing and childhood problems. These witnesses would have testified to the following: Defendant's mother had a

nerve problem and could not cope with motherhood or stress; defendant was a "hypo-baby" and cried a lot; he had nightmares as a child; he would become very upset or nervous if anyone talked to him the "least bit loud"; his mother was rough with him and at times would "scream and holler and pop him a lot for really nothing"; his mother and father frequently argued and cursed each other in his presence; his mother and father divorced when he was approximately nine years old; during his senior year in high school his mother was hospitalized for mental problems; and his "step-daddy's daddy had approached him in a way that was not natural." Defendant attempted to get this testimony in as foundation for support of the expert witness's medical diagnosis of his mental condition. While the trial court sustained the prosecutor's objection to this lay testimony, the record reveals that defendant, through the testimony of his expert witnesses, was allowed to present the same evidence of his early childhood that the court had earlier disallowed. Therefore, defendant was not prejudiced by the trial court's refusal to allow the lay testimony and his assignment of error is without merit.

[10] Defendant next contends that the trial court erred in not allowing defendant's expert witnesses to give their opinions as to defendant's state of mind at the time of the homicides. Defendant argues that since he was on trial for first degree murder in which the State must prove he acted with malice, the trial court should have allowed the experts' opinions to assist the jury by stating whether defendant had any conscious intent to kill either of the two victims.

Testimony by experts is admissible if it will assist the "trier of fact to understand the evidence or to determine a fact in issue." N.C.G.S. § 8C-1, Rule 702 (1986). Moreover, an expert may be permitted to give his opinion even though it embraces an ultimate issue to be decided by the trier of fact. *Id.*, Rule 704 (1986). However, it is not error for a trial court to refuse to admit expert testimony embracing a legal conclusion that the expert is not qualified to make. *See State v. Ledford*, 315 N.C. 599, 340 S.E. 2d 309 (1986) (under new rules experts still precluded from stating that a legal standard has been met, i.e., that injuries were proximate cause of death); *Murrow v. Daniels*, 85 N.C. App. 401, 355 S.E. 2d 204, *rev'd and remanded on other grounds*, 321 N.C. 494,

364 S.E. 2d 392 (1987) (expert's opinion that defendant's lack of security was "gross negligence" an improper legal conclusion).

In *State v. Wilkerson*, we held that "in determining whether expert medical opinion is to be admitted into evidence the inquiry should be not whether it invades the province of the jury, but whether the opinion expressed is really one based on the special expertise of the expert, that is, whether the witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact." *Wilkerson*, 295 N.C. 559, 568-69, 247 S.E. 2d 905, 911 (1978). *See also State v. Saunders*, 317 N.C. 308, 345 S.E. 2d 212 (1986) (expert opinion as to nature of deceased's wound properly admitted since it was helpful to the jury in understanding the type of wound involved and in determining whether the defendant acted in self-defense).

In the present case, the trial court admitted a substantial portion of the proffered testimony of defendant's expert witness related to defendant's mental condition at the time of the homicides. Dr. Brad Fisher, a psychologist, testified on behalf of defendant. He gave his opinion that defendant suffered from a chronic emotional disturbance characterized by an inability to deal with stress; that defendant tends to take stress and internalize it; that defendant was not operating in a right state of mind at the time he shot his father and stepmother; and that "it is highly probable that he had no ability at the specific time to distinguish between right and wrong."

Dr. Bob Rollins, a psychiatrist, testified on behalf of defendant, in pertinent part, as follows: that in his opinion defendant did have a mental disorder at the time of the shootings, which he diagnosed as adjustment disorder with mixed disturbance of emotions and conduct. He described adjustment disorder as overreaction to a situation because the person has a particular vulnerability to that stress.

Dr. Selwyn Rose, a psychiatrist, testified that he also diagnosed defendant as suffering from an emotional disorder with disturbance of emotion and conduct. He described defendant as living in a fantasy world, going to his father for reconciliation and going into a rage when rebuffed by his father.

All of the preceding testimony was admitted into evidence. In addition to the above testimony, however, defendant attempt-

ed to have his expert witnesses testify that at the time of the killings defendant did not act in a cool state of mind, that he was acting under a suddenly aroused violent passion, that he did not act with deliberation, and that as a result of his mental disorder his ability to conform his behavior to the requirements of law was impaired.[1] The trial court sustained the prosecutor's objections to this latter testimony and refused to admit it into evidence.

Such testimony embraces precise legal terms, definitions of which are not readily apparent to medical experts.[2] What defend-

1. Out of the presence of the jury defendant was permitted to get the questions and answers in the record. The following exchanges are representative:

"Q. And do you have an opinion satisfactory to yourself, based on your evaluation and the sources that you have described as to whether at the time that Jerry Weeks and Peggy Price Jackson Weeks were shot, Terry Wayne Weeks was acting while he was in a cool state of mind?

MR. JACOBS: Object.

THE COURT: Sustained."

"Q. Do you have an opinion . . . whether . . . at the time that Peggy Price Jackson Weeks was shot, whether Terry Wayne Weeks was acting under the influence of some suddenly aroused, violent passion; do you have such an opinion?

A. I have an opinion.

Q. And what is that opinion?

A. In my opinion, he was under the influence of suddenly aroused and violent passion."

"Q. Do you have an opinion . . . whether . . . at the time that Peggy Price Jackson Weeks was shot, whether Terry Wayne Weeks was acting after premeditation?

A. Yes, I do.

Q. What is that opinion?

A. That it was not, that it was not a premeditated act."

MR. BRUCE: "Your Honor, we would seek the admission of these answers."

2. Dr. Fisher, testifying out of the presence of the jury, in answer to a question as to whether defendant, in his opinion, was acting under the influence of some suddenly aroused, violent passion, responded as follows:

ant sought to accomplish with this testimony was to have the experts tell the jury that certain legal standards had not been met. *See State v. Ledford*, 315 N.C. 599, 340 S.E. 2d 309. We are not convinced that either the psychologist or the psychiatrists were in any better position than the jury to make those determinations. Having the experts testify as requested by defendant would tend to confuse, rather than help, the jury in understanding the evidence and determining the facts in issue. We, therefore, conclude that the trial court did not err in refusing to admit this testimony.

[11] Defendant next contends that the trial court erred in not allowing into evidence a statement written by defendant at the request of one of the police officers. Defendant, citing *State v. Watts*, 224 N.C. 771, 32 S.E. 2d 348 (1944), argues that this exculpatory statement was admissible because inculpating statements made by defendant on the same day were offered by the State and admitted into evidence.

When the State offers into evidence a part of a confession the accused may require the whole confession to be admitted. *State v. Davis*, 289 N.C. 500, 223 S.E. 2d 296, *death sentence vacated*, 429 U.S. 809, 50 L.Ed. 2d 69 (1976). Thus, when the State introduces part of a statement made by a defendant, the defendant is then entitled to have everything brought out that was said by him at the time the statement was made to enable him to take whatever advantage the statement introduced may afford him. *State v. Watts*, 224 N.C. 771, 32 S.E. 2d 348. However, if the State does not introduce statements of a defendant made on a later date, a defendant is not entitled to introduce these later self-serving statements since the State has not opened the door for such testimony. *State v. Davis*, 289 N.C. 500, 223 S.E. 2d 296.

In the present case, defendant was questioned on the morning of 17 February 1985. After being advised of his rights defendant agreed to talk to Glenn Odom of the Wayne County Sheriff's

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I do think he was acting under the influence of a suddenly aroused violent passion; however, I think it's necessary to state that those are, those words come a little hard to psychologists and psychiatrists. I think we work more comfortable with thinking of it as a confused state of mind, a time when he lost control, when he snapped, but I believe that we really are talking about the same thing, just from a different language perspective.

Department. During this conversation defendant admitted certain facts with respect to the crimes with which he was later charged. Defendant was subsequently taken to the Wayne County Sheriff's Department, was again advised of his rights, and made a more detailed statement to Officer Odom. These statements were reduced to writing and were the statements admitted into evidence. Later that afternoon, defendant was questioned by Agent McMahan of the State Bureau of Investigation. Because defendant indicated to Agent McMahan that he did not want to discuss events relating to the killings, Agent McMahan asked defendant to write out a statement for him and gave defendant an Interrogation Advice of Rights Form and some paper on which to write. Agent McMahan then left town and upon his return a few hours later, defendant informed Agent McMahan that he had written out the statement but had given it to his attorney. It is this latter statement that defendant contends should have been allowed into evidence at the trial.

The evidence shows that this statement was not made at the same time as the oral statements that were introduced into evidence. Therefore, in order for defendant to be entitled to introduce this later self-serving statement, the State must have "opened the door." *State v. Davis*, 289 N.C. 500, 223 S.E. 2d 296. However, the record shows that neither this statement nor testimony concerning its contents was offered into evidence by the State at any time. Therefore, the State did not open the door for defendant to introduce this subsequent self-serving statement. Furthermore, defendant's reliance on *State v. Watts*, 224 N.C. 771, 32 S.E. 2d 348, is misplaced, since *Watts* involved only one statement, part of which was introduced by the State. We hold that the trial court did not err in excluding defendant's self-serving statement that was solely in the possession of defendant's attorney.

[12] Next, defendant contends that the trial court erred in sustaining the State's objections to defendant's redirect examination of Dr. Bob Rollins concerning whether Dr. Rollins' diagnosis of defendant's mental condition was substantially the same as the United States Air Force's diagnosis. Defendant argues that this redirect examination amounted to clarifying issues brought out by the State on cross-examination rather than introducing new material on redirect as found by the trial court.

On redirect examination of a witness, the calling party is permitted to examine the witness to clarify matters covered on direct examination and to question the witness concerning new matters elicited on cross-examination. 1 Brandis on North Carolina Evidence § 36 (1982). However, the calling party is ordinarily not permitted to either have the direct testimony repeated or to question the witness on entirely new matters. *Id.*

In the case *sub judice*, Dr. Rollins testified, on direct examination by the defense, that he had reviewed documents from the United States Air Force that included defendant's medical records. Dr. Rollins testified further that his review of these records did not change his diagnosis, which was that defendant was suffering from an adjustment disorder. On cross-examination, the State questioned Dr. Rollins regarding defendant's assertion that when he was in the military he suffered from sleepwalking. Dr. Rollins testified that he had doubts whether defendant actually had a problem with sleepwalking. Although Dr. Rollins was cross-examined further, this was the extent of any reference to the Air Force diagnosis. On redirect, defendant attempted to ask Dr. Rollins to compare the two diagnoses and to have Dr. Rollins give his opinion as to whether both tests concluded that defendant was suffering from an adjustment disorder. At this point the State objected and the trial court sustained the objection on the basis that this was new matter.

A review of the record shows that the contents of the Air Force medical records of defendant were not discussed either on direct or on cross-examination of the witness, thus there was no testimony for which a clarification was needed. *State v. Franks*, 300 N.C. 1, 265 S.E. 2d 177 (1980). A further review of the record shows that what defendant attempted to elicit from Dr. Rollins on redirect is substantially the same testimony that was previously admitted through the testimony of defendant's expert witness Dr. Fisher. Thus, even if the trial court erred, defendant has not been prejudiced so as to entitle him to a new trial. *State v. Matthews and State v. Snow*, 299 N.C. 284, 261 S.E. 2d 872 (1980).

[13] In his next assignment of error defendant contends that the trial court committed prejudicial error in refusing to allow testimony concerning the mental status of the victim, Peggy Weeks. Defendant argues that this testimony was important to show a

lack of premeditation on his part because it would show that there might have been a dispute at the time of the killings during which tempers were lost and shootings occurred, possibly in the heat of passion without malice. Defendant argues this evidence was admissible under N.C.G.S. § 8C-1, Rule 803(3), declaration of an unavailable declarant showing an existing mental or emotional condition.

Evidence tending to show a declarant's state of mind is an exception to the hearsay rule. N.C.G.S. § 8C-1, Rule 803(3) (1986). The evidence is admissible when the state of mind of the declarant is relevant and its probative value is not outweighed by the potential for prejudice. *Griffin v. Griffin*, 81 N.C. App. 665, 344 S.E. 2d 828 (1986). However, the failure of a trial court to admit or exclude this evidence will not result in the granting of a new trial absent a showing by defendant that a reasonable possibility exists that a different result would have been reached absent the error. *State v. Hickey*, 317 N.C. 457, 346 S.E. 2d 646 (1987).

In the present case, defendant attempted to elicit, on cross-examination of Robert Lee Smith, testimony showing that defendant had problems with his father and stepmother, Peggy Weeks. Smith had had dinner with the victims a few hours before they were killed and, had defendant been permitted to question Smith, the evidence would have shown that the victims were concerned about the amount of a telephone bill created by defendant's long-distance calls to Montana, and that they had ordered defendant to get a job to enable him to pay for this telephone bill. Defendant contends that this evidence would have shown some antipathy on the part of the victim Peggy Weeks towards defendant during a period of two to five hours before her death.

Assuming, *arguendo*, that the above evidence should have been admitted, we find that defendant was not prejudiced since the record clearly reveals that this very same testimony was elicited from various witnesses throughout the trial. Because defendant has not shown any prejudice, N.C.G.S. § 15A-1443(a), we find this assignment of error meritless.

[14] In his final assignment of error concerning evidentiary rulings by the trial court, defendant contends that the trial court abused its discretion in admitting statements made by defendant. Defendant argues that the State violated the discovery rules of

N.C.G.S. § 15A-903(a), and contends that the trial court, therefore, erred in admitting this testimony.

Upon motion of a defendant, a trial court must order the prosecutor to permit a defendant to inspect and copy any relevant written or recorded statements in the State's control that were made by a defendant. N.C.G.S. § 15A-903(a)(1) (1983). Further, N.C.G.S. § 15A-903(a)(2) provides that upon motion, the trial court must order the prosecutor to divulge any oral statements made by the defendant that are relevant to the case. When a party fails to comply with the order, the trial court may grant a continuance or a recess, prohibit the violating party from introducing the non-disclosed evidence, or enter any other appropriate order. N.C.G.S. § 15A-910 (1983). Because the trial court is not required to impose any sanctions for abuse of discovery orders, what sanctions to impose, if any, is within the trial court's discretion. *State v. Alston*, 307 N.C. 321, 298 S.E. 2d 631 (1983), including whether to admit or exclude evidence not disclosed in accordance with a discovery order. *State v. Braxton*, 294 N.C. 446, 242 S.E. 2d 769 (1978).

Defendant argues that the State failed to comply with the discovery order regarding statements defendant made to Holly Jackson, to B. J. Lee, and to Jerry Best, an investigative officer. A review of the record clearly shows that defendant's argument is without merit.

A review of the *voir dire* concerning the statements made to Holly Jackson reveals that the State first learned of these statements three days prior to introducing them at trial, and disclosed these statements to defendant prior to Jackson testifying at trial. Disclosure of such statements prior to the beginning of the week during which the case is calendared for trial is required if the statement is then known by the State. N.C.G.S. § 15A-903(a)(2) (1983). The evidence shows the State did not know of these statements of Jackson within the time frame as provided by statute. We see no abuse of discretion in the trial court's admitting these statements since it could have determined that the State's disclosure of these statements within three days of discovery was a reasonable time. Similarly, a review of the *voir dire* concerning defendant's statements made to B. J. Lee shows that the State did not learn of these statements until the morning that

they were to be introduced, at which time they were disclosed to defendant.

Regarding defendant's statements made to the investigating officer, Jerry Best, the record shows that defendant was given a synopsis of the oral statements more than a month before trial. When a defendant's statements are oral rather than recorded, the statute requires only that the substance of that statement be provided to a defendant. N.C.G.S. § 15A-903(a)(2) (1983). Defendant has failed to show any abuse by the State of the discovery order or any abuse of discretion by the trial court. Further, defendant has failed to show or assert any prejudice from these statements. N.C.G.S. § 15A-1443(a) (1983). We find defendant's assignment of error concerning discovery without merit.

The next three assignments of error brought forward by defendant involve the trial court's jury instructions that defendant contends were erroneous and prejudicial.

[15] First, defendant assigns as error the trial court's refusal to submit to the jury, with respect to both indictments, possible verdicts of voluntary manslaughter. Specifically, defendant argues that by requiring defendant to prove that he acted in the heat of passion upon adequate provocation or by requiring him to go forward and produce some evidence from which a jury might find that malice has been negated, the trial court impermissibly shifted the burden of proof to defendant in violation of *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed. 2d 508 (1975). Furthermore, defendant argues that the evidence was sufficient to support possible verdicts of voluntary manslaughter, thus the trial court erred in failing to submit these possible verdicts to the jury.

Second degree murder is the unlawful killing of a human being with malice, but without premeditation and deliberation. *State v. Duboise*, 279 N.C. 73, 181 S.E. 2d 393 (1971). Malice may be presumed upon proof beyond a reasonable doubt of a killing by the intentional use of a deadly weapon, nothing else appearing. *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975), *rev'd on other grounds*, 432 U.S. 233, 53 L.Ed. 2d 306 (1977). A jury instruction that creates a presumption that shifts the burden of proof to the defendant violates the fourteenth amendment to the United States Constitution. *Mullaney v. Wilbur*, 461 U.S. 684, 44 L.Ed. 2d 508. However, absent any contrary evidence, the pre-

sumption of malice arises. *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575. Once the evidence supports a presumption, a defendant, in order to reduce the crime to voluntary manslaughter, has the burden of going forward with or producing some evidence of heat of passion on sudden provocation, or to rely on such evidence as may be present in the State's case. *State v. Hankerson*, 288 N.C. at 651, 220 S.E. 2d at 589. Moreover, this Court has held that the above requirement does not impermissibly shift the burden of proof of the crime charged to defendant and *Mullaney* is not violated. *Id.* Also, absent any evidence to support it, a trial court is not required to charge the jury on the question of defendant's guilt of lesser degrees of the crime charged. *State v. Wingard*, 317 N.C. 590, 346 S.E. 2d 638 (1986).

Defendant argues that requiring him to rebut the presumption of malice flowing from the State's proof of the intentional infliction of a wound upon the deceased with a deadly weapon, proximately resulting in death, violates *Mullaney*. Defendant's argument is without merit because the presumption persists only in the absence of evidence to the contrary. *State v. Patterson*, 297 N.C. 247, 254 S.E. 2d 604 (1979). Evidence raising an issue on the existence of malice and unlawfulness causes the presumption to disappear, "leaving only a permissible inference which the jury may accept or reject." *State v. Reynolds*, 307 N.C. 184, 190, 297 S.E. 2d 532, 536 (1982). Furthermore, if there is any evidence of heat of passion on sudden provocation, either in the State's evidence or offered by the defendant, the trial court must submit the possible verdict of voluntary manslaughter to the jury. *State v. Hankerson*, 288 N.C. at 651, 220 S.E. 2d at 589.

The issue, therefore, is whether there was sufficient evidence to support the submission of voluntary manslaughter to the jury. Defendant, in order to raise an issue entitling him to a voluntary manslaughter charge, must offer evidence or rely on evidence in the State's case showing the following: (1) that he shot his father and stepmother in the heat of passion; (2) that this passion was provoked by acts of the victims which the law regards as adequate provocation; and (3) that the shooting took place immediately after the provocation. *State v. Robbins*, 309 N.C. 771, 778, 309 S.E. 2d 188, 192 (1983).

A review of the record shows that neither the State's evidence nor the evidence offered by defendant supports defendant's

assertions that the killings were done in a heat of passion provoked by defendant's father and stepmother. The State's evidence tended to show that defendant, after obtaining his gun, went to his father's bedroom where he shot his father and stepmother several times. He then set fire to the bedroom while the victims were still alive. The State's evidence tended to show an intentional killing with a deadly weapon, thereby raising the presumption that the killings were done with malice. While defendant did present some evidence that his parents were concerned about an excessive phone bill, there is no evidence of any confrontation on the night of the killings or any evidence showing that the killings were provoked by either victim. Although the State's evidence tended to show that a derringer, not the murder weapon, was found on the floor of defendant's father's bedroom, there was no evidence tending to show that either of the victims was the aggressor and had confronted defendant with the derringer prior to the killings. We hold that the State's evidence does not show and defendant has failed to produce any evidence to show heat of passion on sudden provocation, thus the trial court did not err by failing to submit the possible verdicts of voluntary manslaughter.

[16] Next defendant contends that the trial court erred by submitting to the jury the possible verdict of guilty of first degree murder of his stepmother under the felony murder rule. Defendant argues that it was not the intent of the legislature to apply the felony murder rule, N.C.G.S. § 14-17, to a murder committed in the perpetration of another murder.

The pertinent part of N.C.G.S. § 14-17 reads as follows:

> A murder . . . which shall be committed in the perpetration or attempted perpetration of any arson, rape, or a sex offense, robbery, kidnapping, burglary, *or any 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) (emphasis added).

Defendant does not argue that the facts of this case do not support the application of the felony murder rule, but argues instead, that it was not the intent of the legislature to use this rule when the underlying felony is murder. This Court has previously addressed this precise question and found no reason why the felony murder rule should not be applicable when the underlying

felony is murder, *State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788 (1981), thus defendant's contention is without merit.

[17] In his final assignment of error relating to jury instructions, defendant contends that the trial court erred in its instructions concerning defendant's burden of proving his insanity defense. Defendant argues that a trial court's refusal to define "satisfaction," as used in the jury instructions, leaves unbridled discretion in the jury as to a defendant's burden of proof and creates a potential for inconsistent jury decisions.

As conceded by defendant, the trial court instructed the jury substantially in accordance with existing North Carolina law on the insanity defense. The trial court instructed the jury in relevant part as follows:

> [T]he defendant has the burden of proof on the issue of insanity. However, unlike the State, which must prove all the other elements of the crime beyond a reasonable doubt, the defendant need only prove his insanity to your satisfaction.

Defendant contends that the trial court should have defined "satisfaction." However, as conceded by defendant, this issue has previously been addressed by this Court, and we found no error in the trial court's refusal to define "satisfaction" to the jury. *State v. Franks*, 300 N.C. 1, 265 S.E. 2d 177. In the present case, as in *Franks*, the jury was properly instructed on the standard of proof needed by defendant to prove his insanity. Furthermore, from its own determination and from the trial court's instructions, a jury knows what satisfies it, and a "jury is presumed to have understood the plain English contained" in the trial court's instruction. *Franks*, 300 N.C. at 18, 265 S.E. 2d at 187. Defendant's argument is meritless.

Defendant next contends that the trial court committed two prejudicial errors during the sentencing phase. He first contends that the trial court erred in finding that the murder of Jerry Weeks was especially heinous, atrocious or cruel. Because of our disposition of defendant's second assignment of error concerning the sentencing phase of the trial we need not address this first assignment of error.

[18] Defendant argues that the trial court erred in imposing judgment on the conviction of defendant for the second degree

murder of Jerry Weeks, because this crime was the underlying felony used for the conviction of defendant for the felony murder of Peggy Weeks.

This Court has consistently held that when the sole basis of a defendant's conviction of first degree murder is pursuant to the felony murder rule, no additional sentence may be imposed for the underlying felony as a separate independent offense, since the underlying felony merges with the conviction of first degree murder. *See State v. Fields*, 315 N.C. 191, 337 S.E. 2d 518 (1985); *State v. Silhan*, 302 N.C. 223, 275 S.E. 2d 450 (1981).

In the present case the jury specifically found defendant guilty of first degree murder of Peggy Price Weeks under the felony murder rule, but made no finding as to his guilt on the basis of malice, premeditation and deliberation. Because the underlying felony was the murder of Jerry Weeks, the trial court could not impose an additional sentence upon defendant by sentencing him separately for this murder. Therefore, the judgment entered upon defendant's conviction of second degree murder of Jerry Weeks must be arrested.

For the reasons discussed herein, we find no prejudicial error in defendant's trial. However, the judgment entered for the murder of Jerry Weeks is arrested. The result is:

No. 85CRS2447 Murder in the First Degree—no error.

No. 85CRS2446 Murder in the Second Degree—judgment arrested.

STATE OF NORTH CAROLINA v. SIEGLINDE JOHNSON ALLEN

No. 714A86

(Filed 5 May 1988)

1. **Criminal Law § 75.14— murder—confession—mental capacity to waive rights**

There was an adequate basis in a murder prosecution for the judge's findings as to defendant's capacity to understand and waive her constitutional rights where defendant's court-appointed psychiatrist testified that defendant had been incapable of understanding or waiving her constitutional rights on

both dates when she had made statements; defendant's psychiatrist testified that he had consulted records of defendant's evaluation at Dorothea Dix, even though he disagreed with the Dix conclusions; the district attorney cross-examined the defense psychiatrist extensively about the Dix evaluation; the defense witness was the only psychiatrist to testify; and the court found that one of the statements was admissible, making findings of fact based on the Dorothea Dix evaluation. The district attorney properly used the Dix report to impeach the defense witness, it cannot be said that the Dix records were not introduced as evidence, and the court could properly consider the defense psychiatrist's opinion, the underlying basis for that opinion, and the evidence presented to impeach the opinion. N.C.G.S. § 8C-1, Rule 703.

2. **Criminal Law § 75.14— murder—confession—voluntary**

The finding of the trial judge in a murder prosecution that defendant's confession was voluntarily given was supported by the evidence and was conclusive on appeal where impeachment evidence was used to cast doubt on the defense psychiatrist's conclusion that defendant was mentally incompetent; defendant's statement was logical and straightforward; while both the defense psychiatrist and a doctor at Dorothea Dix agreed that defendant was somewhat mentally retarded, subnormal mentality alone will not render an otherwise voluntary confession inadmissible; and the record fails to show any circumstances precluding understanding or the free exercise of defendant's will.

3. **Criminal Law § 75.1— two statements—first not a custodial interrogation—second not tainted**

In a murder prosecution in which defendant made inculpatory statements on March 6 and 7, the trial court erred by finding that the March 6 statement was the result of a custodial interrogation and the March 7 statement was therefore untainted and admissible.

4. **Jury § 6.3— voir dire—questions on insanity defense—presented to jury panel as whole**

A defendant in a murder prosecution was not denied an adequate opportunity to form a basis on which to exercise her peremptory challenges where the trial judge required defense counsel to direct certain questions concerning the insanity defense to the jury panel as a whole rather than individually. The record shows that jurors spoke up individually if the question asked of them as a panel concerned them individually.

5. **Jury § 6.3— voir dire—objections to particular question sustained**

The trial court in a murder prosecution did not err during jury selection by sustaining the State's objections to specific defense questions asking whether the jurors understood that punishment would be imposed by the trial judge if they did not return a verdict of first degree murder; whether the jurors believed a person could be so mentally ill as to be incapable of knowing the nature and quality of her act; whether a person could never have a mental illness so severe as to prevent her from knowing right from wrong; what one juror knew about schizophrenia; whether the jurors could take into account various facts and conditions; and by not allowing defendant to clarify a comment by the prosecutor concerning turning defendant loose.

6. Criminal Law § 102.4— murder—trial hotly contested—district attorney's conduct

The trial court in a murder prosecution did not fail to adequately control the district attorney's conduct or err by denying defendant a new trial where the trial was hotly contested, numerous objections were sustained and instructions given, and the court at one point sent the jury out and instructed both attorneys to join him in chambers to discuss abiding by the rules of court.

7. Criminal Law § 99.2— comment of trial judge—no objection at trial—no appeal

The defendant in a murder prosecution failed by lack of a contemporaneous objection to preserve her argument regarding the judge's comment that he did not have to listen to the evidence because that was the jury's job. N.C.G.S. § 15A-1446(a) and (b) (1983).

8. Criminal Law § 102.6— murder—prosecutor's closing argument—not grossly improper

The district attorney's closing argument in a murder prosecution was not so grossly improper that it required the trial court to intervene *ex mero motu*. An expert witness's compensation is a permissible subject for cross-examination and therefore argument; reading the argument in context shows that the district attorney was not arguing that the only way to insure that defendant would not kill again was to find her guilty, but that he was speaking to the four possible verdicts which would result in restraint of defendant's liberty; and, rather than arguing that defendant would not be committed if the jury found her not guilty by reason of insanity, the district attorney stated the grounds for commitment but misstated the maximum commitment.

9. Arson § 4.1— setting fire to own apartment—evidence sufficient

The trial court did not err in a murder and arson prosecution by not dismissing the charge of arson where the evidence substantially supported each element of arson, and, although defendant set her own apartment afire, the "dwelling of another" element was satisfied because there were several apartments in the building.

10. Criminal Law § 112.6— murder and arson—insanity defense—instructions

The trial court in a murder and arson prosecution did not err by refusing to include all of the evidence supporting defendant's plea of insanity in the jury instruction where the trial court gave the instruction from N.C. Pattern Jury Instruction—Crim. 304.10 and drew the jury's attention to most of the items of evidence defendant had wanted included.

11. Criminal Law § 112.6— insanity—instruction on consideration of defendant's competence to stand trial—no error

The trial court in a prosecution for murder and arson did not err by instructing the jury that it could consider the fact that defendant had been found competent to stand trial in its decision on the insanity defense. The finding that defendant was competent to stand trial was simply one factor that the jury could include when considering all of the evidence with regard to defendant's insanity defense; moreover, the court explained the difference between competency to stand trial and insanity and instructed that the competency finding was not conclusive or binding.

12. Homicide § 25.2— murder—instructions—premeditation and deliberation—mental deficiency

The trial court in a murder and arson prosecution did not err by refusing to give defendant's requested instruction, which drew attention to specific aspects of diseases and deficiencies of the mind which might possibly have affected defendant's ability to commit the crime with malice or with premeditation and deliberation, where defendant's requested instruction was given in substance.

13. Criminal Law § 112.6— murder and arson—insanity—instruction on procedures upon acquittal

The trial court did not err in a prosecution for murder and arson in its instruction to the jury regarding procedures upon an acquittal on the grounds of insanity.

14. Criminal Law § 112.6— murder and arson—insanity—confusing instruction clarified—no error

There was no plain error in a prosecution for murder and arson in the court's instruction on insanity where, although the court's charge on insanity was slightly confusing at one point, the judge immediately corrected himself and clarified the matter and, although the judge failed to give the commitment instruction before the jury retired, the jury was brought back and given the commitment instruction and the judge went over the special insanity issue again.

15. Criminal Law § 138.24— arson—very young victim as aggravating factor—prior conviction for victim's murder

The trial court did not err when sentencing defendant for first degree arson by finding in aggravation that the victim was very young where defendant was also convicted of the child's murder. The victim's age is an aggravating factor which the court may consider in an arson case regardless of whether the arson results in a death. N.C.G.S. § 15A-1340.3 and N.C.G.S. § 15A-1340.4.

BEFORE *Freeman, J.*, and a jury at the 18 August 1986 Session of Superior Court, IREDELL County, defendant was convicted of first-degree murder and first-degree arson. Judgments sentencing her to a life term for each conviction, to run consecutively, were entered on 29 August 1986. On 8 September 1986 the trial court allowed defendant's Motion for Appropriate Relief by which she sought a new sentencing hearing on her conviction for first-degree arson. After a new sentencing hearing, a life sentence was again imposed. Defendant appeals as of right pursuant to N.C.G.S. § 7A-27(a). Heard in the Supreme Court 9 November 1987.

Lacy H. Thornburg, Attorney General, by G. Patrick Murphy, Assistant Attorney General, for the State.

Edmund L. Gaines and James B. Mallory III for defendant-appellant.

MEYER, Justice.

Defendant was convicted of the first-degree murder of her infant son and of first-degree arson. On appeal, her assignments of error relate to: (1) the admissibility of her inculpatory statements to law enforcement officials, (2) the restriction of her inquiries of potential jurors during jury selection, (3) the district attorney's conduct during the trial, (4) the trial court's failure to dismiss the arson charge, (5) the trial court's jury instructions, and (6) the trial court's finding and use of an aggravating factor in sentencing defendant to life for the arson conviction. We find no error in defendant's trial.

The State's evidence tended to show the following sequence of events. On 6 March 1985 defendant was living in an apartment with her husband and two children in Statesville, North Carolina. Defendant's younger child, Thomas Steven Allen, was approximately five weeks old at the time. At about ten o'clock that morning, defendant and her elder child went to visit her neighbor, Edwin Dyer, whose house was fifty yards away. During the course of her visit with Mr. Dyer and his wife, defendant got up three times to go to the door and look towards her apartment. After thirty to forty-five minutes, defendant left the Dyers' house. She returned very shortly and told Mr. Dyer that her apartment was on fire. Mr. Dyer went to defendant's apartment but was unable to enter because of the smoke. Mrs. Dyer called defendant's landlord who, after several attempts to determine the source of the smoke, discovered a fire behind a bedroom door. He entered the bedroom, where he saw a great deal of smoke and a fairly large circle of flames. Shining a flashlight into the room, he also saw a crib and the body of an infant lying on its stomach. The child was badly burned about the legs and feet. Later, a volunteer fireman observed that the infant's nose and mouth were filled with black mucus and that its right foot was almost entirely burned off.

State Bureau of Investigation Agent David Campbell found that the crib's floor had been burned from the top downwards and that the subflooring beneath the bedroom carpet was charred. The burn patterns of the subflooring showed the use of a flammable accelerant. He found a bottle of alcohol in a baby necessity basket in the apartment's kitchen. In his expert opinion, the fire started inside the crib and after some burning and running of the flammable liquid, the fire fell down onto the floor beside the crib. He further testified that the fire was set by human hands.

Defendant was asked to go to the Sheriff's Department to answer some questions about the fire. She was questioned by State Bureau of Investigation Agent David Keller and Detective Gary Edwards of the Iredell County Sheriff's Department. Defendant made several incriminating statements about her role in the death of her infant son. These 6 March 1985 statements were subsequently suppressed by Judge Fetzer Mills on the grounds that defendant had made them during an "in-custody interrogation" without having been properly advised of her right to have an attorney appointed to represent her if she could not afford one.

After making these inculpatory statements, defendant was taken before a magistrate. Warrants were obtained and served upon her, charging her with first-degree murder and first-degree arson. She was incarcerated overnight in the Iredell County jail. Early the next morning, on 7 March 1985, Detective Edwards went to the jail and interviewed defendant. After fully advising her of her *Miranda* rights, he wrote down a statement defendant made to him and she signed it. The gist of this statement was that on 6 March defendant was alone with her two children in the apartment. She went to the kitchen and got a bottle of alcohol. She then went to the bedroom, poured alcohol around the crib as well as on the infant's feet and legs, and set fire to the crib with a cigarette lighter. She watched the fire burn for about a minute and then left the apartment and, taking her elder child, went to her neighbors', where she stayed for about thirty minutes. Defendant stated that she wanted to kill her infant son and had been thinking about burning the child for a few days. She said she had previously tried to kill her daughter by smothering the child with a pillow. This 7 March 1985 statement was admitted into evidence at trial.

Defendant pled not guilty by reason of insanity. At the pretrial hearing on defendant's motion to suppress the 6 and 7 March statements, a court-appointed forensic psychiatrist testified that on 6 and 7 March, when the statements were made, defendant lacked sufficient mental capacity to know and understand her constitutional rights or to make a knowing and intelligent waiver of those rights. At trial, defendant presented testimony that as a result of her attempt to suffocate her daughter in 1984, she had been admitted to Catawba Memorial Hospital in Hickory, where she was diagnosed as suffering from a major depression with psychosis. Further testing in that year yielded the conclusion that defendant suffered from schizophrenia, disorganized type, with paranoid features. Following her release from Catawba Memorial, defendant continued in therapy for a short while, but then her case was terminated and by June 1984, she was back with her husband and daughter. At about this time, she became pregnant with her son, the victim in this case. The child was born in February 1985.

The court-appointed psychiatrist, Dr. Selwyn Rose, evaluated defendant and treated her prior to trial. He testified at trial that at the time of the fire defendant suffered from paranoid schizophrenia and mental retardation such that she lacked the capability of knowing the nature and quality of her behavior. The jury nevertheless found defendant guilty of both first-degree murder, for which it recommended a life sentence, and of first-degree arson.

I

[1] At the pretrial hearing on defendant's motion to suppress both her 6 and 7 March 1985 inculpatory statements, Dr. Rose testified to the effect that defendant was incapable of understanding or waiving her constitutional rights on both dates because of her mental retardation and schizophrenia. The court ruled that defendant's 7 March statement was admissible. In its order, the court made findings of fact based on an evaluation of defendant made by Dr. Mary Rood at the Dorothea Dix Hospital in the weeks following defendant's arrest. Defendant now attacks the findings in the court's order as based on incompetent evidence. She argues that not only did the Dorothea Dix report pertain solely to her capacity to proceed to trial, but also that because it

was not properly introduced at the pretrial hearing, the court should not have considered it when making its ruling on her ability to waive her constitutional rights. She further argues that the only competent evidence on the question of her mental ability was Dr. Rose's testimony. We disagree.

Prior to petitioning the court for funds to hire Dr. Rose, defendant's counsel obtained an order committing defendant to Dorothea Dix in order to determine her capacity to proceed to trial, pursuant to N.C.G.S. § 15A-1002. Defendant's counsel also requested the Dorothea Dix staff to evaluate defendant's capacity to distinguish between right and wrong at the time of the offenses. At the pretrial hearing, Dr. Rose testified on direct examination that he had consulted the Dorothea Dix evaluation as well as other medical records in forming his opinion about defendant's ability to understand and waive her constitutional rights. On cross-examination, the district attorney questioned Dr. Rose extensively about the Dorothea Dix evaluation. The record discloses that although Dr. Rose acknowledged the results of the tests performed on defendant at Dorothea Dix as being accurate, he disagreed with the conclusions drawn from them. N.C.G.S. § 8C-1, Rule 705 provides in part that an expert may be required on cross-examination to disclose the underlying facts or data upon which he relied in forming his expert opinion. The district attorney, therefore, properly used the conclusions in the Dorothea Dix report, parts of which he read to Dr. Rose, to impeach the latter's opinion under Rule 705 as to defendant's ability to understand and waive her constitutional rights.

Defendant argues that the record does not demonstrate conclusively that the Dorothea Dix report was properly introduced into evidence. We note, however, that the following exchange took place during the district attorney's cross-examination of Dr. Rose:

> Q: And now with reference to that report from Dorothea Dix, have you found that, sir?
>
> A: I don't find my copy. Can I borrow somebody's, please? It is in a mass of data here, I think.
>
> Q: I understand.
>
> A: Yes, I have it in front of me now.

MR. GAINES: I object to questions concerning the report from Dorothea Dix.

MR. ZIMMERMAN: I am going to offer it to the Court on Voir Dire. I think it is competent and has been competent in every case I have tried in the past sixteen years.

COURT: Over-ruled, go ahead.

We also note that in the table of exhibits prepared by the court reporter, the Dorothea Dix records are listed as introduced as State's Exhibit No. 6. We cannot say, therefore, that the Dorothea Dix report was not introduced as evidence. The State argues that the trial court could correctly admit and consider the report under N.C.G.S. § 8C-1, Rule 703. We agree. Under Rule 703, an expert may give his opinion based on facts not otherwise admissible in evidence provided that the information considered by the expert is of the type reasonably relied upon by experts in the particular field in forming opinions or inferences on the subject. Prior to the enactment of Rule 703, this Court had adopted a policy that allowed experts to give their opinion when the information upon which they relied met an "inherently reliable" test. *State v. Huffstetler*, 312 N.C. 92, 322 S.E. 2d 110 (1984), *cert. denied*, 471 U.S. 1009, 85 L.Ed. 2d 169 (1985); *State v. Wood*, 306 N.C. 510, 294 S.E. 2d 310 (1982), *appeal after remand*, 310 N.C. 460, 312 S.E. 2d 467 (1984); *State v. Wade*, 296 N.C. 454, 251 S.E. 2d 407 (1979). The official Commentary notes that although Rule 703 requires that the facts or data "be of a type reasonably relied upon by experts in the particular field" rather than that they be "inherently reliable," the thrust of *Wade* is consistent with the rule. In *Wood* we observed that

> [t]estimony as to matters offered to show the basis for a physician's opinion and not for the truth of the matters testified to is not hearsay. "We emphasize again that such testimony is not substantive evidence." *State v. Wade*, . . . 296 N.C. at 464, 251 S.E. 2d at 412. Its admissibility does not depend on an exception to the hearsay rule, but on the limited purpose for which it is offered.

State v. Wood, 306 N.C. at 516-17, 294 S.E. 2d at 313. In *Huffstetler* we noted little difference between the "inherently reliable" standard and the "reasonable reliance" standard. In the

case *sub judice* the trial court could properly admit the Dorothea Dix report under Rule 703 for the limited purpose of showing part of the underlying basis of Dr. Rose's opinion.

Under Rule 705 the district attorney had demonstrated to the trial court, sitting as finder of fact, that some of the underlying data that Dr. Rose used in reaching his opinion about defendant's mental condition was directly contrary to that opinion. The Dorothea Dix report concluded that (1) defendant was intellectually limited but not mentally ill, (2) she was capable of proceeding to trial, and (3) she was able to distinguish right from wrong as to the charges against her. The trial court was required to make a decision on the admissibility of defendant's 7 March inculpatory statement based on defendant's mental capacity. In order to do this, the court could properly consider Dr. Rose's opinion, the underlying bases for that opinion, and the evidence presented to impeach that opinion. Merely because Dr. Rose was the only psychiatrist to testify at the hearing does not mean that the court was obligated to find his opinion dispositive, particularly when some of the underlying data he consulted and partially agreed with had reached a contrary conclusion. Judge Mills properly noted in his order that information contrary to Dr. Rose's opinion had been brought out on cross-examination and that this information was part of the underlying data upon which Dr. Rose had based his opinion.

The presumption in non-jury trials is that the court disregards incompetent evidence in making its decision. *City of Statesville v. Bowles*, 278 N.C. 497, 180 S.E. 2d 111 (1971). We have on numerous occasions held that if a trial judge's findings of fact are supported by competent evidence, they are conclusive on appeal. *See, e.g., State v. Jackson*, 302 N.C. 101, 273 S.E. 2d 666 (1981). A trial judge's findings of fact will be reversed only where it affirmatively appears that they are based in whole or in part upon incompetent evidence. *State v. Davis*, 290 N.C. 511, 227 S.E. 2d 97 (1976). It cannot be said that the trial judge's findings here are based upon incompetent evidence. It was within Judge Mills' prerogative to disbelieve Dr. Rose's testimony, especially in view of the fact that his testimony was substantially impeached. The only evidence offered to rebut the presumption of competency having been rejected, Judge Mills was left with the presumption. In addition, there was defendant's statement which was entirely coher-

ent, which was completely responsive to the questions asked when the statement was taken, and which coincided with the evidence found at the scene and disclosed by the investigation. We conclude that there was an adequate basis for Judge Mills' findings of fact as to defendant's capacity to understand and waive her constitutional rights.

[2] Defendant goes on to argue that the evidence of her mental illness and diminished mental capacity was sufficient to prove that she lacked the ability to give a voluntary statement. She relies on *State v. Ross*, 297 N.C. 137, 254 S.E. 2d 10 (1979), in which we held that a defendant's confession cannot be used against her when " 'the evidence indisputably establishes the strongest probability that [the defendant] was insane and incompetent at the time [s]he allegedly confessed.' " *Id.* at 141, 254 S.E. 2d at 12 (quoting *Blackburn v. Alabama*, 361 U.S. 199, 207, 4 L.Ed. 2d 242, 248 (1960)). Defendant's reliance on *Ross* is misplaced. There, the defendant, convicted of first-degree burglary, was suffering from chronic, undifferentiated schizophrenia, which included delusions and a misinterpretation of reality. The only evidence the State introduced as to defendant's mental competence was the testimony of a deputy sheriff present when defendant gave his statement. Portions of the statement were neither logical nor sensible. Here, in contrast, impeachment evidence was used to cast doubt upon Dr. Rose's conclusion that defendant was mentally incompetent. Defendant's statement was logical and straightforward. We cannot conclude that the evidence here indisputably establishes that defendant was insane at the time she confessed.

Moreover, in *State v. White*, 291 N.C. 118, 229 S.E. 2d 152 (1976), we reaffirmed our holding in *State v. Thompson*, 287 N.C. 303, 214 S.E. 2d 742 (1975), that subnormal mentality is a factor to be considered in determining the voluntariness of a confession but that this condition, standing alone, does not render an otherwise voluntary confession inadmissible. Both Dr. Rose and Dr. Rood at Dorothea Dix agreed that defendant was somewhat mentally retarded. Under *White*, slight mental retardation would not render defendant's 7 March confession inadmissible unless other circumstances precluding understanding or the free exercise of will were present. When Detective Edwards interviewed defendant at the jail, he read each of defendant's constitutional rights to her. She indicated that she understood them and she signed a

waiver of rights form. She made the statement which the detective wrote out for her. After reading it, defendant signed the statement. The record fails to show any circumstances precluding understanding or the free exercise of defendant's will. We conclude therefore that Judge Mills' finding that defendant's 7 March confession was voluntarily given was supported by competent evidence and is conclusive on appeal.

[3] Defendant finds a second basis upon which to build her argument that her 7 March inculpatory statement was inadmissible. Judge Mills suppressed her 6 March statement because he found it to be the result of an in-custody interrogation prior to which flawed *Miranda* warnings had been given. Defendant contends that the 6 March statement resulted from an unlawful seizure of her person which then tainted the 7 March confession. *Dunaway v. New York*, 442 U.S. 200, 60 L.Ed. 2d 829 (1979). The State argues that Judge Mills erred in concluding that defendant was in custody when she was questioned on 6 March, so that her 7 March confession remains untainted. We agree.

We begin with the premise that *Miranda* warnings need only be given to a person who is subjected to custodial police interrogation. *State v. Davis*, 305 N.C. 400, 290 S.E. 2d 574 (1982). There, we stated:

> Thus, if it be concluded that a defendant was not "in custody" at the time of questioning, a reviewing court need not consider whether he was subjected either to express questioning or its equivalent, as such considerations come into play only for the purpose of determining whether a person has been "interrogated" after it has been concluded that he was "in custody" at the crucial time. If it be determined that he was not in custody, then it may be concluded *ipso facto* that he was not interrogated for *Miranda* purposes, and the reviewing court is not required to consider whether [he] waived his rights under *Miranda*. . . . [Citing *Rhode Island v. Innis*, 446 U.S. 291, 64 L.Ed. 2d 297 (1980).]
>
> . . . .
>
> In determining whether a defendant is "in custody" for *Miranda* purposes, however, the reviewing court may rely upon neither the subjective intent of the police to restrain

> him nor the subjective belief of the defendant as to what the police would do if he attempted to leave. Instead, the reviewing court must determine whether the suspect was in custody based upon an objective test of whether a reasonable person in the suspect's position would believe that he had been taken into custody or otherwise deprived of his freedom of action in any significant way or, to the contrary, would believe that he was free to go at will. *See United States v. Mendenhall*, 446 U.S. 544, 554, 64 L.Ed. 2d 497, 509, 100 S.Ct. 1870, 1877 (1980).

Id. at 409, 410, 290 S.E. 2d at 580-81.

The transcript of the suppression hearing shows that State Bureau of Investigation Agent Keller went to defendant's apartment on 6 March and learned from Agent Campbell, a specialist in arson investigations, that the fire had been set by human hands with a liquid accelerant. Agent Campbell then introduced Agent Keller to defendant and asked her if she would talk to them at the Sheriff's Department, to which request defendant agreed. Defendant's minister asked to speak to defendant and was allowed to do so. Defendant, her husband and her sister-in-law were then driven in Agent Keller's car to the Sheriff's Department. The officers interviewed defendant's husband for approximately thirty minutes while defendant and her sister-in-law waited downstairs. Defendant was then asked to come upstairs, was informed that she did not have to talk to the officers and was told that they wanted to interview her about the facts surrounding her child's death. She was twice informed that she was free to go before Agent Keller advised her of all her *Miranda* rights except that if she could not afford to hire an attorney, one would be appointed to represent her. Defendant then proceeded to give a series of explanations as to how the fire started. The interview was conducted in a room that Detective Keller described as comfortable. He testified that defendant was not threatened in any way and that she would have been allowed to leave the room at any time during the hour and thirty-five minute interview had she so desired. She did not choose to do so.

This evidence leads us to the conclusion that a reasonable person in defendant's position would not have believed that she had been taken into custody or otherwise deprived of her freedom

of action in any significant way. On the contrary, a reasonable person in defendant's position would have believed that she was free to go at will. *State v. Davis*, 305 N.C. 400, 290 S.E. 2d 574. We hold that defendant was not in custody when she made her 6 March inculpatory statement, so that *Miranda* warnings were not necessary at that time. The court erred in suppressing defendant's 6 March statement. Moreover, defendant's 7 March statement was untainted and admissible. Defendant's complaint that she was unlawfully seized is accordingly without merit. Defendant's assignments of error with regard to the admissibility of her 7 March statement are overruled.

II

Defendant next argues that the trial court erred in restricting the form and substance of certain questions her defense counsel asked of potential jurors as well as the manner in which these questions were asked. The questions fall into two categories: (1) inquiry of individual jurors concerning the insanity issue, and (2) various specific inquiries to which the trial court sustained the district attorney's objections.

We begin with the premise that the presiding judge has the duty to supervise the examination of prospective jurors. Regulation of the manner and the extent of inquiries on voir dire rests largely in the trial judge's discretion. *State v. Young*, 287 N.C. 377, 387, 214 S.E. 2d 763, 771 (1975), *death penalty vacated*, 428 U.S. 903, 49 L.Ed. 2d 1208 (1976); N.C.G.S. § 9-14 (1986). 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).

[4] We turn now to the first category of questions about which defendant complains. Defendant's counsel wanted to put certain questions relating to the insanity defense to each juror individually. The trial court, however, required him to direct these questions to the jury panel as a whole rather than to individual jurors. The questions included, for example, whether any juror had visited a person in a mental hospital, had been a patient in such a hospital, believed that psychiatry or psychology was not a legitimate part of the medical profession, or disagreed with the concept that a person incapable of understanding the difference

between right and wrong due to some mental illness should be found not guilty by reason of insanity.

In *State v. Young*, 287 N.C. 377, 214 S.E. 2d 763, we stated:

> The voir dire examination of prospective jurors serves a dual purpose: (1) to ascertain whether grounds exist for challenge for cause and (2) to enable counsel to exercise intelligently the peremptory challenges allowed by law. *State v. Allred*, 275 N.C. 554, 169 S.E. 2d 833 (1969). "Obviously, prospective jurors may be asked questions which will elicit information not, per se, a ground for challenge in order that the party, propounding the question, may exercise intelligently his or its peremptory challenges." *State v. Jarrette*, [284 N.C. 625, 292 S.E. 2d 721 (1974)].

State v. Young, 287 N.C. at 387, 214 S.E. 2d at 771. *See also* N.C.G.S. § 15A-1214(c) (1986). Defendant contends that because her defense counsel was forced to ask these questions of the jury panel as a whole, the opportunity adequately to base the use of her peremptory challenges upon identification of prejudiced or biased jurors was lost. Our examination of the transcript of the jury voir dire persuades us otherwise. The record shows that the jurors spoke up individually if the question asked of them as a panel concerned them individually. For example, defendant's counsel was permitted to ask the panel whether any juror disagreed with the concept of the insanity defense and then was permitted to ask and obtain an answer from each individual juror. His other questions relating to the insanity defense were answered individually by the jurors where necessary. We conclude therefore that defendant was not denied an adequate opportunity to form a basis upon which to exercise her peremptory challenges.

[5] The second category of questions about which defendant complains is also related to her insanity defense, but here the trial court sustained the district attorney's objections to each specific question, and the questions were not answered. We address these questions seriatim.

First, defendant asked the jurors whether they understood that if they did not return a verdict of first-degree murder, punishment would be imposed by the trial judge. After the trial

judge sustained the district attorney's objection, he informed counsel that he would instruct the jury as to the applicable law at the appropriate time. This was entirely proper.

Second, defendant asked the jurors whether they believed that a person could be so mentally ill as to be incapable of knowing the nature and quality of her act, and whether they believed that a person could never have a mental condition so severe as to prevent her from distinguishing between right and wrong. These questions had been previously asked of the jurors, though in slightly different wording, and were therefore repetitious. The trial court properly sustained the district attorney's objections.

Third, defendant asked one juror what she knew about schizophrenia. The trial judge sustained an objection to the question. Defendant then was allowed to ask a barrage of questions to the same effect of the entire panel. This assignment of error is meritless.

Fourth, defendant asked numerous questions which inquired of the jurors whether they could take into account various facts and conditions when making their decision on defendant's guilt or innocence. Again, most of these questions related to the insanity defense. Objections to a number of these questions were sustained. Many of those to which objections were sustained were repetitious, some speculated as to what the evidence might show, and others were simply attempts to stake out the jurors as to what their decision would be if they found certain facts to exist. The trial court properly sustained the district attorney's objections to these questions.

Finally, defendant complains that she was prevented from clarifying a comment by the district attorney concerning "turning [defendant] loose" by not being allowed to question jurors concerning what they believed would happen to defendant if they found her not guilty. The district attorney had stated that if a person was guilty and the State proved it, then that person should be convicted and punished. If a person was not guilty, or the State failed to prove guilt, then the person should be "turned loose." We note that when the district attorney made these remarks, defendant immediately objected to "the turning loose business." The trial court sustained defendant's objection, thereby vitiating any prejudice to defendant. Any possible

adverse impact on the jury was created by defendant's own subsequent repeated references to the phrase.

We conclude that the trial court did not abuse its discretion in its management of the jury voir dire in defendant's case. These assignments of error are overruled.

III

[6] Defendant next attacks the district attorney's conduct during the trial, characterizing it as improper and prejudicial throughout. Further, she maintains that the trial court failed in its duty to control the trial by failing to curtail the district attorney's behavior, and erred in denying her a new trial on the grounds of the district attorney's improper arguments during his closing. We find the district attorney's conduct less than laudable, but we conclude that it was not sufficiently prejudicial to warrant the trial court's *ex mero motu* intervention or to grant defendant a new trial.

Defendant directs our attention to thirty-eight different instances of the district attorney's conduct, which she describes as ranging from sarcastic comments to impertinent and insulting interruptions during defendant's direct examination of her own witnesses. The State makes a valiant attempt to find justification for the district attorney's behavior in each instance. Several examples will suffice to suggest the flavor of this contest.

Defendant explains that on direct examination of one of her expert witnesses, a Dr. Blumenthal, defense counsel asked him if a Mr. Wagner's testing results were consistent with what he had found in January 1984. After Dr. Blumenthal answered, the district attorney objected and stated, "[T]here's no consistency of Mr. Wagner in their data." Defendant argues that the district attorney was thus able to contradict the witness' testimony on direct examination by his own statements. The State argues that the district attorney was merely stating the grounds for his objection. Again, during direct examination of defendant's witness Dr. Selwyn Rose, the district attorney objected and moved to strike an answer Dr. Rose had given. The district attorney then added, "Your Honor please, this is absolutely ridiculous." Defense counsel requested an instruction on this remark. The trial court thereupon instructed *both* attorneys to refrain from making com-

ments, even though the improper remark had come from the district attorney alone. The State argues that the context of this remark was Dr. Rose's speculation as to how officers were able to get statements from defendant about her child's death when, as Dr. Rose testified, she was so disconnected from it. Finally, during Dr. Rose's cross-examination, defense counsel objected. The district attorney made the following comment, "I'm not interested whether you think it's sick or not. The idea of killing a fetus is sick to me. What do you think about it?" Upon further objection, the district attorney withdrew his question and the trial court then sustained defense counsel's objection. The State argues here that this occurred during the cross-examination of a critical defense witness and that the trial court's action cured any error. Other examples include the district attorney's allegedly deliberate mispronunciation both of a defense witness' name and of defendant's mental malady.

We have carefully reviewed the entire transcript, but in the recognition that this was a hotly contested trial, we cannot discern *prejudicial* error. The conduct of a trial is left largely to the control and discretion of the presiding judge. *Hamilton v. Henry*, 239 N.C. 664, 80 S.E. 2d 485 (1954). Numerous objections of counsel were sustained and numerous instructions given throughout the trial. We note that at the end of the third day of trial, when defendant moved for a mistrial on grounds of the district attorney's misconduct, the trial judge made the following comment:

> THE COURT: Certainly the basic conduct of the trial is within the discretion of the trial court. I will concede that some of [the district attorney's] comments are improper as well as some of [defense counsel's], and I'd appreciate it if both of you would refrain from improper comments and that sort of thing. And I guess I'll just have to start embarrassing you in front of the jury and maybe that will have some effect on it, but things will go a lot smoother and a lot quicker and probably serve both your clients better if you both acted in a courteous and gentlemenly [sic] manner.

The trial judge denied defendant's motion. The next morning, the district attorney offered an apology to the court for any improper comments he might have made and for his interruption of witnesses. He stated that rather than interrupt, he would in the

future make an objection. In spite of this resolve, however, as the trial wore on, the trial court was obliged to warn both attorneys to refrain from making comments and arguing objections in front of the jury. At one point, the jury was sent out. The trial court then instructed both lawyers to join him in chambers to discuss abiding by the rules of court. The transcript shows that this discussion appears to have had some effect. We cannot say therefore that the trial court failed adequately to control the district attorney's conduct to the point that defendant was prejudiced, or that it erred in denying defendant a new trial grounded on this conduct.

We should not be understood, however, as facilely condoning the behavior demonstrated by the record before us. Trials should not be allowed to degenerate into a battle of personalities in which the interests of the parties and the rules of court are pushed aside by the efforts of opposing counsel to upstage each other. *See* General Rules of Practice, Rule 12 (1987) (Courtroom Decorum); North Carolina Rules of Professional Conduct, Canon VII, Rule 7.1 (Vol. III 1985) (Representing the Client Zealously).

[7] Defendant next argues that the trial judge made an improper comment to the effect that he did not have to listen to the evidence because that was the jury's job. Defense counsel did not object to the comment in question at trial, but apparently objected to it in the local newspaper. The comment does not appear in the transcript, but the trial judge later explained its context and his intent on the record, although out of the jury's presence. We conclude, however, that defendant has failed to preserve her argument because of the lack of contemporaneous objection. N.C.G.S. § 15A-1446(a) and (b) (1983). This assignment of error is overruled.

[8] Defendant's final contention is that the trial court erred in failing to intervene in the State's closing argument to stop the district attorney's improper arguments and in failing to grant defendant a new trial on the same grounds. Defendant specifically complains that the district attorney should not have argued to the jury that her expert witnesses were being compensated to testify, or that the only way to assure that she would not kill again was to find her guilty, or that if the jury should find her not guilty by reason of insanity, she might be released within ninety days. Defendant's contention is without merit.

> The law in this area is clear. We have consistently held that counsel must be allowed wide latitude in the argument of hotly contested cases. He may argue to the jury the facts in evidence and all reasonable inferences to be drawn therefrom together with the relevant law so as to present his side of the case. *State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125; *State v. Noell*, 284 N.C. 670, 202 S.E. 2d 750. Whether counsel abuses his privilege is a matter ordinarily left to the sound discretion of the trial judge, and we will not review the exercise of this discretion unless there be such gross impropriety in the argument as would be likely to influence the verdict of the jury.

State v. Covington, 290 N.C. 313, 327-28, 226 S.E. 2d 629, 640 (1976). A close reading of the district attorney's closing argument reveals no such gross impropriety.

First, an expert witness' compensation is a permissible cross-examination subject to test partiality towards the party by whom the expert was called. *State v. Creech*, 229 N.C. 662, 51 S.E. 2d 348 (1949). Here, the district attorney questioned Dr. Rose and Mr. Wagner about payment for their services. He could therefore properly argue the evidence he had drawn from them to the jury. Second, the district attorney's alleged implication that the only way to ensure that defendant would not kill again was to find her guilty rather than not guilty by reason of insanity is not borne out by the record. A reading of this portion of the closing argument in context shows that the district attorney was speaking to the four possible verdicts which would result in the restraint of defendant's liberty. This Court has held that a prosecutor may properly ask the jury to return the highest degree of conviction and the severest punishment available for the crime. *State v. Hamlet*, 312 N.C. 162, 321 S.E. 2d 837 (1984). Third, the district attorney did not argue that defendant would not be committed if the jury found her not guilty by reason of insanity. Rather, he stated the grounds for commitment but misstated the maximum recommitment period. When considered in the totality of the argument, this misstatement did not rise to the level of prejudicial error. We are unable to conclude that the district attorney's closing argument was so grossly improper that it required the trial court's intervention *ex mero motu*. Neither does it warrant a new trial. These assignments of error are overruled.

IV

[9] Defendant next argues that the trial court erred in failing to dismiss the arson charge against her. She contends that the State failed to present evidence that she intended to burn the apartment. This argument fails.

The common law definition of arson is in force in this state. Arson is the willful and malicious burning of the dwelling house of another person. *State v. Vickers*, 306 N.C. 90, 291 S.E. 2d 599 (1982).

> "For a burning to be 'wilful and malicious' in the law of arson, it must simply be done 'voluntarily and without excuse or justification and without any bona fide claim of right. An intent or animus against either the property itself or its owner is not an element of the offense' of common law arson."

State v. White, 291 N.C. 118, 126, 229 S.E. 2d 152, 157 (quoting *State v. White*, 288 N.C. 44, 50, 215 S.E. 2d 557, 561 (1975)). The evidence in this case substantially supports each element of arson. One can reasonably infer from the act of setting fire to the infant's crib and then leaving the apartment for a period of at least thirty minutes that the fire would spread to the structure around the crib. Defendant would hardly have left her apartment, taking her elder child with her, had she not anticipated that it would catch fire. While she visited her neighbors, she left her seat three times to look at her apartment from their front door. The reasonable jury inference from these actions was that defendant intended the apartment to burn and was looking to see if it was on fire.

Though defendant set her own apartment afire, the "dwelling house of another" element of common law arson is satisfied here. The record reflects that the building in which defendant resided was an apartment house consisting of several apartments in a single building. If a dweller in an apartment house burns the building, he or she is guilty of arson even though the fire is confined to the rooms occupied by the wrongdoer, because the building is the dwelling house of the other tenants. The trial judge properly instructed the jury on this aspect of the case.

> [T]he main purpose of common law arson is to protect against danger to those persons who might be in the dwelling house which is burned. Where there are several apartments in a single building, this purpose can be served only by subjecting to punishment for arson any person who sets fire to any part of the building.

State v. Jones, 296 N.C. 75, 77-78, 248 S.E. 2d 858, 860 (1978).

Defendant's assignments of error in this regard are overruled.

V

[10] Defendant's next complaint concerns the trial court's jury instructions. Although requested to do so, the court refused to include all of the evidence supporting defendant's plea of insanity in the jury instruction on this defense. She argues that the court's refusal to give defendant's requested instruction prejudiced her because the insanity defense was the crux of her case. We find no prejudice. The trial court gave the instruction from N.C.P.I.—Crim. 304.10, and although it refused to give defendant's requested instruction verbatim, it drew the jury's attention to most of the items of evidence defendant had wanted included. A trial court is not required to give requested instructions verbatim. *State v. Beach*, 283 N.C. 261, 196 S.E. 2d 214 (1973). Defendant's requested instruction was given in substance. This argument is without merit.

[11] Defendant argues that the trial court erred in instructing the jury that it could consider the fact that defendant had been found competent to stand trial in its decision on the insanity defense. We disagree. Evidence was introduced at trial describing defendant's behavior immediately before and after the crimes, in addition to which the jury observed defendant's behavior during the trial. Defendant herself presented exhaustive evidence of the testing she underwent before and after the crimes. That she had been found competent to stand trial after the crimes was simply one factor that the jury could include when considering all the evidence with regard to defendant's insanity defense. Moreover, although the tests for competency to stand trial and insanity are different, the trial court explained the difference to the jury, and instructed it that the competency finding was not conclusive or

binding in its decision on the insanity defense. We conclude that the trial court did not err in its instruction on defendant's insanity defense. This assignment of error is overruled.

[12] Defendant next contends that the trial court erred in refusing to give her requested instruction that drew attention to specific aspects of the diseases and deficiencies of the mind which might possibly have affected her ability to commit the murder with malice or with premeditation and deliberation. We are not so persuaded. The trial court gave an instruction following N.C.P.I. —Crim. 206.10 which included an explanation of intent, premeditation and deliberation. In addition, the court instructed the jury as follows:

> Now, specific intent to kill is a necessary ingredient of premeditation and deliberation. If the defendant does not have the mental capacity to form an intent to kill or to premeditate and deliberate upon the killing, she cannot be convicted of murder in the first degree whether such mental deficiency be due to disease of the mind or some other cause.

Defendant's requested instruction concerning the effect of mental deficiency arising from diseases of the mind was given in substance. The trial court did not err in the instruction it gave. *See State v. Monk*, 291 N.C. 37, 229 S.E. 2d 163 (1976).

[13] Defendant also requested a jury instruction to the effect that if the jury should find her not guilty by reason of insanity, she had stipulated that she met the criteria for involuntary commitment under article 5A of chapter 122 of the North Carolina General Statutes. The trial court refused to do so. Defendant now argues that the instruction that the trial court *did* give was insufficient to alleviate the jury's fears that she would be allowed to go free if it found her not guilty by reason of insanity. The State contends that the trial court's instruction complied with this Court's decision in *State v. Hammonds*, 290 N.C. 1, 224 S.E. 2d 595 (1976). We agree. In *Hammonds* we held that "upon request, a defendant who interposes a defense of insanity to a criminal charge is entitled to an instruction by the trial judge setting out in *substance* the commitment procedures outlined in G.S. 122-84.1, applicable to acquittal by reason of mental illness." *Id.* at 15, 224 S.E. 2d at 604 (emphasis added). Chapter 122 has been repealed and replaced by chapter 122C. The trial court gave the pattern

jury instruction in N.C.P.I.—Crim. 304.10 which informed the jury of the commitment hearing procedures in N.C.G.S. §§ 15A-1321 and -1322, pursuant to article 5 of chapter 122C. This instruction adequately charged the jury regarding procedures upon acquittal on the ground of insanity. *State v. Adcock*, 310 N.C. 1, 310 S.E. 2d 587. Defendant's assignment of error is overruled.

[14] Defendant's final assignment of error in this area is that the trial court erred because it instructed the jury on the insanity defense in a confusing manner. In addition, she claims prejudicial error from the court's failure to instruct on commitment procedures before sending the jury out, making it necessary to bring the jury back for this purpose. We disagree.

Since defendant failed to object at trial on the grounds she here alleges, we review for plain error. *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983); N.C.R. App. P. 10(b)(2). We find none. Our reading of the trial court's jury instructions reveals that at one point the judge's charge regarding the jury's consideration of and answer to the insanity issue was slightly confusing, but the judge immediately corrected himself and clarified the matter. Although he failed to give the commitment instruction before it retired, the jury was brought back and given the commitment instruction. At the same time, the judge went over the special insanity issue again. We conclude that this is not the " 'exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done." ' " *State v. Odom*, 307 N.C. at 660, 300 S.E. 2d at 378 (quoting *United States v. McCaskill*, 676 F. 2d 995, 1002 (4th Cir. 1982)). These assignments of error are overruled.

VI

[15] Finally, defendant contends that the trial court erred at defendant's second sentencing hearing on the arson conviction in finding in aggravation that the victim was very young. N.C.G.S. § 15A-1340.4(1)(j) (1983). She argues that use of the infant's age as an aggravating factor in the arson case was a form of double jeopardy, as she had already been convicted of the child's murder. She also contends that the aggravating factor applies only to offenses against persons and not to offenses against property, such as arson. Defendant has misunderstood the law. Under N.C.G.S.

§§ 15A-1340.3 and -1340.4 the victim's age is a statutory aggravating factor which the court may consider in the arson case regardless of whether the arson results in a death. The court therefore did not aggravate the sentence for arson based on defendant's conviction in the joined murder.

Moreover, defendant was convicted of first-degree arson. First-degree arson, as distinguished from second-degree, arises where the dwelling house is occupied at the time of the burning. N.C.G.S. § 14-58 (1986). First-degree arson is an offense against both persons and property. N.C.G.S. § 15A-1340.4(1)(j) addresses the victim's *vulnerability*. *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983). Even had defendant's child not been harmed by the burning, if it resulted in sufficient charring to constitute arson, defendant would be guilty of first-degree arson and the child's vulnerability because of its young age could still have been used to aggravate defendant's arson conviction. This aggravating factor stands independent of the murder conviction and the trial court could properly consider it. Defendant's assignments of error are overruled.

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

No error.

RARITAN RIVER STEEL COMPANY v. CHERRY, BEKAERT & HOLLAND, A GENERAL PARTNERSHIP; GARY J. WOLFE; S. DONALD BLANTON; HERMAN O. COLEMAN; C. CLINE COMER; W. DOUGLAS SERRISS; JOE R. NANTZ; CLARENCE EUGENE WILLIAMS, SR.; PRESTON CLARK; HOWARD J. KIES; HARRACE M. ROLNICK; PETER A. CAPRISE; JERRY P. FOX; ERIC C. PRESSLEY; R. TURNER RIVENBARK; WAYNE COMSTOCK; TONY W. WARFFORD; WIT BROWN; LOUIS EDDIE DUTTON; WILLIAM LANIER, JR.; DAVID WHALEY; T. ERNEST SIEVELKORN; JAMES LANEY; HAROLD B. HENDERSON; ALBRY SHAW; J. ARLEY ROWE, JR.; WILLIAM BLANKENSHIP; ROBERT HOLMAN; DON HOLLAND; ANTHONY G. CAMPAS; JOHN COMPTON; DONALD LEONARD; MICHAEL NEWHOUSE; CHARLES WEATHERSBY; WALLACE PERMENTER; CLYDE FUSSELL; WAYNE BUSEY; JERRY LLOYD; DAVID BOLTON; JOHN CORDELL; RALPH DAVIS; HARRY STOLTE, JR.; CHARLES BROWN; WAYNE GRIER; HARRY GRIGGS, JR.; RALPH HAROLD; FRANCES KOGER; KENNETH LITTON, JR.; CHARLES YOUNG; BOBBY BLACK; WILLIAM FLURRY; JACK MOODY; RUDOLF OHME, JR.;

E. A. THOMAS, JR.; RAYMOND WARCO; E. C. BLACKBURN; ANTHONY MORRIS; W. H. PETERSON; J. DOMINQUEZ; ROBERT HARTER; LLOYD BRAMMER; HENRY COLBRETH; PATRICK CALLEN; W. H. HUFF; JEFFRY McCLANATHAN; RICHARD ROBERTS; WILBURN ROBERTSON; GEORGE TORNWALL; AND ROBERT WHITE, PARTNERS

SIDBEC-DOSCO, INC. v. CHERRY, BEKAERT & HOLLAND, A GENERAL PARTNERSHIP; GARY J. WOLFE; S. DONALD BLANTON; HERMAN O. COLEMAN; C. CLINE COMER; W. DOUGLAS SERRISS; JOE R. NANTZ; CLARENCE EUGENE WILLIAMS, SR.; PRESTON CLARK; HOWARD J. KIES; HARRACE M. ROLNICK; PETER A. CAPRISE; JERRY P. FOX; ERIC C. PRESSLEY; R. TURNER RIVENBARK; WAYNE COMSTOCK; TONY W. WARFFORD; WIT BROWN; LOUIS EDDIE DUTTON; WILLIAM LANIER, JR.; DAVID WHALEY; T. ERNEST SIEVELKORN; JAMES LANEY; HAROLD B. HENDERSON; ALBRY SHAW; J. ARLEY ROWE, JR.; WILLIAM BLANKENSHIP; ROBERT HOLMAN; DON HOLLAND; ANTHONY G. CAMPAS; JOHN COMPTON; DONALD LEONARD; MICHAEL NEWHOUSE; CHARLES WEATHERSBY; WALLACE PERMENTER; CLYDE FUSSELL; WAYNE BUSEY; JERRY LLOYD; DAVID BOLTON; JOHN CORDELL; RALPH DAVIS; HARRY STOLTE, JR.; CHARLES BROWN; WAYNE GRIER; HARRY GRIGGS, JR.; RALPH HAROLD; FRANCES KOGER; KENNETH LITTON, JR.; CHARLES YOUNG; BOBBY BLACK; WILLIAM FLURRY; JACK MOODY; RUDOLF OHME, JR.; E. A. THOMAS, JR.; RAYMOND WARCO; E. C. BLACKBURN; ANTHONY MORRIS; W. H. PETERSON; J. DOMINQUEZ; ROBERT HARTER; LLOYD BRAMMER; HENRY COLBRETH; PATRICK CALLEN; W. H. HUFF; JEFFRY McCLANATHAN; RICHARD ROBERTS; WILBURN ROBERTSON; GEORGE TORNWALL; AND ROBERT WHITE, PARTNERS

No. 123PA86

(Filed 5 May 1988)

1. Accountants § 1; Negligence § 2— tort of negligent misrepresentation

The tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care.

2. Accountants § 1— audited financial statements—showing of justifiable reliance

A party cannot show justifiable reliance on information contained in audited financial statements without showing that he relied upon the actual financial statements themselves to obtain this information.

3. Accountants § 1— audited financial statements—negligent misrepresentation by accountants—insufficient complaint

Plaintiff's complaint was insufficient to state a claim against defendant accountants for negligent misrepresentation in the preparation of an audit report of the financial statements of a corporation where plaintiff alleged that it got the financial information upon which it relied in extending credit to the

audited corporation from a Dun & Bradstreet report rather than from the audited statements themselves.

4. **Accountants § 1— audited financial statements—negligent misrepresentation by accountants—sufficient complaint**

A second plaintiff did not plead facts which defeat its negligent misrepresentation claim against defendant accounting firm where it did not allege that it relied on sources other than the audited financial statements in extending credit to the audited corporation.

5. **Accountants § 1— scope of accountant's liability to third persons**

The rule set forth in *Restatement (Second) of Torts* § 552 (1977) is adopted as the standard for determining the scope of an accountant's liability to persons other than the client for whom an audit was prepared. Under this rule, an accountant's liability extends not only to those with whom the accountant is in privity or near privity but also to those persons, or classes of persons, whom he knows and intends will rely upon his opinion or whom he knows his client intends will so rely.

6. **Accountants § 1— client's use of audited statements—knowledge by auditor**

It makes no difference whether an auditor's knowledge that his client intends to supply information to another person or limited groups of persons is acquired from his client or from another source.

7. **Accountants § 1— negligent misrepresentation in audited reports—duty of care to creditors**

In an action against accountants for negligent misrepresentation in the preparation of audited financial statements for a corporation, plaintiff's complaint was sufficient to show that defendants owed it a duty of care where plaintiff alleged that, when defendants prepared audited financial statements for the corporation, they knew: (1) the statements would be used by the audited corporation to represent its financial condition to creditors who would extend credit on the basis of them; and (2) plaintiff and other creditors would rely upon these statements.

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

ON Cherry, Bekaert & Holland's petition for discretionary review of a decision of the Court of Appeals, 79 N.C. App. 81, 339 S.E. 2d 62 (1986), reversing in part the order of the trial court entered 9 May 1985 allowing defendants' motion to dismiss. Heard in the Supreme Court 11 February 1987.

Grier and Grier, by Joseph W. Grier, III and Richard C. Belthoff, Jr., for plaintiff-appellee Raritan River Steel Company.

Golding, Crews, Meekins & Gordon, by Rodney A. Dean and Andrew W. Lax, for plaintiff-appellee Sidbec-Dosco, Inc.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by James G. Billings and Martha Jones Mason, for defendant-appellants.

Smith, Helms, Mulliss & Moore, by McNeill Smith, amicus curiae.

EXUM, Chief Justice.

As the case comes before us it is an action against accountants for negligent misrepresentation. Plaintiffs, creditors of Intercontinental Metals Corporation ("IMC"), allege they incurred damages when they extended credit to IMC in reliance on incorrect information contained in an audit report on IMC's financial status prepared for IMC by defendants. Plaintiffs claim defendants were negligent in their preparation of the report.

Interesting questions of first impression are presented. The first deals with whether plaintiffs who have relied on financial information in an accountant's audit report must demonstrate that they obtained the information from the actual report itself. We conclude that they must. The second question involves the scope of an accountant's liability to persons other than the client for whom the audit report was prepared. We conclude that the scope of liability is best measured by the approach set out in the *Restatement (Second) of Torts* § 552 (1977).

I.

According to the complaints Raritan River Steel Company and Sidbec-Dosco, Inc. (hereinafter "Raritan" and "Sidbec-Dosco," respectively) in these consolidated actions are creditors of IMC. Defendants are a firm of certified public accountants, and the individual partners of the firm, retained by IMC to provide an audit of the company's financial statements for the years ending 30 September 1980 and 30 September 1981. Plaintiffs extended credit to IMC on the basis of what they contend was an incorrect overstatement of the company's net worth contained in the audit reports prepared by defendants. For their losses resulting from this extension of credit to IMC plaintiffs seek to hold defendants liable on two legal theories. The first is that defendants breached their contract with IMC and plaintiffs may take advantage of the breach as third-party beneficiaries of the contract. The second theory is negligent misrepresentation.

The trial court granted defendants' motions to dismiss plaintiffs' complaints for failure to state a claim upon which relief can be granted. N.C.G.S. § 1A-1, Rule 12(b)(6) (1983). The Court of Appeals reversed except for the dismissal of Sidbec-Dosco's third-party beneficiary claim, which it affirmed. We allowed in part defendants' petition for discretionary review. We agreed to review only the issues arising on plaintiffs' negligent misrepresentation claims. We declined to review the Court of Appeals' rulings that Raritan had stated a third-party beneficiary claim and Sidbec-Dosco had not. We now reverse the Court of Appeals' decision that Raritan has stated a claim for negligent misrepresentation. We affirm the Court of Appeals' decision that Sidbec-Dosco has stated a claim for negligent misrepresentation, albeit for different reasons.

II.

Defendants contend that the trial court properly dismissed both Raritan's and Sidbec-Dosco's complaints pursuant to Rule 12(b)(6) because neither complaint alleged reliance on the financial statements defendants audited. We agree with regard to Raritan but disagree as to Sidbec-Dosco.

A.

THE RARITAN CLAIM

Raritan's complaint states in pertinent part:

> 4. Defendant Cherry Bekaert was engaged, pursuant to a valid and enforceable contract, to examine the financial statements of Intercontinental Metals Corporation, Intercontinental Metals Trading Corporation and other related companies (collectively hereafter "IMC") as of September 30, 1981 and September 30, 1980, in accordance with Generally Accepted Auditing Standards and to express an opinion as to whether or not such financial statements presented fairly the financial position of IMC and the results of its operations and changes in its financial position for the years ending September 30, 1980 and September 30, 1981. Defendant Cherry Bekaert published its Report of Certified Public Accountants, Consolidated Financial Statements, Years ended September 30, 1981 and 1980 on or about January 30, 1982.

. . . .

6. Plaintiff had over a period of years sold hot-rolled carbon wire rod (raw steel) to IMC on open account, relying on information available to plaintiff with respect to the financial condition of IMC.

7. Subsequent to May 6, 1982, IMC placed orders for hot-rolled carbon wire rod (raw steel) with plaintiff in substantial amounts. Plaintiff's inquiry with respect to the current financial position of IMC on or about May 6, 1982 included a report from Dun & Bradstreet, Inc. showing IMC's audited net worth as of September 30, 1981, to be $6,964,475.00. The Dun & Bradstreet, Inc. report made specific reference to defendant Cherry Bekaert's Report of Certified Public Accountants as the source of information contained in its report.

8. In reliance upon information contained in the Dun & Bradstreet, Inc. report, as supplied by defendant Cherry Bekaert's Report of Certified Public Accountants, plaintiff extended credit to IMC in excess of $2,247,844.61.

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1979). " '[A] complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff[s] [are] entitled to no relief under any state of facts which could be proved in support of the claim.' " *Id.* at 103, 176 S.E. 2d at 166 (quoting 2A Moore's Federal Practice § 12.08 (2d ed. 1968)). While the concept of notice pleading is liberal in nature, a complaint must nonetheless state enough to give the substantive elements of a legally recognized claim or it may be dismissed under Rule 12(b)(6). *Stanback v. Stanback*, 297 N.C. 181, 204, 254 S.E. 2d 611, 626 (1979). Moreover, if a complaint pleads facts which serve to defeat the claim it should be dismissed. *Sutton v. Duke*, 277 N.C. at 102, 176 S.E. 2d at 166.

Raritan alleges that it got the financial information upon which it relied, essentially IMC's net worth, not from the audited statements themselves, but from information contained in Dun & Bradstreet. This allegation, we conclude, defeats Raritan's claim for negligent misrepresentation so as to render it dismissible under Rule 12(b)(6).

[1, 2] The tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care. *Howell v. Fisher*, 49 N.C. App. 488, 272 S.E. 2d 19, *disc. rev. denied*, 302 N.C. 218, 277 S.E. 2d 69 (1981); *Davidson and Jones, Inc. v. County of New Hanover*, 41 N.C. App. 661, 255 S.E. 2d 580, *disc. rev. denied*, 298 N.C. 295, 259 S.E. 2d 911 (1979). We conclude that a party cannot show justifiable reliance on information contained in audited financial statements without showing that he relied upon the actual financial statements themselves to obtain this information.

[3] Only one court, to our knowledge, has touched on the question whether a plaintiff must show that he relied upon the actual audited statements prepared by an accountant in order to have a viable claim for the accountant's negligent misrepresentation. The New Jersey Supreme Court seems to require such a showing as essential to the claim. *H. Rosenblum, Inc. v. Adler*, 93 N.J. 324, 352-53, 461 A. 2d 138, 153 (1983). After stating an expansive test for assessing accountants' liability, the Court limited its holding by declaring:

> The principle that we have adopted applies by its terms only to those foreseeable users who receive the audited statements from the business entity for a proper business purpose to influence a business decision of the user, the audit having been made for that business entity. Thus, for example, an institutional investor or portfolio manager who does not obtain audited statements from the company would not come within the stated principle.

Id. We have not found, nor have plaintiffs cited, a case in which the plaintiffs prevailed against an auditing accountant on a negligent misrepresentation claim without demonstrating that they relied upon the accountant's actual audit opinion. Even in cases, such as *Rosenblum*, in which courts have broadened the scope of those to whom the accountant owes a duty, plaintiffs have been able to show at least that they relied directly on the audited financial statements. *See International Mortgage Co. v. John P. Butler Accountancy Corp.*, 177 Cal. App. 3d 806, 223 Cal. Rptr. 218 (1986); *Touche Ross v. Commercial Union Ins.*, 514 So. 2d 315 (Miss. 1987); *H. Rosenblum, Inc. v. Adler*, 93 N.J. 324, 461 A. 2d

138; *Citizens State Bank v. Timm, Schmidt & Co.*, 113 Wis. 2d 376, 335 N.W. 2d 361 (1983).

Our holding that reliance on the audited financial statements is required in these kinds of cases stems in part from an understanding of the audit report. An audit report represents the auditor's opinion of the accuracy of the client's financial statements at a given period of time. *See generally* R. Gormley, *The Law of Accountants and Auditors* 1-26 (1981). The financial statements themselves are the representations of management, not the auditor. B. Ferst, *Basic Accounting for Lawyers* 11 (3d ed. 1975). Isolated statements in the report, particularly the net worth figure, do not meaningfully stand alone; rather, they are interdependent and can be fully understood and justifiably relied on only when considered in the context of the entire report, including any qualifications of the auditor's opinion and any explanatory footnotes included in the statements.

Raritan alleges that it relied not upon the audited financial statements as prepared by defendants but upon "information contained in the Dun & Bradstreet, Inc. report. . . ." Raritan thus pleads facts which defeat its claim for negligent misrepresentation and render this claim dismissible under Rule 12(b)(6).

B.

THE SIDBEC-DOSCO CLAIM

Sidbec-Dosco's complaint states in relevant part:

> 17. That based upon financial information showing substantial net worth of IMC, the Plaintiff extended substantial unsecured credit to IMC during 1982.
>
> . . . .
>
> 24. That the Plaintiff has incurred substantial expenses and damages as a direct result of its extension of credit to IMC and IMTC in reliance on the reported financial condition of these entities.

[4] Because Sidbec-Dosco does not allege that it relied on sources other than the audited financial statements it has not pleaded facts which defeat its claim and its complaint is not dismissible on this ground. Under the liberal rules of notice

pleading Sidbec-Dosco's complaint may not be dismissed unless "it appears to a certainty" that Sidbec-Dosco is not entitled to relief under any "state of facts." *Sutton v. Duke*, 277 N.C. at 103, 176 S.E. 2d at 166. Under its pleading Sidbec-Dosco may be able to prove at trial that it did indeed rely on the audit report prepared by defendants.

III.

The more difficult question raised by Sidbec-Dosco's complaint is whether it alleges enough to show that defendants owed it a duty of care.

The complaint specifically states:

> 5. That at the time the Defendant prepared the audited financial statements for IMC, the Defendant knew that such financial statements would be used for, among other purposes, general representations by the company of its financial condition, and that extensions of credit to IMC and its affiliated companies would be based upon such statements.
>
> . . . .
>
> 22. That the Defendant's contract with IMC was entered into for the direct benefit of the Plaintiff and other creditors *who the Defendant knew would be relying upon such information.* (Emphasis supplied.)

Courts in our sister states have recognized at least four different approaches to determine the scope of an accountant's liability for negligent misrepresentation in the context of financial audits. The most restrictive standard was first enunciated in an opinion by then Chief Judge Cardozo of the New York Court of Appeals, in which the Court concluded that to be liable for negligent misrepresentation, an accountant must be in privity of contract with the person seeking to impose liability or there must be "[a] bond . . . so close as to approach that of privity." *Ultramares Corp. v. Touche, Niven & Co.*, 255 N.Y. 170, 182-83, 174 N.E. 441, 446 (1931). Several jurisdictions follow this restrictive view. *See, e.g., Toro Co. v. Krouse, Kern & Co., Inc.*, 827 F. 2d 155 (7th Cir. 1987) (applying Indiana law); *Robertson v. White*, 633 F. Supp. 954 (W.D. Ark. 1986) (applying Arkansas law); *Briggs v. Sterner*, 529 F. Supp. 1155 (S.D. Iowa 1981) (applying Iowa law); *Shofstall v.*

Allied Van Lines, Inc., 455 F. Supp. 351 (N.D. Ill. 1978). Recently the New York Court of Appeals reaffirmed its reliance on the *Ultramares* approach and announced criteria with which to determine whether the "privity or near-privity" standard had been met. *Credit Alliance Corp. v. Arthur Andersen & Co.*, 65 N.Y. 2d 536, 493 N.Y.S. 2d 536, 483 N.E. 2d 110 (1985). The Court said:

> Before accountants may be held liable in negligence to non-contractual parties who rely to their detriment on inaccurate financial reports, certain prerequisites must be satisfied: (1) the accountants must have been aware that the financial reports were to be used for a particular purpose or purposes; (2) in the furtherance of which a known party or parties was intended to rely; and (3) there must have been some conduct on the part of the accountants linking them to that party or parties, which evinces the accountant's understanding of that party or parties' reliance.

Id. at 443, 483 N.E. 2d at 118.

A less restrictive rule is set forth in the *Restatement (Second) of Torts* § 552 (1977). That section provides in pertinent part:

> *Information Negligently Supplied for the Guidance of Others.*
>
> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) . . . [T]he liability stated in Subsection (1) is limited to loss suffered
>
> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
>
> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

Restatement (Second) of Torts § 552 (1977). As we understand it, under the Restatement approach an accountant who audits or prepares financial information for a client owes a duty of care not only to the client but to any other person, or one of a group of persons, whom the accountant or his client intends the information to benefit; and that person reasonably relies on the information in a transaction, or one substantially similar to it, that the accountant or his client intends the information to influence. If the requisite intent is that of the client and not the accountant, then the accountant must know of his client's intent at the time the accountant audits or prepares the information. A number of jurisdictions adhere to the Restatement standard. *See, e.g., Ingram Industries, Inc. v. Nowicki*, 527 F. Supp. 683 (E.D. Ky., 1981) (applying Kentucky law); *Badische Corporation v. Caylor*, 257 Ga. 131, 356 S.E. 2d 198 (1987); *Spherex, Inc. v. Alexander Grant & Co.*, 122 N.H. 898, 451 A. 2d 1308 (1982); *Blue Bell, Inc. v. Peat, Marwick, Mitchell & Co.*, 715 S.W. 2d 408 (Tex. App. 1986).

The courts of three states have recently adopted a position which extends an accountant's liability to all persons whom the accountant should reasonably foresee might obtain and rely on the accountant's work. *See International Mortgage Co. v. John P. Butler Accountancy Corp.*, 177 Cal. App. 3d 806, 223 Cal. Rptr. 218; *Touche Ross v. Commercial Union Ins.*, 514 So. 2d 315; *Citizens State Bank v. Timm, Schmidt & Co.*, 113 Wis. 2d 376, 335 N.W. 2d 361; *see also H. Rosenblum, Inc. v. Adler*, 93 N.J. 324, 461 A. 2d 138 (limiting the reasonably foreseeable test to those persons who actually receive the accountant's work from the accountant's client).

The fourth approach, adopted below by the Court of Appeals, was first enunciated in *Biakanja v. Irving*, 49 Cal. 2d 647, 320 P. 2d 16 (1958), where the California Supreme Court held a notary public liable to an intended beneficiary under a negligently prepared will. The California Court said:

> The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the

> closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.

Id. at 650, 320 P. 2d at 19. Several of the *Biakanja* factors were applied to assess an accountant's liability for negligent misrepresentation by the Missouri Court of Appeals in *Aluma Kraft Mfg. Co. v. Elmer Fox & Co.*, 493 S.W. 2d 378 (Mo. App. 1973).

We reject the *Ultramares* "privity or near-privity" approach, as elucidated in *Credit Alliance*, because it provides inadequately for the central role independent accountants play in the financial world. Accountants' audit opinions are increasingly relied upon by the investing and lending public in making financial decisions. *See* Wiener, *Common Law Liability*, 20 San Diego L. Rev. 233, 250 (1983). The accounting profession itself has recognized as much. The Financial Accounting Standards Board has stated that

> [m]any people base economic decisions on their relationships to and knowledge about business enterprises and thus are potentially interested in the information provided by financial reporting. Among the potential users are owners, lenders, suppliers, potential investors and creditors, employees, management, directors, customers, financial analysts and advisors . . . and the public.

Comment, *The Citadel Falls?—Liability For Accountants In Negligence To Third Parties Absent Privity: Credit Alliance Corp. v. Arthur Anderson & Co.*, 59 St. John's L. Rev. 348, 360 (1985) (citing 2 American Institute of Certified Public Accountants, AICPA Professional Standards ET, §§ 51.04, 101.01 (1981)). Because of this heavy public reliance on audited financial information we believe an approach that protects those persons, or classes of persons, whom an accountant knows will rely on his audit opinion, but who may not otherwise be in "privity or near privity," with him is desirable.

Although the *Ultramares* approach to accountants' liability seems unduly restrictive, we also decline to adopt the "reasonably foreseeable" test because it would result in liability more expansive than an accountant should be expected to bear. Courts which extend an accountant's liability to all reasonably foreseen users of

his financial information do so on the ground that there is no good reason to exempt accountants from the general rule that a negligent actor is liable for all reasonably foreseeable consequences of his negligence. *See International Mortgage Co. v. John P. Butler Accountancy Corp.*, 177 Cal. App. 3d at 819-20, 223 Cal. Rptr. at 226; *Rosenblum v. Adler*, 93 N.J. at 339-41, 461 A. 2d at 145-47; *Citizens State Bank v. Timm, Schmidt & Co.*, 113 Wis. 2d at 386, 335 N.W. 2d at 366. The reasoning of the *Rosenblum* court is representative. It analogized a negligent misrepresentation claim against an accountant to a products liability claim against a manufacturer and concluded that public policy did not justify disparate negligence standards. *Rosenblum v. Adler*, 93 N.J. at 341, 461 A. 2d at 147.

Between the production and distribution of an accountant's audit report and the design and manufacture of a product we perceive significant differences which justify establishing a narrower class of plaintiffs to whom the accountant owes a duty of care. Designers and manufacturers have control over the processes by which the products enter the stream of commerce. *See* R. Gormley, *The Foreseen, The Foreseeable, and Beyond—Accountants' Liability to Nonclients*, 14 Seton Hall L. Rev. 528, 552 (1984). Manufacturers, and to a lesser extent designers, can limit their potential liability by controlling the number of products they release into the marketplace. Auditors, on the other hand, have no control over the distribution of their reports, and hence lack control over their exposure to liability. Moreover, as noted previously, auditors do not control their client's accounting records and processes. B. Ferst, *Basic Accounting for Lawyers* 11 (3d ed. 1975). While, in the final analysis, an auditor renders an opinion concerning the accuracy of his client's records, he necessarily relies, in some measure, on the client for the records' contents.[1]

1. The description of the auditing process by the American Institute of Certified Public Accountants in its Statement on Auditing Standards reveals the degree to which auditors are unable to control certain variables:

> An examination made in accordance with generally accepted auditing standards is subject to the inherent limitations of the auditing process. . . . [T]he auditor's examination, based on the concept of selective testing of the data being examined, is subject to the inherent risk that material errors or irregularities, if they exist, will not be detected. The risk that material errors or irregularities will not be detected is increased by the possibility of management's override of internal controls, collusion, forgery, or unrecorded

Because of the accountant's inability to control the distribution of his report, as well as his lack of control over some of the contents of the statements he assesses, a standard which limits his potential liability is appropriate.

A more fundamental difference between product designers and manufacturers and accountants lies in their differing expectations concerning their work product. Manufacturers and designers fully expect that their products will be used by a wide variety of unknown members of the public. Indeed, this is their hope, for with wider use will come increased profits. This is not the case when an accountant prepares an audit. An accountant performs an audit pursuant to a contract with an individual client. The client may or may not intend to use the report for other than internal purposes. It does not benefit the accountant if his client distributes the audit opinion to others. Instead, it merely exposes his work to many whom he may have had no idea would scrutinize his efforts. We believe that in fairness accountants should not be liable in circumstances where they are unaware of the use to which their opinions will be put. Instead, their liability should be commensurate with those persons or classes of persons whom they know will rely on their work. With such knowledge the auditor can, through purchase of liability insurance, setting fees, and adopting other protective measures appropriate to the risk, prepare accordingly.

It is instructive that Judge Cardozo, the architect of reasonable foreseeability as the touchstone for products liability, *MacPherson v. Buick Motor Co.*, 217 N.Y. 282, 111 N.E. 1050 (1916), declined to adopt the same standard for accountants' liability in

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transactions. Certain acts, such as collusion between client personnel and third parties or among management or employees of the client, may result in misrepresentations being made to the auditor or in the presentation to the auditor of falsified records or documents that appear truthful and genuine. Unless the auditor's examination reveals evidential matter to the contrary, his reliance on the truthfulness of certain representations and on the genuineness of records and documents obtained during his examination is reasonable. . . . Further, the auditor cannot be expected to extend his auditing procedures to seek to detect unrecorded transactions unless evidential matter obtained during his examination indicates that they may exist. For example, an auditor ordinarily would not extend his auditing procedures to seek failures to record the receipt of cash from unexpected sources.

1 Prof. Stand. [AICPA] (CCH) AU §§ 327.11-.12 (1982).

Ultramares. Judge Cardozo distinguished accountants from manufacturers because of the potential for excessive accountants' liability. He wrote that if accountants could be held liable for negligence by those who were not in privity, or nearly in privity, accountants would face "liability in an indeterminate amount for an indeterminate time to an indeterminate class." *Ultramares Corp. v. Touche, Niven & Co.*, 255 N.Y. at 179-80, 174 N.E. at 444. Because of this potential for inordinate liability Judge Cardozo concluded, as do we, that accountants should be held liable to a narrower class of plaintiffs than the class embraced by the reasonable foreseeability test.

We also reject the *Biakanja* balancing test adopted by the Court of Appeals. This test has been applied by only one other court to assess an accountant's liability. *See Aluma Kraft Mfg. Co. v. Elmer Fox & Co.*, 493 S.W. 2d 378 (Mo. App. 1973). More importantly, the *Biakanja* test is difficult to apply. It requires that the "moral blame" of the defendant and the "policy of preventing future harm" be considered in determining whether the defendant should be held liable. These factors are not capable of precise application and seem to add little to an assessment of whether a defendant violated a particular duty of care. Furthermore, the *Biakanja* test approximates a "reasonable foreseeability" test. One of the factors in the test is "the foreseeability of harm to the plaintiff." *Biakanja v. Irving*, 49 Cal. 2d at 650, 320 P. 2d at 19. For the reasons already specified, we decline to adopt a standard which would extend accountants' liability to all reasonably foreseeable plaintiffs.

[5] We conclude that the standard set forth in the *Restatement (Second) of Torts* § 552 (1977) represents the soundest approach to accountants' liability for negligent misrepresentation. It constitutes a middle ground between the restrictive *Ultramares* approach advocated by defendants and the expansive "reasonably foreseeable" approach advanced by plaintiffs. It recognizes that liability should extend not only to those with whom the accountant is in privity or near privity, but also to those persons, or classes of persons, whom he knows and intends will rely on his opinion, or whom he knows his client intends will so rely. On the other hand, as the commentary makes clear, it prevents extension of liability in situations where the accountant "merely knows of the ever-present possibility of repetition to anyone, and the possibili-

ty of action in reliance upon [the audited financial statements], on the part of anyone to whom it may be repeated." *Restatement (Second) of Torts* § 552, Comment h. As such it balances, more so than the other standards, the need to hold accountants to a standard that accounts for their contemporary role in the financial world with the need to protect them from liability that unreasonably exceeds the bounds of their real undertaking.

[6] We acknowledge that courts have not been uniform in their application of the Restatement approach. *See generally* R. Gormley, *The Foreseen, The Foreseeable, and Beyond—Accountants' Liability to Nonclients*, 14 Seton Hall L. Rev. 528, 540-48 (1984). Some confusion arises due to illustration 10 under Comment h.[2] This illustration has been read by some to mean that liability turns on whether the accountant's client specifically mentions a person or class of persons who are to receive the audited financial statements. *See Blue Bell v. Peat, Marwick, Mitchell & Co.*, 715 S.W. 2d at 412. The Restatement's text does not demand that the accountant be informed by the client himself of the audit report's intended use. The text requires only that the auditor *know* that his client intends to supply information to another person or limited group of persons. Whether the auditor acquires this knowledge from his client or elsewhere should make no difference. If he knows at the time he prepares his report that specific persons, or a limited group of persons, will rely on his work, and intends or knows that his client intends such reliance, his duty of care should extend to them.

[7] Applying the Restatement test to Sidbec-Dosco's complaint, we conclude Sidbec-Dosco has stated a legally sufficient claim

2. Example 10 under Commentary h provides as follows:

A, an independent public accountant, is retained by B Company to conduct an annual audit of the customary scope for the corporation and to furnish his opinion on the corporation's financial statements. A is not informed of any intended use of the financial statements; but A knows that financial statements, accompanied by an auditor's opinion, are customarily used in a variety of financial transactions by the corporation and that they may be relied upon by lenders, investors . . . and the like . . . . In fact B Company uses the financial statements and accompanying auditor's opinion to obtain a loan from X Bank. Because of A's negligence, he issues an unqualifiedly favorable opinion upon a balance sheet that materially misstates the financial position of B Company and through reliance upon it X Bank suffers pecuniary loss. A is not liable to X Bank.

against defendants for negligent misrepresentation. Sidbec-Dosco alleges that when defendants prepared the audited financial statements for IMC they knew: (1) the statements would be used by IMC to represent its financial condition to creditors who would extend credit on the basis of them; and (2) plaintiff and other creditors would rely upon these statements. These allegations are sufficient to impose upon defendants a duty of care to Sidbec-Dosco under the Restatement approach as we have interpreted and adopted it herein.

In summary we reverse the Court of Appeals' decision that Raritan stated a claim against defendants for negligent misrepresentation. We affirm, for the reasons stated herein, the Court of Appeals' decision that Sidbec-Dosco stated such a claim. The decision below, therefore, insofar as it addressed plaintiffs' claims for negligent misrepresentation, is

Affirmed in part and reversed in part.

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

PEOPLES SECURITY LIFE INSURANCE COMPANY v. MILTON S. HOOKS

No. 437PA87

(Filed 5 May 1988)

1. **Contracts § 35— interference with contract—business competition as justification**

Competition in business constitutes justifiable interference in another's business relations and is not actionable so long as it is carried on in furtherance of one's own interest and by means that are lawful.

2. **Contracts § 33— hiring of competitor's employees—justifiable interference with employment contracts**

Plaintiff insurance company's allegations that defendant left his position with plaintiff to accept employment with a competing company, that his new job involved developing the territory of eastern North Carolina and South Carolina, and that defendant offered plaintiff's employees job opportunities which induced them to terminate their terminable at will contracts and, by locating these employees in their previously assigned territories, induced them to breach the non-competition clauses in their contracts with plaintiff *are held*

insufficient to state a claim for tortious interference with contract because the hiring and placing of plaintiff's former employees by defendant for the purposes of developing the territory assigned to him by a company competing with plaintiff amounted to justifiable interference.

3. Contracts § 7.1; Master and Servant § 11.1— hiring of plaintiff's employees— no breach of covenant not to compete

The mere fact that plaintiff may have been inconvenienced because defendant hired its employees does not give rise to a legally recognizable claim against defendant for breaching the covenant contained in his own terminable at will employment contract with plaintiff not to solicit or service plaintiff's policyholders or interfere with its existing policies for one year after termination.

Justice MEYER dissenting.

ON discretionary review of a decision of the Court of Appeals, 86 N.C. App. 354, 357 S.E. 2d 411 (1987), which affirmed a judgment entered by *Long, J.*, at the 27 October 1986 Civil Session of Superior Court, NASH County. Heard in the Supreme Court on 11 February 1988.

Mount, White, Hutson & Carden, P.A., by James H. Hughes, for the plaintiff-appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, by James T. Williams, Jr. and Jim W. Phillips, Jr., for the defendant-appellee.

MITCHELL, Justice.

The plaintiff contends that the Court of Appeals erred in affirming the trial court's entry of judgment, pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, dismissing the plaintiff's claims. We conclude that the Court of Appeals was correct in affirming the dismissal.

The plaintiff, Peoples Security Life Insurance Company [hereinafter Peoples Life], brought this action alleging in its complaint that it is in the business of selling life, health and accident insurance policies. The defendant, Hooks, was employed by the plaintiff until 27 November 1985 as a district manager with supervisory responsibilities in the towns of Rocky Mount, Wilson and Farmville and their immediate vicinities. Hooks supervised, on behalf of Peoples Life, approximately forty-five insurance agents

whose duties included selling and servicing insurance policies and collecting premiums.

On 27 November 1985, Hooks resigned from Peoples Life to accept employment with Monumental Life Insurance Company, a competitor of Peoples Life. At Monumental, Hooks was assigned the job of developing the territory of eastern North and South Carolina. To assist him in developing his assigned territory, Hooks hired fifteen insurance agents and four sales managers who until then were employed by Peoples Life.

In its complaint, the plaintiff alleged as its first claim for relief that the defendant maliciously interfered with employment contracts existing between Peoples Life and certain former agents. The plaintiff alleged as its second claim that the defendant, by hiring the plaintiff's employees, breached a covenant not to compete contained in his own employment contract with Peoples Life. The plaintiff alleged actual damages in excess of $785,000 and sought punitive damages of not less than $1,000,000.

The defendant denied the material allegations in plaintiff's complaint and counterclaimed for monies allegedly due him.

A motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) tests the legal sufficiency of the complaint. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). In ruling on the motion, the allegations of the complaint are viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted. *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976). In reviewing a dismissal of a complaint for failure to state a claim, the appellate court must determine whether the complaint alleges the substantive elements of a legally recognized claim and whether it gives sufficient notice of the events which produced the claim to enable the adverse party to prepare for trial. *See Sutton v. Duke*, 277 N.C. at 104, 176 S.E. 2d at 167; *see also Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979). A claim should be dismissed under Rule 12(b)(6) where it appears that the plaintiff is entitled to no relief under any statement of facts which could be proven. *See Newton v. Standard Fire Ins. Co.*, 291 N.C. at 111, 229 S.E. 2d at 300; *Sutton v. Duke*, 277 N.C. at 102, 176 S.E. 2d at 166.

FIRST CLAIM

The plaintiff, Peoples Life, brought this action alleging in its first claim for relief that the defendant tortiously interfered with terminable at will contracts between the plaintiff and certain of its former employees. Pertinent allegations include the following:

> 7. That most of the contracts which plaintiff had with its insurance agents provided that in the event that agents left the employment of the company they agreed for a period of one year "not to work upon or in any way interfere with any part of any account or territory upon which the Agent previously worked in the same State for the Company."
>
> 8. That the defendant, Milton S. Hooks, had personal knowledge of the contractual relationship with the agents in the Rocky Mount-Wilson-Farmville area with the plaintiff, and of the terms and conditions thereof.
>
> . . . .
>
> 11. That before resigning from the employment of the plaintiff, the defendant, Milton S. Hooks, sought out and took employment with another insurance company, which he knew to have a history of pirating the plaintiff's insurance agents. His employment was to develop the territory of eastern North and South Carolina for his new employer.
>
> 12. That the plaintiff is informed and believes that before terminating his employment with the plaintiff, the defendant, Milton S. Hooks, understood and actively engaged in inducing the plaintiff's agents to terminate their contracts of employment with the plaintiff.
>
> 13. That immediately after his resignation the defendant, Milton S. Hooks, with full knowledge of his contractual relationship with the plaintiff, employed 15 of the plaintiff's insurance agents and 4 of its sales managers, intentionally inducing them to terminate their contracts of employment with the plaintiff.
>
> 14. That upon information and belief, the defendant, Milton S. Hooks, employed said insurance agents to sell insurance in the same territory in which they had sold insurance for plaintiff, in direct violation of their contractual obligation to the

plaintiff "not to work upon or in any way interfere with any part of any account or territory upon which the Agent previously worked in the same State for the Company."

. . . .

19. That the actions, as outlined above, by the defendant, were without justification and were done wilfully, in reckless and wanton disregard of the plaintiff's rights.

In *Childress v. Abeles*, Justice Parker, later Chief Justice, explained the claim for tortious interference with a contract and defined its elements as follows:

> The overwhelming weight of authority in this nation is that an action in tort lies against an outsider who knowingly, intentionally and unjustifiably induces one party to a contract to breach it to the damage of the other party.
>
> [The] essential elements of the wrong [are as follows]: *First*, that a valid contract existed between the plaintiff and a third person, conferring upon the plaintiff some contractual right against the third person. *Second*, that the outsider had knowledge of the plaintiff's contract with the third person. *Third*, that the outsider intentionally induced the third person not to perform his contract with the plaintiff. *Fourth*, that in so doing the outsider acted without justification. *Fifth*, that the outsider's act caused the plaintiff actual damages. (Citations omitted.)

240 N.C. 667, 676, 84 S.E. 2d 176, 181 (1954).

[1] A motion under Rule 12(b)(6) should be granted when the complaint reveals that the interference was justified or privileged. *See, e.g., Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E. 2d 282 (1976); *Childress v. Abeles*, 240 N.C. 667, 84 S.E. 2d 176 (1954). In *Smith* we held that "[t]he privilege [to interfere] is conditional or qualified; that is, it is lost if exercised for a wrong purpose. In general, a wrong purpose exists where the act is done other than as a reasonable and *bona fide* attempt to protect the interest of the defendant which is involved." *Smith v. Ford Motor Co.*, 289 N.C. at 91, 221 S.E. 2d at 294 (quoting Carpenter, *Interference With Contract Relations*, 41 Harv. L. Rev. 728, 746 (1928)). In determining whether an actor's conduct is justified, consideration

is given to the following: the circumstances surrounding the interference, the actor's motive or conduct, the interests sought to be advanced, the social interest in protecting the freedom of action of the actor and the contractual interests of the other party. 4 Restatement (Second) Torts § 767 (1979); *see also Smith v. Ford Motor Co.*, 289 N.C. at 94, 221 S.E. 2d at 296. If the defendant's only motive is a malicious wish to injure the plaintiff, his actions are not justified. 86 C.J.S. *Torts* § 44 (1954). If, however, the defendant is acting for a legitimate business purpose, his actions are privileged. Numerous authorities have recognized that competition in business constitutes justifiable interference in another's business relations and is not actionable so long as it is carried on in furtherance of one's own interests and by means that are lawful. *See Childress v. Abeles*, 240 N.C. 667, 84 S.E. 2d 176; 45 Am. Jur. 2d *Interference* §§ 29-32 (1950); *see generally* Annot. "Interference with Business Relation," 9 A.L.R. 2d 262-63 (1969). With these familiar principles in mind, we review the plaintiff's claim for interference with its employment contracts.

[2] In the present case, the plaintiff's complaint alleges that the defendant offered the plaintiff's employees job opportunities which induced them to terminate their terminable at will contracts and, by locating these employees in their previously assigned territories, induced them to breach the non-competition clauses contained in their contracts with the plaintiff. The plaintiff contends that these allegations state a valid claim for tortious interference.

The mere fact that the plaintiff's employment contracts with the employees in question were terminable at will does not provide the defendant a defense to the plaintiff's claim for tortious interference. *Childress v. Abeles*, 240 N.C. at 678, 84 S.E. 2d at 184. Moreover, even though the employment contracts were terminable at will, the non-competition clauses contained therein were not. The non-competition clauses bound the employees for one year after termination of their employment with the plaintiff, and competition by the employees during that period in violation of the clauses would be a breach of contract.

The plaintiff's complaint reveals on its face, however, that the defendant was justified in offering the plaintiff's employees new jobs and locating them in their previously assigned territory.

The complaint alleges that the defendant left his position with the plaintiff, Peoples Life, to accept employment with a competing insurance company. His new job involved "develop[ing] the territory of eastern North and South Carolina."

We conclude that the hiring and placing of the plaintiff's former employees by the defendant for the purpose of developing the territory assigned to him by a company competing with the plaintiff amounted to justifiable interference. In reaching this conclusion, we recognize and apply the general principle that interference may be justified when the plaintiff and the defendant are competitors. *Childress v. Abeles*, 240 N.C. 667, 84 S.E. 2d 176. *See also, Bennett v. Storz Broadcasting Co.*, 270 Minn. 525, 134 N.W. 2d 892 (1965); *Schonwald v. Ragains*, 32 Okla. 223, 122 P. 203 (1912); *Philadelphia Dairy Prod. v. Quaker City Ice Cream Co.*, 306 Pa. 164, 159 A. 3 (1932); *Thacker Coal & Coke Co. v. Burke*, 59 W.Va. 253, 53 S.E. 161 (1906). *Contra Moye v. Eure*, 21 N.C. App. 261, 205 S.E. 2d 221 (1974); *Overall Corp. v. Linen Supply, Inc.*, 8 N.C. App. 528, 174 S.E. 2d 659 (1970). Further, we find the well-reasoned opinion of Judge Learned Hand in *Triangle Film Corp. v. Artcraft Pictures Corp.*, 250 F. 981 (2d Cir. 1918) to be persuasive. Judge Hand, writing for the majority in that case, stated that public policy demands that absent some monopolistic purpose everyone has the right to offer better terms to another's employee, so long as the latter is free to leave. *Id.* A contrary result would be intolerable, both to the new employer who could use the employee more effectively and to the employee who might receive added pay. *Id.* To hold otherwise would unduly limit lawful competition. *Id.*

Later cases adopt the rationale of *Triangle Film.* The free enterprise system demands that competing employers be allowed to vie for the services of the "best and brightest" employees without fear of subsequent litigation for tortious interference. *See McCluer v. Super Maid Cook-Ware Corp.*, 62 F. 2d 426 (10th Cir. 1932); *Vincent Horwitz Co. v. Cooper*, 352 Pa. 7, 41 A. 2d 870 (1945); *Diodes, Inc. v. Franzen*, 260 Cal. App. 2d 244, 67 Cal. Rptr. 19 (1968); *Coleman & Morris v. Pisciotta*, 107 N.Y.S. 2d 715, 279 A.D. 656 (1951). To restrict an employer's right to entice employees, bound only by terminable at will contracts, from their positions with a competitor or to restrict where those employees

may be put to work once they accept new employment savors strongly of oppression.

> Competition . . . is the life of trade. Every act done by a trader for the purpose of diverting trade from a rival, and attracting it to himself, is an act intentionally done, and, in so far as it is successful, to the injury of the rival in his business . . . . To hold such an act wrongful and illegal would be to stifle competition. Trade should be free and unrestricted; and hence every trader is left to conduct his business in his own way, and cannot be held accountable to a rival who suffers a loss of profits by anything he may do, so long as the methods he employs are not of a class of which fraud, misrepresentation, intimidation, coercion, obstruction, or molestation of the rival or his servants . . . are instances.

Macauley Bros. v. Tierney, 19 R.I. 255, 256, 33 A. 1, 2 (1895), *cited with approval in C. S. Smith Metro. Mkt. v. Lyons*, 16 Cal. 2d 389, 106 P. 2d 414 (1940); *Kingstron Trap Rock Co. v. International Union of Operating Engineers*, 129 N.J. Eq. 570, 19 A. 2d 661 (1941).

In refusing to recognize the plaintiff's claim for tortious interference with contractual rights, we do not leave employers without recourse. Employers' rights to protect their interests, by reasonable employment contracts, are recognized everywhere. A breach by an employee of a covenant not to compete, even in an employment contract terminable at will, affords the employer a claim for relief against the employee. *See, e.g., Kadis v. Britt*, 224 N.C. 154, 29 S.E. 2d 543 (1944). Further, the mere existence of a claim for breach of contract against such an employee does not automatically prevent the employer from having a valid claim for tortious interference. *Childress v. Abeles*, 240 N.C. at 678-79, 84 S.E. 2d at 184. If the employer can demonstrate that the interference was wrongful and without justification, an action also lies against the tortious interferer. *Id.*

SECOND CLAIM

[3] In the plaintiff's second claim for relief it alleges that the defendant breached the covenant not to compete contained in his own terminable at will employment contract with the plaintiff. Pertinent allegations of the complaint are:

22. That pursuant to the terms of said contract between plaintiff, Peoples Security Life Insurance Company, and the defendant, Milton S. Hooks, Hooks agreed that upon termination he would, for a period of one year, refrain from "solicitation or servicing of policyholders of the Company . . . or in any way interfering with existing policies."

23. That the defendant, Milton S. Hooks, has interfered with plaintiff's business in violation of his contract by hiring 15 of plaintiff's insurance agents, 4 of its sales managers and the District Marketing Specialist thereby inducing them to terminate their employment with the plaintiff and leaving plaintiff without adequate means of servicing its policyholders and collecting its premiums.

The complaint does not allege that the defendant solicited or serviced policyholders of Peoples Life. Neither does the complaint allege that the defendant directly interfered with existing policies. Rather, it alleges that because the defendant induced certain of the plaintiff's employees to change employers, he generally "interfered with plaintiff's business." We conclude that the mere fact that the plaintiff may have been inconvenienced because the defendant hired its employees does not give rise to a legally recognizable claim against the defendant for breaching his covenant not to solicit or service the plaintiff's policyholders or interfere with its existing policies. We hold that the second claim in the complaint fails to allege facts sufficient to state a claim upon which relief may be granted.

We do not address the defendant's contention that the covenant not to compete in his employment contract with the plaintiff is unenforceable, since we need not answer that question in resolving the issues before us. We hold that the Court of Appeals did not err in affirming the trial court's dismissal of the plaintiff's claims under Rule 12(b)(6) for failure to state a claim upon which relief may be granted. The decision of the Court of Appeals is affirmed.

Affirmed.

Justice MEYER dissenting.

Plaintiff's first claim against defendant in this lawsuit sounds in tortious interference with contract. In its opinion in this case, the majority holds in part that, because competition in business constitutes a justification for interfering with the contractual relationships of others, plaintiff's lawsuit against defendant must fail as a matter of law. It is my sincere belief that the law of North Carolina is not now, nor should it ever be, that business competition is recognized as a legal justification for behavior such as that displayed by defendant here. This case, in my view, was for the jury, and accordingly, I dissent.

The case, as a procedural matter, is before us by virtue of the trial judge's decision to grant defendant Hooks' motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. I note as an initial matter that the burden of the movant in a case such as that before us is substantial. A claim for relief should clearly not suffer dismissal unless it affirmatively appears that plaintiff is entitled to no relief under any state of facts which could be presented in support of the claim. *See Presnell v. Pell*, 298 N.C. 715, 260 S.E. 2d 611 (1979). Moreover, in construing the complaint, the accepted rule is to construe it liberally, with every reasonable intendment and presumption in favor of the plaintiff. *Childress v. Abeles*, 240 N.C. 667, 84 S.E. 2d 176 (1954).

As the majority opinion correctly indicates, this Court, in its opinion in *Childress*, explained the nature of a claim for tortious interference with a contract. We defined its elements as follows:

> *First*, that a valid contract existed between the plaintiff and a third person, conferring upon the plaintiff some contractual right against the third person. *Second*, that the outsider had knowledge of the plaintiff's contract with the third person. *Third*, that the outsider intentionally induced the third person not to perform his contract with the plaintiff. *Fourth*, that in so doing the outsider acted without justification. *Fifth*, that the outsider's act caused the plaintiff actual damages.

Id. at 674, 84 S.E. 2d at 181-82 (citations omitted). The majority, concluding in essence that under no set of facts presented by plaintiff could defendant have acted without justification, held

proper the trial court's decision to grant defendant's motion to dismiss pursuant to Rule 12(b)(6). I simply do not agree, for, in my view, all five of these prerequisites were potentially satisfied, and the case was therefore for the jury.

Before reaching the question of justification, I note as an aside that there is no question but that employment contracts *at will* are not treated any differently vis-a-vis the action in question here. In *Childress v. Abeles*, 240 N.C. 667, 84 S.E. 2d 176, this Court held that the mere status of the contract as terminable at will does not defeat the plaintiff's cause of action for tortious interference. In so holding, our Court relied on the reasoning of the United States Supreme Court in the case of *Truax v. Raich*, 239 U.S. 33, 60 L.Ed. 131 (1915). In that case, it stated that "[t]he fact that employment is at the will of the parties, respectively, does not make it one at the will of others. . . . [B]y the weight of authority, the unjustified interference of third persons is actionable although the employment is at will." *Id.* at 38, 60 L.Ed. at 134.

As for the question of justification, I believe strongly that the majority is incorrect in its conclusion that competition in business such as that allegedly motivating defendant in this case is, under North Carolina law, a legal justification serving to eviscerate this or any other plaintiff's cause of action for tortious interference with contract. In my view, the law in this State is, and should be, that business competition is not such a justification and that, accordingly, cases such as that before us are not dismissible as a matter of law, but rather, are best left with a jury for decision.

It is admitted that this issue—specifically, whether business competition is a justification for interfering with the contractual relations of others—has produced divergent points of view amongst the jurisdictions of this nation. The majority quite correctly indicates that the law of several states and the view of the Restatement (Second) of Torts are supportive of its position in this matter. Moreover, citing dicta in this Court's decision in *Childress v. Abeles*, 240 N.C. 667, 84 S.E. 2d 176, it claims further that the law of our own State is consistent with the idea of business competition as a legal justification for contract interference. I take issue with this latter claim in the majority opin-

ion. In fact, the law currently is, and certainly should continue to be, to the contrary.

Though this Court has not addressed anything approaching the issue before us today since the *Childress* case, our own Court of Appeals has applied the reasoning from that decision on several occasions. In *Overall Corporation v. Linen Supply, Inc.*, 8 N.C. App. 528, 174 S.E. 2d 659 (1970), for example, plaintiff and defendant were corporate competitors in the industrial laundry business. Defendant induced one of plaintiff's employees to breach an employment contract as a route salesman with plaintiff and to enter a similar contract with defendant. The employee in question then solicited the business of plaintiff's customers, inducing them thereby to breach their contracts with plaintiff for laundry service. The Court of Appeals, in upholding plaintiff's award against defendant for tortious interference with contract, made the following significant statement:

> We see no valid reason for holding that a competitor is privileged to interfere wrongfully with contractual rights. If contracts otherwise binding are not secure from wrongful interference by competitors, they offer little certainty in business relations, and it is security from competition that often gives them value.

Id. at 531, 174 S.E. 2d at 661. This position, which the Court of Appeals subsequently affirmed in *Moye v. Eure*, 21 N.C. App. 261, 204 S.E. 2d 221 (1974), is one with which I agree.

If there is uncertainty as to what the law is in North Carolina on this question, there can be, in my view, no question as to what the law should be. The majority's position—that business competition justifies interference with contract—is, it seems to me, wrong for a number of significant policy reasons. First, the majority's holding today is severely at odds with the longstanding and historic principle of freedom of contract. The principle of freedom of contract rests on the premise that it is in the public interest to accord individuals broad powers to order their affairs through legally enforceable agreements. A. Farnsworth, *Contracts* § 5.1 (1982). In North Carolina, this vitally important principle has long been a part of our jurisprudential heritage. Under our law, parties are free to contract to anything as long as it is not illegal, unconscionable, or against the public interest. *Bicycle*

Transit Authority, Inc. v. Bell, 314 N.C. 219, 333 S.E. 2d 299 (1985).

Here, plaintiff sought to "order [its] affairs" by the insertion of legally enforceable covenants not to compete into its employment contracts with defendant and with those employees defendant eventually hired away. By virtue of these employment contracts, the affected employees were forbidden "to work upon or in any way interfere with any part of any account or territory upon which the Agent previously worked in the same State for the Company" for a period of one year. It is undisputed, moreover, that defendant induced the employees not only to terminate their employment contracts with plaintiff, but also to breach the non-compete clauses contained in those contracts. Yet, we are told by the majority that defendant's egregious conduct which induced the breach was a justifiable and nonactionable action because it was done in the name of business competition. This, in my view, is completely at odds with the important principle of freedom of contract.

Second, the majority opinion, which frustrates the covenant not to compete in this case and will also no doubt frustrate countless others already in existence, is not consistent with this Court's previous decisions concerning such covenants. Covenants not to compete, in the wake of the majority opinion here, will be eviscerated upon a showing that the breach in question was induced by a party citing business competition as his motivation. This will be particularly unfortunate where, as in some cases, though admittedly not here, defendant's new employer has gone to such lengths in inducing the breach as to completely insulate the breaching employee from liability by offering to pay any legal fees incurred and any judgment taken against him.

This insidious state of affairs hardly seems to jibe with this Court's oft-repeated conditional approval of covenants not to compete. Under the law of North Carolina, covenants not to compete are in fact *valid and enforceable* upon a showing that they are (1) in writing, (2) made a part of a contract of employment, (3) based on reasonable consideration, (4) reasonable both as to time and territory, and (5) not against public policy. *See A.E.P. Industries v. McClure*, 308 N.C. 393, 302 S.E. 2d 754 (1983). The majority's position in this case is clearly inconsistent with this tradition.

I take final issue with the majority's position that to allow a claim such as that pursued by plaintiff here would be to severely impede commerce. The majority states specifically that "to restrict an employer's right to entice employees . . . from their positions with a competitor or to restrict where those employees may be put to work once they accept new employment savors strongly of oppression." In my view, the majority's statement is grossly exaggerative, particularly given the facts of the case before us. In essence, under the terms of the covenants not to compete, defendant need wait only a year—a mere twelve months—before "stealing" plaintiff's employees to the benefit of his new employer's operation. This delay, giving credence to plaintiff's freedom to enter into and expect the enforcement of such agreements, could hardly be considered oppression.

In summary, the majority, in its opinion in this case, holds in part that because business competition is a legal justification for interfering with the contractual relationships of others, plaintiff's cause of action against this defendant must fail as a matter of law. In my view, this is not the law, nor should it be the law, in North Carolina. This case was for the jury, and the trial court therefore erred in entering judgment for defendant pursuant to Rule 12(b)(6). Accordingly, and with due respect, I must dissent.

STATE OF NORTH CAROLINA v. ROBERT PERNELL MARTIN

No. 469A86

(Filed 5 May 1988)

1. Searches and Seizures § 17— rape and burglary—tennis shoes found in defendant's bedroom—properly admitted

The trial court did not err in a prosecution for two rapes, sexual offenses, and burglaries by admitting into evidence tennis shoes found in defendant's bedroom where the court found that a detective followed tennis shoe tracks from the house of one victim to the home of Hattie Tart; Ms. Tart told the detective that she was the owner of the house and that she paid rent on it; Ms. Tart in fact paid rent on the house; defendant "may contribute along with Sherry Gore to some of the light bill and food"; Ms. Tart gave the detective permission to enter the house and pointed out defendant's bedroom; the detective knocked on the bedroom door, which was voluntarily opened by defendant; the detective engaged defendant in conversation and stepped into the room without objection from defendant; and the detective then saw the tennis shoes. The evidence clearly supports the finding that Ms. Tart paid the rent

on the house and had the authority over the premises to allow the detective to enter, and the detective was in a place where he had a right to be and could lawfully seize evidence which was in plain view.

2. **Searches and Seizures § 3; Prisons § 2— pretrial detainee—search of cell—contents of notebook—admissible**

The district attorney could properly examine a defendant in a prosecution for two rapes, burglaries, and sexual offenses regarding a letter written by defendant to his brother asking the brother to commit perjury where the letter was in a notebook seized during a search of defendant's cell before trial. The same need to maintain order which restricts a person's constitutional rights while in prison applies to pretrial detainees, so that defendant did not have a reasonable expectation of privacy in a jail cell, and the jailer had a right to inspect anything he found in the cell, including defendant's notebook. Fourth Amendment to the U.S. Constitution.

3. **Criminal Law §§ 91.1, 102.5— cross-examination—erroneous transcript of first trial—objection and continuance denied**

The trial court did not err during defendant's second trial for two rapes, sexual offenses and burglaries by allowing the State to impeach him by asking questions based on the transcript of the first trial and not allowing a continuance because the transcript of the first trial was erroneous. Although the prosecuting attorney was present at the first trial, he was entitled to assume that the transcript was more accurate than his memory and, at the time, there was nothing before the court except the statement of the defense attorney that the transcript was incorrect.

4. **Criminal Law § 117— character evidence—jury not charged on evidence of good character—no error**

The trial court did not err in a prosecution for two burglaries, rapes and sexual offenses by not charging the jury as to evidence of his good character where defendant's character witness did not testify as to reputation or in the form of an opinion, and, even if defendant properly introduced evidence of good character, defendant did not submit his request for instructions in writing and did not preserve his exception. N.C.G.S. § 15A-1231.

5. **Criminal Law §§ 34.2, 34.4— character evidence—cross-examination—other acts of misconduct**

The trial court did not err in a prosecution for two rapes, sexual offenses, and burglaries by allowing the prosecutor to ask defendant's character witness whether he knew that defendant had been selling drugs in jail and, although the State should not have been allowed to ask whether the witness knew that defendant had been charged with selling drugs in jail, there was no prejudice because defendant had already testified that he had grown marijuana. N.C.G.S. § 8C-1, Rule 405(a). N.C.G.S. § 15A-1443(a).

6. **Criminal Law § 102.6— burglary and rape—closing argument—no gross prejudice**

The prosecutor's closing argument in a prosecution for two rapes, burglaries, and sexual offenses was not so grossly improper as to require the

trial court to intervene *ex mero motu* where the prosecuting attorney in effect told the jury the prosecuting witnesses were relying upon them to find the defendant guilty.

Justice MEYER concurring in the result.

Justices MITCHELL and WHICHARD join in this concurring opinion.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from life sentences imposed by *Clark, Judge*, at the 27 January 1986 Criminal Session of Superior Court, COLUMBUS County. This Court allowed defendant's motion to bypass the Court of Appeals in his appeal from sentences of less than life imprisonment. Heard in the Supreme Court 10 September 1987.

The defendant was charged with first degree rape, first degree sexual offense and first degree burglary for an occurrence on 5 May 1985. He was charged with the same crimes for an occurrence on 15 June 1985. All the cases were consolidated for trial. The defendant was first tried for these offenses at the 4 November 1985 Criminal Session of Superior Court, Columbus County. The jury was unable to reach a verdict and the case ended in a mistrial. The defendant was tried a second time at the 27 January 1986 Criminal Session.

A witness for the State testified that on 5 May 1985 during the nighttime, the defendant entered her house while she was asleep and raped her. She also testified he performed cunnilingus on her. He left her tied to her bed. A second witness for the State testified that on 15 June 1985 she was cleaning her house after 10:00 p.m. The defendant came into her house, tied her to the bed, raped her and performed cunnilingus on her.

Sterling Cartrette, a deputy sheriff, testified that early in the morning of 16 June 1985 he went to the home of the second victim. He found tennis shoe tracks which he followed to the home of Ms. Hattie Mae Tart. He found the defendant in a bedroom at Ms. Tart's house. He also found a pair of tennis shoes in the bedroom. A person who had been in a jail cell with the defendant testified the defendant told him he had raped a white woman, commenting that he tied her up and "ate the bitch."

The defendant testified that on the night of 15 June 1985 he had gone to check on his marijuana plants in the woods and had

crossed a bean field to get to the house in which he lived with his girlfriend and Ms. Tart. His girlfriend testified to an alibi for the defendant.

The jury found the defendant guilty of second degree rape, second degree sexual offense, and second degree burglary in the 5 May 1985 offenses. It found the defendant guilty of first degree rape, second degree sexual offense, and second degree burglary in the 15 June 1985 offenses. The defendant appealed from the imposition of prison sentences.

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

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

WEBB, Justice.

We note at the outset that the defendant did not object or assign error to the consolidation of these cases for trial. We do not consider the question of whether this joinder was proper.

[1] The defendant first assigns error to the admission into evidence of his tennis shoes which were found in his bedroom in the house in which he was staying. The defendant objected to the admission of this evidence during the first trial and a voir dire hearing was held out of the presence of the jury. Sterling Cartrette testified that he was a detective with the Columbus County Sheriff's Department. In the early morning of 16 June 1985 he went to the rape victim's home and found footprints made by a person who was wearing tennis shoes. He followed the footprints until they led him to Ms. Hattie Tart's home. He knocked and Ms. Tart came to the door. Detective Cartrette testified that he asked Ms. Tart if there was a male there and she said, "yes." He testified Ms. Tart told him she was the owner of the house and gave him permission to enter. He testified further that Ms. Tart led him to the defendant's bedroom door which was closed. He knocked on the door and identified himself. A male voice asked what he wanted and Detective Cartrette said he wanted to talk to him. The door opened and he saw the defendant standing in his shorts. Detective Cartrette told the defendant a lady had been raped and he had followed the tracks from her house. Detective Cartrette

stepped into the room and advised the defendant of his constitutional rights. At this time Detective Cartrette saw a pair of tennis shoes on the floor. The defendant told him he had worn the tennis shoes the previous night and Detective Cartrette took them. Detective Cartrette arrested the defendant at that time.

Hattie Tart testified for the defendant that Detective Cartrette came to the house in which she was living early in the morning of 16 June 1985. She was awakened by a knock on the door and when she answered it Detective Cartrette asked her if a man was in the house. When she answered in the affirmative, Detective Cartrette asked for the location of the man's room and she led Detective Cartrette to the room. Detective Cartrette knocked once and pushed open the door. She then heard Detective Cartrette tell the defendant to put his clothes on. She testified Detective Cartrette did not ask her whose house it was or who paid the rent until he questioned her again a few days later. She testified that Sherry Gore lived in the house with the defendant. Hattie Tart testified further that she paid the rent and Sherry Gore paid the light bill. Ms. Tart said the defendant paid part of the household expenses by giving money to Sherry. On cross-examination she said it was her house.

Following the voir dire hearing, the court found facts as follows: Detective Cartrette followed tennis shoe tracks from the home of a woman who told him she had been raped to the home of Hattie Tart. Ms. Tart told Detective Cartrette she was the owner of the house. She also told him she paid rent on it to the owner, Mr. Powell. She gave him permission to enter the house and pointed out to him the defendant's bedroom. The court found as facts that Detective Cartrette knocked on the defendant's bedroom door, which door was opened by the defendant. Detective Cartrette then engaged the defendant in conversation and saw the tennis shoes at that time. The court found that Hattie Tart pays the rent on the house and the defendant "may contribute along with the witness Sherry Gore to some of the light bill and food." The court found the search of the premises was done with the permission of the person in control of the house and ordered that the tennis shoes be admitted into evidence.

The defendant argues that the admission of the tennis shoes into evidence is a violation of his right to be free from an

unreasonable search or seizure as guaranteed in the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Sec. 20 of the Constitution of North Carolina. He contends (1) there was no consent given to search the house, (2) that if Ms. Tart gave consent she did not have the authority to authorize a search of the defendant's bedroom, and (3) the defendant's arrest was invalid so that the seizure of the shoes was not incident to a valid arrest.

The evidence clearly supports the finding of the court that Ms. Tart paid the rent on the house and had the authority over the premises to allow Detective Cartrette to enter. *State v. Barnett*, 307 N.C. 608, 300 S.E. 2d 340 (1983). The court also found that when Detective Cartrette knocked on the door of defendant's room the defendant voluntarily opened the door and engaged in a conversation with Detective Cartrette. During this conversation, Detective Cartrette stepped into the bedroom without any objection by the defendant. At this time he saw the tennis shoes. We hold Detective Cartrette was in a place where he had a right to be and he could lawfully seize evidence which was in plain view. *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L.Ed. 2d 564 (1971); *State v. Bogin*, 66 N.C. App. 184, 310 S.E. 2d 640, *disc. rev. denied*, 310 N.C. 478, 312 S.E. 2d 886 (1984). The tennis shoes were properly admitted into evidence.

In light of our holding that the defendant consented to the entry into his bedroom, we do not determine whether he had such control over the bedroom that a consent was necessary. Nor do we pass on his contention that the seizure of the tennis shoes was the fruit of an illegal arrest.

[2] The defendant next contends it was error for the prosecuting attorney to be allowed to ask him on cross-examination whether he had written a letter to his brother, asking the brother to commit perjury at the trial. This question was based on a letter written by the defendant, which was seized during a search of the defendant's cell. In *Hudson v. Palmer*, 468 U.S. 517, 82 L.Ed. 2d 393 (1984), the United States Supreme Court held the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell. The defendant says that in *Hudson* the Court left open the question of whether a different result obtains in the case of pretrial detainees. It is true

that the Court in *Hudson* did not discuss the question of pretrial detainees. That question was not before it. The same considerations which the Court said restrict a person's constitutional rights while in prison, that is, the need to maintain order in places of confinement, apply to pretrial detainees who are confined in jails. In *Bell v. Wolfish*, 441 U.S. 520, 60 L.Ed. 2d 447 (1979), the Court dealt with the restrictions on pretrial detainees' Fourth Amendment rights without making any distinction between prisons and jails in which people are incarcerated awaiting trial. *See also State v. Primes*, 314 N.C. 202, 333 S.E. 2d 278 (1985). We hold the defendant did not have a reasonable expectation of privacy within his jail cell and the search was proper.

The defendant argues that even if the jailer had a right to search his cell, the search was unreasonable. The letter was discovered by going through the defendant's notebook. The defendant argues that this exceeded the lawful scope of the search. If the defendant had no expectation of privacy in his jail cell, we believe the jailer had the right to inspect anything he may have found in the cell. The jailer could have discovered something by reading the notebook that would have enabled him better to maintain order in the jail. We hold the defendant had no expectation of privacy in the jail cell and the search by the jailer was proper.

[3] The defendant next assigns error to the court's decision to allow the State to impeach him by asking questions based on the transcript of the first trial. At his second trial, the defendant testified that he left "Rojay's" at approximately 11:00 p.m. The prosecuting attorney asked the defendant on cross-examination if it were not true that he testified at his former trial that he did not leave until 1:00 a.m. The defendant objected on the ground that the transcript was not correct. He did not make any showing that the transcript was not correct other than the statement of his attorney and the court overruled the objection. After the presentation of evidence had been concluded, the defendant moved for a continuance in order to have time to show the transcript was not correct. This motion was denied. After the trial was complete the defendant filed an affidavit from the court reporter stating that the transcript was not correct. The court reporter further stated that he had been called by the defendant's attorney and was on his way to the trial when his automobile broke down.

The defendant argues it was error to allow the prosecuting attorney to question him based on an erroneous transcript and it was error not to grant the continuance. The defendant contends the question was improper because it was not asked in good faith. He says this is so because the prosecuting attorney was present at the first trial and knew the transcript was not correct. In cross-examining a witness, questions must be asked in a good faith belief that the answers which the examiner wants to elicit are true. *State v. Fisher*, 318 N.C. 512, 350 S.E. 2d 334 (1986); *State v. Dawson*, 302 N.C. 581, 276 S.E. 2d 348 (1981). Although the prosecuting attorney was present at the first trial, we cannot hold he acted in bad faith by relying on the transcript. He could assume the transcript was more accurate than his memory.

Nor can we hold that the court committed error by denying the motion to continue. At the time the motion was made there was nothing before the court except the statement of defendant's attorney that the transcript was not correct. The court did not abuse its discretion by denying the motion to continue. *State v. Ford*, 314 N.C. 498, 334 S.E. 2d 765 (1985). This assignment of error is overruled.

[4] The defendant next contends it was error for the court not to charge the jury as to the evidence of his good character. Bishop E. W. Jones testified for the defendant that he had known the defendant for three to four years, that the defendant was a good worker, that he had never heard anything bad about the defendant, and that the defendant was nice and honest. During the charge conference the defendant's attorney orally requested that the court charge on the evidence of the defendant's good character and reputation. The court said, "And in the absence of a tendered instruction, sir, citing applicable authority in support of it, sir, I'm going to deny it, sir." The court did not instruct on the defendant's character evidence.

When a defendant testifies, as he did in this case, and also offers evidence of his good character, he is entitled to have the jury consider his character evidence both as bearing upon his credibility as a witness and as substantive evidence bearing directly upon the issue of his guilt or innocence. A court is not required to charge on this feature of the case, however, unless the defendant requests it. *State v. Hannah*, 316 N.C. 362, 341 S.E. 2d 514 (1986); *State v. Peek*, 313 N.C. 266, 328 S.E. 2d 249 (1985). Bishop Jones testified that he had never heard anything bad about the defend-

ant and that the defendant was honest. N.C.G.S. § 8C-1, Rule 405(a) provides that character evidence may be proved by testimony as to reputation or testimony in the form of an opinion. Bishop Jones did not testify as to reputation, nor did he testify in the form of an opinion. One might be able to infer that the defendant had a good reputation from Bishop Jones' testimony that he had not heard anything bad about the defendant. If Bishop Jones' relationship with the defendant was such that he would likely have heard the defendant's character discussed if it were bad, the fact that he had never heard anything bad discussed is evidence of good reputation. 1 Brandis on North Carolina Evidence § 110 (1982).

Even if the defendant properly introduced evidence of his good character, he has not preserved his exception. N.C.G.S. § 15A-1231 which provides for conferences on jury instructions says, "any party may tender written instructions." Superior and District Court Rules, Rule 21, which deals with jury instruction conferences, says, "If special instructions are desired, they should be submitted in writing to the trial judge at or before the jury instruction conference." The defendant in this case did not submit his request for instructions in writing. We hold it was not error for the court not to charge on this feature of the case.

[5] The defendant next contends it was error to allow certain questions of Bishop Jones when he was being cross-examined. During cross-examination the following colloquy occurred:

Q. All right, sir. Now, you've stated you know the character and reputation of Mr. Martin. Did you know that he had been selling drugs in the jail?

MR. C. WILLIAMSON: Objection.

MR. G. WILLIAMSON: Objection. Move to strike.

COURT: Overruled.

Q. Did you know that he had been charged with selling drugs in the jail?

MR. G. WILLIAMSON: Objection.

A. I heard that he was charged, and I was surprised. That I asked the Sheriff if marijuana grow in the jail for him to sell it from there.

The defendant argues that this cross-examination was improper under N.C.G.S. § 8C-1, Rule 404, Rule 405(a), and Rule 608(a).

Rules 404 and 608 deal with proof of a person's character. They have been interpreted in regard to asking a defendant on cross-examination about specific instances of misconduct in *State v. Clemmons*, 319 N.C. 192, 353 S.E. 2d 209 (1987); *State v. Scott*, 318 N.C. 237, 347 S.E. 2d 414 (1986); and *State v. Morgan*, 315 N.C. 626, 340 S.E. 2d 84 (1986). We do not interpret Rule 404 or Rule 608 as to their application in this case. Rule 405(a) applies to the cross-examination of character witnesses. It provides in part:

> In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

Assuming, arguendo, that the defendant put on evidence of his good character by the testimony of Bishop Jones, we note that Rule 405(a) allows questions of a character witness on cross-examination concerning specific instances of conduct of the person whose character is in issue. This changes the rule in this state as it existed before the adoption of the Evidence Code. *See State v. Hunt*, 287 N.C. 360, 215 S.E. 2d 40 (1975); 1 Brandis on North Carolina Evidence § 115 (1982). Although a character witness may be cross-examined about specific instances of misconduct, the objection to the second question posed to the witness should have been sustained. In this question the witness was asked whether he knew the defendant had been charged with selling drugs in the jail. In *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971), we held that a defendant could not be asked on cross-examination whether he had been charged with a crime. This Court stated that an indictment's function is not to determine whether a person is guilty of a crime but, rather, is to show only that the State's evidence is sufficient to try the defendant. For this reason it may not be used to impeach a witness. The same considerations apply during the cross-examination of a character witness. The fact that the defendant had been charged with a crime does not show he is guilty of the crime. The objection to this question should have been sustained.

Although we hold that it was error to allow the question as to whether the character witness knew the defendant had been charged with selling marijuana, we also hold this was not prejudicial error. In order to show prejudicial error, an appellant must show there is a reasonable possibility that, had the error not been

committed, a different result would have been reached at trial. *See State v. Billups*, 301 N.C. 607, 272 S.E. 2d 842 (1981); N.C.G.S. § 15A-1443(a) (1977). The defendant testified prior to calling the character witness that he had grown marijuana. Indeed, the reason he gave for his footprints being found near the home of one of the victims was that he was checking on his marijuana plants. We hold that there is not a reasonable possibility that the additional information that defendant had been charged with selling marijuana could have affected the outcome of the trial. This assignment of error is overruled.

[6] In his last assignment of error the defendant contends the court should have stopped the prosecuting attorney *ex mero motu* from making certain parts of the jury argument. The prosecuting attorney argued in part as follows:

> And it's appropriate in this case that when these ladies took the stand, when they passed you as jurors and told you their stories, they leaned this way, and they looked at you with their trusting eyes, and I hope you realize the responsibility that lies with you in this case, because you are their only hope. You are all that's left. They know Robert Martin raped them. And if you turn him loose, you will turn him loose knowing that he raped them. What on earth are they to do?
>
> . . . .
>
> They, by their plea, by their willingness to testify, by coming here in court this week have pleaded with you, "Fellow citizens, will you help me? Will you support me? I've been raped. Will you protect me? He did it. I know it. All of the evidence shows it. Will you help me?" They ask you that, and they will be awaiting your answer.
>
> If this man, in the face of all this evidence, can be acquitted, if after all you've heard you can keep from convicting this man, then we just as well shut down this courthouse and put a wreath on the door, because Justice is dead. Justice is dead. And God help us all.

The defendant contends that the prosecuting attorney argued that the jury was accountable to the prosecuting witnesses, vouched for their credibility, curried favor with the jury by suggesting the prosecuting witnesses personally approved of each juror as a fit person to serve, invited the jury to pay heed not to

the evidence but to the pleas for protection by the two women, and told the jury any verdict other than guilty would be a violation of their oath.

A jury's decision should be based on evidence presented at the trial and not upon any accountability to the witnesses, to the victim, to the community, or to society in general. A prosecuting attorney should not argue otherwise. *State v. Boyd*, 311 N.C. 408, 319 S.E. 2d 189 (1984), *cert. denied*, 471 U.S. 1030, 85 L.Ed. 2d 324 (1985); *State v. Scott*, 314 N.C. 309, 333 S.E. 2d 296 (1985); *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983); and *State v. Britt*, 288 N.C. 699, 220 S.E. 2d 283 (1975). A prosecuting attorney is allowed wide latitude in arguing to the jury and the argument must constitute gross impropriety before the trial judge should intervene *ex mero motu*. Tested by this standard, we hold the closing argument of the district attorney was not such as to require the court to intervene *ex mero motu*. The prosecuting attorney in effect told the jury the prosecuting witnesses were relying upon the jury to find the defendant guilty. It is not as easily inferred from this argument that the jury would be accountable to anyone if it found the defendant not guilty. The argument was not so improper as to require the judge to intervene *ex mero motu*. This assignment of error is overruled.

No error.

Justice MEYER concurring in result.

I concur in the majority's conclusion that there was no prejudicial error in defendant's trial. I cannot join in what I consider unwarranted speculation in the majority opinion.

The majority says: "One *might be able to infer* that the defendant had a good reputation from Bishop Jones' testimony that he had not heard anything bad about the defendant." (Emphasis added.) The majority simply states that if Bishop Jones' relationship with defendant was such that he would have heard if defendant's character were bad, then his never having heard it discussed is evidence of "good reputation." The majority repeats its speculation that "[e]ven if the defendant properly introduced evidence of his good character" (emphasis added) in this way, then it was not error because he failed to preserve it by not requesting the "good character" instruction in writing. The majority states

its speculation yet a third time when it "[a]ssum[es], arguendo, that the defendant put on evidence of his good character by the testimony of Bishop Jones."

Based on such speculation, the majority adopts, for the first time in this state, the rule that if a character witness' relationship with the defendant is such that he would likely have heard defendant's character (actually reputation) discussed if it were bad, the fact that he never heard it discussed is evidence of good reputation. *See* Brandis on North Carolina Evidence § 110 (1982). If this rule is to be adopted by this Court, it should be done in an appropriate case and not upon mere speculation about what the evidence might have shown.

I cannot join in such speculation, and I believe it is improper for the majority to do so. I find it particularly inappropriate in this case. Bishop E. W. Jones, who described his occupation as "Minister of Religion, and Contractor by trade," said that he had known the defendant for three or four years and that during the early part of 1985, he and defendant worked together on a job for another company. Bishop Jones testified that he went out to work on his own and that defendant came to work for him in May or June of 1985 (the first rape took place on 5 May 1985, and the second rape on 15 June 1985) and worked for him "a few weeks before this happened." Bishop Jones described the way in which he had known defendant as a "working relationship." The record is devoid of any indication that they shared any church or religious relationship or that they were friends or even that they lived in close proximity to one another. There is simply nothing in the record to show that Bishop Jones' relationship with defendant was such that he would likely have heard the defendant's character discussed if it were bad. Thus, the fact that he had never heard it discussed would be no evidence whatever of "good character."

I also take exception to another aspect of the majority opinion. It has long been the law of this state that a *defendant* may not be cross-examined as to whether he has been "charged" with a crime. The majority, without citation to authority, extends this rule to a *character witness* for the defendant, whose testimony of "good character" is limited, in effect, to his testimony that he has "never heard anything bad about" the defendant. In many such

cases, as here, the witness would readily admit hearing of charges having been filed against the defendant. In the unique situation where the defendant's "good character" is sought to be established by the fact that the witness has not heard anything bad about him, such testimony should be admissible because it simply goes to show the jury that the character witness was not being entirely truthful.

In this case, the first question of the district attorney was entirely proper:

> Q. All right, sir. Now, you've stated you know the character and reputation of Mr. Martin. Did you know that he *had been* selling drugs in the jail?

(Emphasis added.) Following objection by defense counsel, the district attorney repeated the question but, probably inadvertently, used the term "charged with":

> Q. Did you know that he *had been charged with* selling drugs in the jail?

(Emphasis added.) Even assuming that the change of words was intentional, it would not be error in the context of the circumstances here. The majority, though finding error, finds the error not to be prejudicial because other evidence of defendant's use and growing of marijuana was admitted. This is simply not a proper case in which to extend the rule against cross-examination of a defendant as to "charges" filed against him to a character witness whose testimony is limited to never having heard anything bad about the defendant.

The majority seems to adopt two major principles of the law of evidence, both new to this state, neither of which it finds to be prejudicial under the facts presented by this case. I consider the purported adoption of both pure dictum.

Justices MITCHELL and WHICHARD join in this concurring opinion.

STATE OF NORTH CAROLINA v. JOHN QUINTON SHANK

No. 734A86

(Filed 5 May 1988)

Criminal Law § 50.1; Homicide § 18.1— first degree murder—effect of diminished mental capacity on premeditation and deliberation—expert testimony excluded—error

The trial court erred in a first degree murder prosecution in which defendant did not plead insanity by not allowing defendant's expert to testify that in his opinion defendant's diminished mental capacity affected his ability to make and carry out plans or to testify as to whether he determined defendant was under the influence of mental or emotional disturbance at the time of the offense. Testimony tending to show that defendant did not have the capacity to premeditate or deliberate was relevant in determining the presence or absence of an element of the offense with which defendant was charged; N.C.G.S. § 8C-1, Rule 704 now allows opinion testimony even though it relates to an ultimate issue; and the testimony is not inadmissible under any other Rule of Evidence.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) (1986) from a judgment imposing a sentence of life imprisonment entered by *Williams, J.*, upon defendant's conviction of first degree murder at the 15 September 1986 Criminal Session of Superior Court, CLEVELAND County. Heard in the Supreme Court 10 November 1987.

Lacy H. Thornburg, Attorney General, by Charles M. Hensey, Special Deputy Attorney General, for the State.

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

WHICHARD, Justice.

Defendant was convicted of the first degree murder of Dellaree Shank and sentenced to life imprisonment. We award a new trial.

The State's evidence tended to show that on 6 January 1986, between 8:30 and 9:00 a.m., defendant went to the Cleveland County Health Department, where his estranged wife, Dellaree Shank, worked. Defendant and Ms. Shank walked out of the building into the parking lot. They talked for a short time, then defendant pulled out a gun. As Ms. Shank ran away screaming,

defendant shot her. She fell to the pavement. Defendant walked up to her and shot her several more times. Then defendant got in a truck and drove away. The State Medical Examiner testified that Ms. Shank's body had five gunshot wounds.

At about 9:15 a.m., defendant called his brother, Clifford Shank, and told him that he had done "something stupid," that he had "shot Dellaree." Clifford left his work in Kings Mountain and drove toward Shelby. He picked up defendant near a shopping center on Highway 74. Defendant told Clifford that he had shot Dellaree because she "wouldn't leave [him] alone." He asked Clifford to drive him to Clover, South Carolina. Clifford told defendant that he needed to get back to work, and he dropped defendant off at a shopping center in Gastonia. Defendant was subsequently arrested.

Later that day, police discovered a gun and holster in a bedroom in the house of Carolyn Lawrence, defendant's girlfriend. The gun had recently been fired. The State introduced evidence that defendant had borrowed a pistol and ammunition from a friend on 2 January 1986, and had bought a shoulder holster from a gun shop on 4 January 1986.

Defendant testified in his own behalf. He stated that he and Ms. Shank were married in 1978, divorced in 1981, and remarried in 1984. They had two children from these marriages. In September or October 1985, he and Ms. Shank separated. He quit his job in Shelby and moved to Arizona, taking the children with him. Ms. Shank got a court order for custody. Police came to defendant's house, got the children, and took them back to North Carolina to Ms. Shank. Defendant returned to this state and filed suit for custody. While the suit was pending, he looked for a job. When he could not find work, he became depressed. He started to drink heavily, used cocaine and "speed," and lost thirty pounds in two months. He and Ms. Shank had continuing arguments about custody. He borrowed a gun for protection and for target shooting, but he also considered committing suicide with it. On 4 January he was supposed to visit the children, but Ms. Shank refused to let his mother pick them up.

Defendant further testified that on 6 January 1986, after only an hour and a half of sleep, he went to his grandmother's house, smoked two marijuana cigarettes, then went to the Health De-

partment to find out why Ms. Shank had not let him visit with the children two days earlier. He asked her to go outside to talk. Once outside, they started arguing about her refusal to let him see the children. She told him that no matter what he did, she would make sure that he would never get to see the children again. Defendant testified that he did not remember anything from that time until the time he was arrested.

Defendant did not contend at trial that he was insane when he shot Ms. Shank. However, he attempted to show that at the time of the shooting he was suffering from mental disorders which rendered him incapable of premeditating and deliberating. The trial court allowed defendant to introduce expert testimony that at the time he shot Ms. Shank he was suffering from "psychogenic amnesia."

Dr. John Billinsky, defendant's expert in forensic psychiatry, testified that at the time of the shooting defendant was suffering from "psychogenic amnesia, adjustment reaction with mixed disturbance of emotions and conduct . . ., mixed substance abuse episodic and marital problems." Dr. Billinsky testified that defendant suffered from severe depression in the days and weeks immediately preceding the killing. Defendant drank heavily; he used marijuana, cocaine, and amphetamines; he had "obsessive concerns about the children and about getting back with the children"; and he thought seriously about committing suicide. Dr. Billinsky said that on the morning of 6 January 1986, defendant was suffering from an overwhelming amount of stress. Ms. Shank's threat never to let him see his children again caused defendant to experience intense emotional arousal, resulting in amnesia. Dr. Billinsky also testified that defendant may have had a dissociative episode at this time.

Dr. William Varley, defendant's expert in psychology and psychological testing, testified that he had done a psychological evaluation of defendant on 17 June 1986. He said that the information he obtained through testing defendant and examining Dr. Billinsky's report supported Dr. Billinsky's diagnoses, and that he also believed defendant's period of amnesia was real.

As part of its rebuttal evidence, the State offered the testimony of Dr. Bob Rollins, an expert in forensic psychiatry, who had also examined defendant extensively. His opinion was that at

the time of the shooting defendant was suffering from "adjustment disorder with a mixed disturbance of emotions and conduct[,] . . . [m]ixed substance abuse episodic[,] . . . [a]nd marital maladjustment. . . ." He further testified that these disorders were not "so severe as to prevent [defendant] from understanding what he was doing and knowing that that would have been wrong."

The trial court did not allow defendant's expert to testify that, in his opinion, defendant's diminished mental capacity affected his ability to make and carry out plans. It also did not allow him to testify whether he determined that defendant was under the influence of mental or emotional disturbance at the time of the offense. Defendant assigns error to the court's refusal to allow this testimony. We hold that under the North Carolina Rules of Evidence, this was error which requires a new trial.

During *voir dire*, defense counsel related the anticipated testimony of Dr. Billinsky to the court. The following exchange occurred:

> MR. SHUFORD [prosecutor]: Your Honor, would it be improper for me to conclude that he will not be permitted to testify specifically regarding how the mental state of this defendant on this date would affect his ability to perform [sic] an intent to kill?
>
> THE COURT: I think that's fair.
>
> MR. SHUFORD: All right.

When defense counsel then examined Dr. Billinsky on *voir dire*, the court said that it would sustain the prosecutor's objection to the following question:

> Q. Doctor Billinsky, in view of the fact that you have stated you—in your opinion that his amnesia was real, would you have an opinion as to whether or not on January 6 he would have been able to plan his activities?

The court also stated:

> Well, I think that the defendant is entitled to present evidence in the form of evaluations, in the form of an expert opinion concerning his evaluation by the psychiatrist, and I

> would assume by Doctor Varley, who is a psychologist, as it relates to his emotional and mental state surrounding these events. The Court has indicated that it will not permit the psychologist or the psychiatrist in this case to render an ultimate opinion on the question of whether the defendant had the ability to form a specific intent to kill because I think that is a question of fact for the jury. However, the factors relevant to the jury making that determination may be elicited from this witness, short of him invading the province of the jury and rendering an opinion on the ultimate issue which the State has to establish, and that is the defendant did form the specific intent or he didn't. I think the jury is entitled to consider evidence from which they could reach the ultimate issue which they're asked to decide.

Upon direct examination of Dr. Billinsky before the jury, the court sustained the prosecutor's objections to the following questions:

> Q. Do you have an opinion satisfactory to yourself as to whether on January the 6th, John Shank had the ability to make or carry out plans?
>
> . . .
>
> Q. Doctor Billinsky, I note that the order which ordered you to make this examination indicated that you were to determine whether the capital felony in question was committed while the defendant was under the influence of mental or emotional disturbance. Did you determine that?

In 1983, the General Assembly enacted the North Carolina Rules of Evidence, effective 1 July 1984. Rule 704 states that "[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." N.C.G.S. § 8C-1, Rule 704 (1986). This rule changed the former doctrine "that exclude[d] evidence in the form of an opinion if it purport[ed] to resolve the 'ultimate issue' to be decided by the trier of fact." N.C.G.S. § 8C-1, Rule 704 comment (1986). Since first degree murder requires premeditation and deliberation, *State v. Marshall*, 304 N.C. 167, 172, 282 S.E. 2d 422, 425 (1981), opinion testimony tending to show that a defendant did not have the capacity to premeditate or deliberate is testimony

that "embraces an ultimate issue to be decided by the trier of fact." N.C.G.S. § 8C-1, Rule 704 (1986). Under Rule 704, such testimony is not thereby rendered inadmissible.

While not all opinion evidence is admissible, "[g]enerally, all relevant evidence is admissible." *State v. Riddick*, 315 N.C. 749, 757, 340 S.E. 2d 55, 60 (1986) (citing Rule 402). Moreover, "[u]nder Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time." N.C.G.S. § 8C-1, Rule 704 advisory committee's note (1986).

Under Rule 401, relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1986). To convict defendant of first degree murder, the State had to prove beyond a reasonable doubt that he killed with premeditation and deliberation. *State v. Propst*, 274 N.C. 62, 70, 161 S.E. 2d 560, 568 (1968). "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. Barts*, 316 N.C. 666, 687, 343 S.E. 2d 828, 842 (1986). Opinion testimony that defendant did not have the ability to "plan his activities" or "to make or carry out plans," and that he was under mental or emotional disturbance at the time he killed Ms. Shank, would tend to make it less probable that he acted after deliberation. *See State v. Riddick*, 315 N.C. at 757, 340 S.E. 2d at 60 (evidence of a defendant's state of mind at the time of the offense is a "fact of consequence to the determination of the action."). Such testimony is clearly relevant in a trial for first degree murder.

Rule 702, which deals with expert opinion testimony, provides that "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue," an expert witness may testify thereto in the form of an opinion. N.C.G.S. § 8C-1, Rule 702 (1986). Testimony that a defendant was incapable of planning his activities or carrying out plans, and that he was under mental or emotional disturbance, could assist the jury in determining whether a defendant in fact premeditated and deliberated. Further, the probative value

of such testimony in this case clearly outweighed any possible confusion of the issues or concerns of delay. N.C.G.S. § 8C-1, Rule 403 (1986).

Because (1) testimony tending to show that defendant did not have the capacity to premeditate or deliberate was relevant in determining the presence or absence of an element of the offense with which he was charged, (2) Rule 704 now allows opinion testimony even though it relates to an ultimate issue, and (3) the testimony was not inadmissible under any other rule of evidence, the trial court erred in not allowing the testimony. We cannot say there is no "reasonable possibility that, had the error . . . not been committed, a different result would have been reached at the trial . . . ." N.C.G.S. § 15A-1443(a) (1983). The error thus is prejudicial and requires a new trial.

We note that North Carolina's Rule 704 is identical to the former Rule 704 of the Federal Rules of Evidence. In 1984, Congress amended Federal Rule 704, adding subsection (b). That subsection provides:

> (b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are for the trier of fact alone.

Fed. R. Evid. 704(b), *as added by* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 2067-68 (effective 12 Oct. 1984). In the absence of such a provision, North Carolina's Rule 704 plainly provides that an expert witness is not precluded from testifying as to whether a defendant had the capacity to make and carry out plans, or was under the influence of mental or emotional disturbance, merely because such testimony relates to an ultimate issue to be decided by the trier of fact.

Our decision is not inconsistent with *State v. Cooper*, 286 N.C. 549, 213 S.E. 2d 305 (1975). In *Cooper*, the defendant was charged with the murders of his wife and four of his children. A forensic psychiatrist testified at trial that Cooper suffered from paranoid schizophrenia and that he was unable to exercise the capacity to distinguish right from wrong at the time of the kill-

ings. The jury found that the defendant there was not legally insane at the time of the killings and convicted him of five counts of first degree murder. He received five life sentences. The defendant there contended before this Court that the trial court erred in failing to instruct the jury that it should consider evidence of his mental disease on the question of whether he premeditated and deliberated the killings. *Id.* at 565, 213 S.E. 2d at 316. The evidence there all related to a defense of insanity, however, not to the effect of the defendant's mental disease in negating his capacity to premeditate and deliberate. This Court held that there was no reversible error in the trial court's charge. *Id.* at 573, 213 S.E. 2d at 321.

Cooper and the cases following *Cooper*[1] are distinguishable from the case at hand. In those cases, the defendants presented their evidence of diminished mental capacity in support of a defense of not guilty by reason of insanity. Defendant here, by contrast, presented his evidence not to support an insanity defense—*i.e.* a defense of incapacity to distinguish between right and wrong at the time of and in respect to the offense, *id.* at 569, 213 S.E. 2d at 318—but to show a mental condition which could have been found to negate the capacity to premeditate and deliberate, evidence which we have herein held was proper under the new rules. Even in *Cooper*, a pre-Rules case, this Court recognized that such evidence would provide a proper basis for a not guilty verdict on a charge of first degree murder based on premeditation and deliberation. It stated:

> It is well established that to convict a defendant of murder in the first degree, when the killing was not perpetrated by one of the means specified by G.S. 14-17 and was not committed in the perpetration of or attempt to perpetrate a felony, the State must prove beyond a reasonable doubt that the killing was with premeditation and deliberation. It is also well established that a specific intent to kill is a necessary ingredient of premeditation and deliberation. *It*

1. *State v. Mize*, 315 N.C. 285, 337 S.E. 2d 562 (1985); *State v. Adcock*, 310 N.C. 1, 310 S.E. 2d 587 (1984); *State v. Franks*, 300 N.C. 1, 265 S.E. 2d 177 (1980); *State v. Harris*, 290 N.C. 718, 228 S.E. 2d 424 (1976); *State v. Hammonds*, 290 N.C. 1, 224 S.E. 2d 595 (1976); *State v. Shepherd*, 288 N.C. 346, 218 S.E. 2d 176 (1975); *State v. Wetmore*, 287 N.C. 344, 215 S.E. 2d 51 (1975), *death penalty vacated*, 428 U.S. 905 (1976); and other cases, if any.

follows, necessarily, that a defendant who does not have the mental capacity to form an intent to kill, or to premeditate and deliberate upon the killing, cannot be lawfully convicted of murder in the first degree, whether such mental deficiency be due to a disease of the mind, intoxication, . . . or some other cause.

Id. at 572, 213 S.E. 2d at 320 (emphasis supplied; citations omitted).

Insofar as *State v. Kirkley*, 308 N.C. 196, 302 S.E. 2d 144 (1983), and *State v. Anderson*, 303 N.C. 185, 278 S.E. 2d 238 (1981), are inconsistent with this opinion, they are overruled. In those cases, the defendants, like defendant here, introduced evidence of mental disorders, not to support a defense of insanity, but to show that they did not have the capacity to premeditate and deliberate at the time of the killings.

For the foregoing reasons, we award defendant a new trial at which the court shall admit the evidence here held improperly excluded, if defendant again offers such evidence.

New trial.

STATE OF NORTH CAROLINA v. JAMES WALLACE JACKSON

No. 477A87

(Filed 5 May 1988)

1. Constitutional Law § 60; Jury § 7.14— peremptory challenges of black jurors— no violation of equal protection

A black defendant's equal protection rights were not violated by the State's exercise of peremptory challenges of black jurors where the prosecution articulated racially neutral reasons for exercising its challenges by showing that it sought jurors who were "stable, conservative, mature, government oriented, sympathetic to the plight of the victim, and sympathetic to law enforcement crime solving problems and pressures," and where the trial court also considered evidence that (1) one of the principal witnesses for the State was a black police officer, (2) the first peremptory challenge was to a white juror, (3) the State left a black person on the jury when it still had three peremptory challenges, and (4) there were no comments by either prosecutor which would indicate a discriminatory intent by the State.

2. Constitutional Law § 60; Jury § 7.14— peremptory challenges of blacks—hearing on Batson violation—no right to examine prosecutor

A defendant does not have the right to examine the prosecuting attorney in a hearing at trial or post trial to determine if there has been a *Batson* violation by the prosecution's use of peremptory challenges to exclude members of defendant's race from the petit jury.

Justice FRYE concurring.

Justice MARTIN joins in this concurring opinion.

APPEAL by defendant from an order of *Ellis, J.*, at the 7 May 1987 Criminal Session of Superior Court, WAKE County. Heard in the Supreme Court 16 March 1988.

This is the third time this case has been in this Court. In *State v. Jackson*, 308 N.C. 549, 304 S.E. 2d 134 (1983), we held the defendant's confession was admissible in evidence. We found no error in the defendant's conviction and sentence in *State v. Jackson*, 317 N.C. 1, 343 S.E. 2d 814 (1986). The United States Supreme Court on 23 February 1987 remanded the case to this Court for further consideration in light of *Griffith v. Kentucky*, 479 U.S. ---, 93 L.Ed. 2d 649 (1987) and *Batson v. Kentucky*, 476 U.S. 79, 90 L.Ed. 2d 69 (1986).

We remanded the case to the Superior Court of Wake County for a determination as to whether the defendant's equal protection rights had been violated by the prosecutor's improper exercise of peremptory challenges of black jurors. The defendant subpoenaed Superior Court Judge Donald W. Stephens and Special Deputy Attorney General Joan H. Byers to testify at the hearing. Judge Stephens and Ms. Byers had prosecuted the defendant at his trial before Judge Stephens was appointed a superior court judge. The court quashed these subpoenas on motion by the State.

The selection of the jury at the trial of this case was not transcribed. The attorneys who represented the defendant at trial and Special Deputy Attorney General Joan Byers, who represented the State, stipulated what happened at the trial, which stipulation was given to the court. In addition the court was given the trial notes of the attorneys who participated in the trial. Judge Stephens' affidavit was also submitted to the court. It was stipulated that the State used five peremptory challenges to

remove four blacks and one white from the jury. The jury that tried the case consisted of eleven white persons and one black person. Ms. Byers stated to the court, "Prior to trial my co-counsel and I felt that it was of the utmost importance that we select a jury that was stable, government oriented, employed, and had sufficient ties to the community, and a mind-set, if you will, that would . . . pay more attention to the needs of law enforcement than the fine points of individual rights." She also stated that a black detective was to be one of the principal witnesses for the State and it was important to establish his credibility. For this reason Ms. Byers said race did not enter the consideration of the type person the State wanted on the jury.

Ms. Byers stated that the State peremptorily challenged one black woman because she was unemployed. Ms. Byers said the prosecution did not feel that an unemployed person had as significant a stake in an orderly society as an employed person. Ms. Byers also stated that this person had been a student counselor at Shaw University and the prosecution felt "that was too liberal a background and her subsequent questions and demeanor gave us that feeling."

Ms. Byers stated that a black male was peremptorily challenged because he was a third year law student at the University of North Carolina. He had been taught by professors of "somewhat liberal views." The prosecution was afraid he would lead the other jurors because he had studied law.

Ms. Byers said the prosecution peremptorily challenged a second black female because she was unemployed and "she answered us hesitantly and again she appeared indifferent or hostile about either being a member of a jury or indifferent or hostile to us." Ms. Byers gave as the prosecution's reason for removing a third black female that the prosecution was afraid she would identify with the defendant's mother who it was anticipated would testify. The juror had a son of the approximate age of the defendant and although she had a daughter the same approximate age as the victim the prosecution was afraid she would lean toward the defendant. The State successfully challenged two black jurors for cause.

The court found that the defendant had "made a prima facie showing of the inference of purposeful discrimination." It found

further that the State had "articulated a neutral explanation related to this particular case for each of the peremptory challenges it used and that the State has given a clear and reasonably specific explanation of its legitimate reasons for the exercising of its challenges." The defendant's motion for a mistrial was denied.

The defendant appealed.

Lacy H. Thornburg, Attorney General, by Barry S. McNeill, Assistant Attorney General, for the State.

Gordon Widenhouse for defendant appellant.

WEBB, Justice.

[1] This appeal brings to the Court two questions. The first is whether there was error in the finding of the superior court that this black defendant's right to the equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution has not been violated by the discriminatory exclusion of members of his race from the petit jury. The second question involves the procedure which was used in the superior court to determine if such a violation had occurred.

In *Batson v. Kentucky*, 476 U.S. 79, 90 L.Ed. 2d 69, the United States Supreme Court overruled *Swain v. Alabama*, 380 U.S. 202, 13 L.Ed. 2d 759 (1965), and held a prima facie case of purposeful discrimination in the selection of a petit jury may be established on evidence concerning the prosecutor's exercise of peremptory challenges at the trial. In order to establish such a prima facie case the defendant must be a member of a cognizable racial group and he must show the prosecutor has used peremptory challenges to remove from the jury members of the defendant's race. The trial court must consider this fact as well as all relevant circumstances in determining whether a prima facie case of discrimination has been created. When the trial court determines that a prima facie case has been made, the prosecution must articulate legitimate reasons which are clear and reasonably specific and related to the particular case to be tried which give a neutral explanation for challenging jurors of the cognizable group. The prosecutor's explanation need not rise to the level of justifying a challenge for cause. At this point the trial court must determine if the defendant has established purposeful discrimination.

Since the trial court's findings will depend on credibility, a reviewing court should give those findings great deference. *Batson*, 476 U.S. 98, n. 21, 90 L.Ed. 2d 89, n. 21.

In this case the prosecutors stated as their criteria for selecting jurors that they be "stable, government oriented, employed and had sufficient ties to the community, and a mind-set . . . that would pay more attention to the needs of law enforcement than the fine points of individual rights." In addition to this statement of the State's criteria for jury selection, other factors which the court may have taken into account were (1) one of the principal witnesses for the State was a black police officer, (2) the first peremptory challenge was to a white juror, (3) the State left a black person on the jury when it still had three peremptory challenges, and (4) there were no comments by either prosecutor which would indicate a discriminatory intent by the State. With the criteria advanced by the State and taking into account all circumstances of the case, we cannot hold, after paying special deference to the findings of the superior court, that it was error to deny the defendant's motion for mistrial.

In reaching this conclusion we have been helped by cases from other jurisdictions. In *United States v. Cartlidge*, 808 F. 2d 1064 (5th Cir. 1987), the following explanations were held sufficient: an excused juror was young, single and unemployed; another excused juror avoided eye contact; a third excused juror was divorced and appeared to have a low income occupation. In *United States v. Mathews*, 803 F. 2d 325 (7th Cir. 1986), *rev'd on other grounds*, --- U.S. ---, --- L.Ed. 2d ---, 108 S.Ct. 883 (1988), a prosecutrix' statement was held to be a sufficient explanation for peremptory challenges to two jurors. The prosecutrix said one juror was late coming to court which indicated a lack of commitment to the importance of the proceedings. In the courtroom she did not seem to be attentive to the proceedings at hand. A second juror spent a great deal of time looking at the prosecutrix in what she felt was a hostile way. The prosecutrix felt she would be "strongly for or against her position." In *People v. Cartagena*, 128 A.D. 2d 797, 513 N.Y.S. 2d 497 (1987), a prosecutor's affidavit was held to be a sufficient explanation. The prosecutor said in his affidavit that he excused four black jurors based on "their educational backgrounds, their employment history, the employment of their spouses and children, and criminal record, if any." In

Chambers v. State, 724 S.W. 2d 440 (Tex. Ct. App. 1987), no error was found when the prosecutor explained challenges to four jurors. He said one juror's religious preference was Church of Christ which the prosecutor felt was a "little bit away from the mainstream," he had not served on a jury before, the space on the jury card for name of husband or wife was marked "not applicable" and the space for number of children was unmarked, and his handwriting was not very legible. The explanation for excusing the second juror was that he had misspelled "Baptist," he was very young (23 years of age) and his name "rang a bell." A third juror was excused because she was a Jehovah's Witness which the prosecutor felt was a fringe religious group and her juror card indicated she was unmarried with two children. A fourth juror was excused because the prosecutor "just didn't feel like the juror was really attentive to what was going on. I had a feeling he was nodding his head a little too much towards you, and not enough towards me."

The defendant, relying on *Slappy v. State*, 503 So. 2d 350 (Fla. App. 3d 1987), argues that the only legitimate criterion articulated by the State for challenging jurors was of a person more likely to value the needs of law enforcement than the rights of individuals. He says that only two of the excused jurors, one white and one black, fit this category. He contends that the criteria used by the State "sweep too broadly" to be valid. The defendant also argues that the criteria advanced by the State were not applied except to excuse black jurors. He contends the State gave disparate treatment to white and black jurors. Two black unemployed persons were challenged by the State and two white unemployed jurors were passed by the State. The defendant says this illustrates the disparate treatment. The State said stability was one criterion of its jury profile and the defendant assumes this means long term residency. Two blacks who had lived twenty and thirty years respectively in the community were excused. Two whites, one of whom had lived two years and the other had lived five years in the community, were kept on the jury. The defendant says this showed the disparate treatment by the State of prospective jurors.

We disagree with the defendant as to the validity of the criteria used by the State in its profile of acceptable jurors. We believe the profile showed, as found by Judge Ellis, that the

State wanted a jury that was "stable, conservative, mature, government oriented, sympathetic to the plight of the victim, and sympathetic to law enforcement crime solving problems and pressures." These are legitimate criteria in picking a jury.

As to the two unemployed black jurors who were excused, there were additional factors which distinguished them in the eyes of the prosecution from the two unemployed whites who were not excused. One of the excused blacks had been a counselor at Shaw University and the State felt this might make her sympathetic to the defendant. The other was excused by the prosecution because her non-verbal communication suggested hostility and indifference. She had lived in the community for thirty years but the State did not feel this compensated for her hostility. The other black juror who was excused had lived in the community for twenty years but she had a son who was of the approximate age of the defendant. The prosecution stated it felt this might make her sympathetic to the defendant.

We might not have reached the same result as the superior court but giving, as we must, deference to its findings, we hold it was not error to deny the defendant's motion for mistrial.

[2] The defendant also assigns error to the quashing of the subpoenas to Judge Stephens and Ms. Joan Byers, the prosecutors in the case. The defendant contends under this assignment of error that he was not allowed to put on evidence at the hearing. The record does not reveal evidence offered by the defendant other than testimony which might have been elicited from Judge Stephens and Ms. Byers. The only question raised by this assignment of error is whether the defendant had the right to examine the prosecutors in a hearing to determine if there has been a *Batson* violation.

In *Batson* the Supreme Court declined to formulate procedures to be followed in determining whether a constitutional violation had occurred. The question of examining the prosecutor was not raised in the cases cited above. In two cases federal courts have held that the judge could conduct an in camera hearing out of the presence of the defendant to let the prosecutor explain his reasons for peremptorily challenging black jurors. *United States v. Tucker*, 836 F. 2d 334 (7th Cir. 1988); and *United States v. Davis*, 809 F. 2d 1194 (6th Cir.), *cert. denied*, --- U.S.

---, 97 L.Ed. 2d 740 (1987). In *United States v. Thompson*, 827 F. 2d 1254 (9th Cir. 1987) and *United States v. Gordon*, 817 F. 2d 1538 (11th Cir. 1987), *vacated in part on other grounds*, 836 F. 2d 1312 (11th Cir. 1988), it was held that a defendant is entitled to an in-court hearing but neither of these cases held the defendant is entitled to examine the prosecutor. The defendant relies on *Roman v. Abrams*, 608 F. Supp. 629 (S.D.N.Y. 1985), *mod. on other grounds*, 790 F. 2d 244 (2nd Cir. 1986). We do not believe this case is helpful to the defendant. In that case the defendant had petitioned the federal district court for a writ of habeas corpus after he had been convicted in a state court. In the hearing in federal court the state prosecutor testified. We do not believe this is precedent for a hearing in a state court in which the prosecutor is appearing as an attorney.

We hold that a defendant who makes a *Batson* challenge does not have the right to examine the prosecuting attorney. In balancing the arguments for and against such an examination, we believe the disruption to a trial which could occur if an attorney in a case were called as a witness overbears any good which could be obtained by his testimony. We do not believe we should have a trial within a trial. The presiding judges are capable of passing on the credibility of prosecuting attorneys without the benefit of cross-examination.

The defendant contends he was deprived of an opportunity to make a stronger showing because the State conceded a prima facie case of discrimination and presented its explanation without allowing the defendant to put on evidence as to the prima facie case. He says for this reason he was not allowed to make as strong a showing for a prima facie case as could have been done. We know of no reason why the defendant could not have offered evidence to strengthen his case after the State had made its showing. The record does not show that the defendant offered to make any showing in addition to the evidence received other than his subpoenas to the prosecutors.

The defendant also argues that he should have been allowed to examine the prosecutors in this case because the *Batson* hearing did not occur at the trial. We know of no reason why the defendant should be allowed to examine a prosecuting attorney at a post trial hearing if he could not do so at trial.

The order of the superior court is

Affirmed.

Justice FRYE concurring.

I concur in both the reasoning and conclusion reached by the Court. I nonetheless write separately to express my concerns regarding the future application of today's decision.

In *Batson v. Kentucky*, 476 U.S. 79, 90 L.Ed. 2d 69 (1986), the United States Supreme Court held that the discriminatory use of peremptory challenges in a single case violates the Fourteenth Amendment to the United States Constitution. That Court held that the equal protection clause forbids the prosecutor from challenging potential black jurors solely because of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant. *Id.* The Supreme Court, however, declined to formulate particular procedures to be followed by trial courts upon a timely objection to a prosecutor's challenges. *Id.* at 99, 90 L.Ed. 2d at 89-90. Today, this Court breathes life into the *Batson* holding by formulating procedures to be followed in determining whether a black defendant's constitutional right to equal protection has been violated by the State's use of peremptory challenges to exclude blacks from petit jury service.

The primordial concern and motivation behind the *Batson* decision was to afford black citizens "the same right and opportunity to participate in the administration of justice enjoyed by the white population." *Id.* at 91, 90 L.Ed. 2d at 84, *citing Swain v. Alabama*, 380 U.S. 202, 13 L.Ed. 2d 755 (1965). To that end, the State's use of peremptory challenges to strike all or a disproportionate number of black prospective jurors will no longer be immune from constitutional scrutiny. Once the defendant has made a *prima facie* showing of purposeful discrimination, the burden then shifts to the State to articulate a racially neutral reason for exercising its challenges.

In this case, this Court is satisfied that the proffered explanations by the State sufficiently demonstrate racially neutral reasons for the State's peremptory challenges of most of the black jurors tendered to it. Our action today must not be interpreted as

a license for prosecuting attorneys to proceed with "business as usual," under the assumption that this right, implicit in the equal protection clause and given vitality by the *Batson* ruling, is a right without a remedy. Although this Court will "rely on the good judgment of the trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination," *People v. Hall*, 35 Cal. 3d 161, 167, 197 Cal. Rptr. 71, 75, 672 P. 2d 854, 858 (1983), we will review with a scrupulous eye such proffered reasons in an effort to thwart the remnants of the past pernicious practice of excluding blacks from juries for no other reason than for the color of their skin.

In the case *sub judice*, the State sought jurors that fit neatly into an acceptable "profile." This profile showed that the State sought individuals who were "stable, conservative, mature, government oriented, sympathetic to the plight of the victim, and sympathetic to law enforcement crime solving problems and pressures." While I agree with the Court that these are "legitimate criteria in picking a jury" in this case, *State v. Jackson*, slip op. at 8, I envision similar "profiles" that may be constructed in a manner so as to systematically exclude blacks. Such "profiles" must not "sweep so broadly" as to attenuate their validity and justify the exclusion of any and all blacks. *See State v. Gilmore*, 103 N.J. 508, 511 A. 2d 1150 (1986). For that reason, such "profiles" should be particularly suspect in a court's determination that the State has offered a sufficient response to defendant's challenge. For this profile to withstand such scrutiny, it must be legitimate, reasonably specific, and related to the particular case to be tried. *Batson*, at 98, 90 L.Ed. 2d at 88.

Absent the total abolition of peremptory challenges, we likely will again face the challenge of determining whether they have been used in an unconstitutional manner. It is the province of the General Assembly to determine whether peremptory challenges have outlived their usefulness. However, it is the province of the courts to ensure that they are used in such a manner not offensive to the constitutional rights of our citizens. We must remain alert to offers of proof made by the State that are but mere colloquial euphemisms for the very prejudice that constitutes invidious discrimination. Too, we must be careful not to lessen the burden of the State and therefore put a crippling burden on the

defendant so that defendant's right to trial by an impartial jury is so prejudiced that he is effectively left a right without a remedy.

I am satisfied that, in the instant case, the trial judge undertook "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available" and that he properly found that the State's use of peremptory challenges was not purposefully discriminatory. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266, 50 L.Ed. 2d 450, 465 (1977). Accordingly, I join the Court's decision.

Justice MARTIN joins in this concurring opinion.

STATE OF NORTH CAROLINA v. JAMES KEITH ROSS

No. 520A85

(Filed 5 May 1988)

1. **Criminal Law §§ 119, 163.3— instruction promised at charge conference—not given—no objection—appellate review**

The trial court's failure to give a promised instruction was properly before the Supreme Court on appeal despite defendant's failure to object prior to the commencement of jury deliberations because, under *State v. Pakulski*, 319 N.C. 562, a request for an instruction at the charge conference is sufficient compliance with Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure to warrant full review on appeal where the requested instruction is subsequently promised but not given, notwithstanding any failure to bring the error to the trial judge's attention at the end of the instructions.

2. **Criminal Law § 116; Constitutional Law § 75— requested instruction on defendant's decision not to testify—promised but not given—prejudicial error**

There was prejudicial error in a first degree murder prosecution from the court's failure to give a requested and subsequently promised jury instruction concerning defendant's decision not to testify in his own defense. Although the evidence of defendant's guilt was substantial, in the context of the historical importance of the Fifth Amendment to the United States Constitution, and the fact that defendant's attorney forecast evidence of self-defense but ultimately presented no evidence at all, the State did not prove that the error was harmless beyond a reasonable doubt.

Justice MARTIN dissenting.

Justice WHICHARD joins in this dissenting opinion.

APPEAL as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from judgments imposing sentences of death entered by *Allen, J.*, at the 12 August 1985 Criminal Session of Superior Court, MCDOWELL County, upon defendant's conviction by a jury of two counts of murder in the first degree. Heard in the Supreme Court on 13 April 1988.

Lacy H. Thornburg, Attorney General, by Charles M. Hensey, Special Deputy Attorney General, for the State.

Gordon Widenhouse for defendant-appellant.

MEYER, Justice.

Defendant was convicted of two counts of murder in the first degree arising out of the shooting deaths of two teen-age boys, Ricky Buchanan and Gary Bailey. The case was tried as a capital case, and consistent with the jury's recommendation, the trial court sentenced defendant to death in both cases. In his appeal to this Court, defendant brings forward numerous assignments of error concerning both the guilt-innocence and the sentencing phases of his trial. We have reviewed the entire record in this matter, and because we find that the trial court committed prejudicial error in failing to give a requested and subsequently promised jury instruction, we hold that defendant is entitled to a new trial.

An extensive review of the evidence presented at trial in this matter is not necessary to dispose of the single issue we address here. The evidence tends to show that defendant was employed as the caretaker of a campground in McDowell County, North Carolina, near the town of Dysartsville. Defendant, who was single, lived alone in a house on the campground premises provided by his employer. Unbeknownst to his employer, defendant, who apparently suffered from pedophilia, had a history of homosexual behavior which included, among other things, a conviction for a sex-related crime in Virginia.

The victims, Ricky Buchanan and Gary Bailey, were both teen-age boys familiar with defendant and the campground. At an uncle's birthday party on 23 January 1985, the two were overheard while talking of going to visit defendant at the campground later that same day. Though the two boys were seen at a local store later that afternoon, they failed to return home that evening and were never heard from again.

On 26 January, pursuant to instructions from the then-incarcerated defendant, law enforcement officers began to dig in a filled-in grease pit adjacent to defendant's house. Shortly thereafter, they found the victims' bullet-riddled bodies. Both of the boys had been shot multiple times, and Ricky Buchanan had been shot on one occasion at extremely close range.

A consensual search of defendant's house revealed, among other things, stains on the living room carpet later identified as blood. Law enforcement officers also found a .32-caliber revolver behind some books on a bookshelf. Expert examination of the bullets removed from the victims' bodies revealed that these bullets had been fired from the .32 revolver. Close examination of the barrel of the revolver revealed blood and, in addition, two human hairs. The blood was of the same type as that of one of the victims, Ricky Buchanan, while the hairs were found to be a head hair from Ricky Buchanan and a pubic hair from defendant Ross.

During both the jury selection process and the opening statement, defense counsel forecast self-defense as defendant's theory of the case. Nevertheless, defendant ultimately did not testify, nor did he in fact present any evidence in his own defense, during the guilt-innocence phase of the trial below. It was in this context that, pursuant to the above-mentioned and other condemning evidence, the jury found defendant guilty of first-degree murder in the deaths of both boys and recommended that defendant be sentenced to death by the trial court.

In his first assignment of error, and the only issue we shall address in this opinion, defendant asserts that the trial judge committed prejudicial error in failing to give a requested and subsequently promised jury instruction at the conclusion of the guilt-innocence phase of the trial below. Specifically, defendant claims here that his cause was severely prejudiced when the trial judge neglected to instruct the jury as requested on the defendant's decision not to testify and, accordingly, that he is entitled to a new trial. We agree, and we hereby order that the defendant receive a new trial.

As we note above in our survey of the facts of the case at bar, defendant did not testify, and in fact presented no evidence at all, during the guilt-innocence phase of the trial below. At the close of that first phase of defendant's trial, a charge conference

was convened by the trial judge for the purpose of determining which jury instructions would be employed prior to the jury's deliberation. That conference produced the following exchange:

> THE COURT: All right. This brings up the Charge Conference. This starts it off, I guess. I will use the pattern on first degree murder as to each count and second degree murder as to each count. I will also charge and I understand that you request it—
>
> MR. COATS: I was looking for the pattern charge number.
>
> THE COURT: *Failure of the defendant to testify?*
>
> MR. COATS: *Yes sir, that's correct.*
>
> THE COURT: *You can put it in the record later. I will use it.* Are there any other requested instructions?
>
> MR. LEONARD: Not for the State.
>
> MR. COATS: Not for the defendant at this time, your Honor.

(Emphasis added.)

Thus, defendant requested, and the trial judge indicated he would give, a jury instruction concerning defendant's decision not to testify in his own defense at trial. Yet, the transcript reveals, and the parties agree, that for whatever reason—perhaps the tension associated with any capital murder trial—the trial judge neglected to give the requested and promised jury instruction. It is this failure on the part of the trial judge to which defendant now assigns error. We find merit in defendant's claim here, and we hold that the trial judge's failure to instruct the jury on defendant's failure to testify constitutes, on the facts of this case, prejudicial error entitling this defendant to a new trial.

[1] We note at the outset that the trial judge's failure to give the requested and promised instruction is properly before us on appeal despite defendant's failure to object prior to the commencement of the jury's deliberation. Granted, it is true that the transcript reveals that defendant failed to embrace a final, explicit opportunity provided by the trial judge for remaining comments on the jury instructions:

THE COURT: I'm going to ask that the alternate jurors remain here. They are s[e]tting up in the Court Reporter's Office where you all can stay for the time being and see if we can't find you a little bit more comfortable quarters to stay but I don't want to let you go at this point. Don't discuss the matter. Go into the Court Reporter's room.

I will caution everyone at this time, if you're back here in this back hallway be very very cautious what you say and if I have any problem at all, I will just have it vacated and won't allow anybody back there around these jurors or the alternate jurors. Sheriff, if you'll keep that in mind. Try to stay as close to it as you can, please sir. *Anything further?*

MR. COATS: *No sir.*

MR. LEONARD: *No.*

(Emphasis added.)

It is also true that Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure provides that no party may assign as error any portion of the jury charge or omission therefrom unless he enters an objection before the jury retires to consider its verdict. *However*, in the recent case of *State v. Pakulski*, 319 N.C. 562, 356 S.E. 2d 319 (1987), we held that a request for an instruction at the charge conference is sufficient compliance with the rule to warrant our full review on appeal where the requested instruction is subsequently promised but not given, notwithstanding any failure to bring the error to the trial judge's attention at the end of the instructions. Accordingly, defendant's assignment of error is properly before us, and we turn now to a full review of the omitted jury instruction in the case at bar.

[2] It is beyond any question that the trial judge's failure to give the requested and subsequently promised jury instruction concerning defendant's decision not to testify in his own defense constitutes error. The State in fact explicitly concedes as much in its written brief to this Court in this matter. In the important case of *Carter v. Kentucky*, 450 U.S. 288, 67 L.Ed. 2d 241 (1981), the United States Supreme Court held that "a state trial judge has the constitutional obligation, *upon proper request*, to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify" by giving an appropriate instruction. *Id.*

at 305, 67 L.Ed. 2d at 254 (emphasis added). This Court expressly adopted this approach in its decision in *State v. Randolph*, 312 N.C. 198, 321 S.E. 2d 864 (1984), and accordingly, the trial judge's omission in the case at bar is error.

The remaining question, and the pivotal one, is whether the trial judge's error in this case was sufficiently prejudicial to defendant's cause to warrant our order of a new trial. In the case before us, the trial judge's error, which implicates defendant's right pursuant to the fifth amendment to the United States Constitution not to be compelled to be a witness against himself, is of constitutional moment. Accordingly, the relevant standard with regard to a prejudice determination is provided in N.C.G.S. § 15A-1443(b), which states as follows:

> 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). Pursuant to this statutory standard, the burden is upon the State in this case to prove beyond a reasonable doubt that the trial judge's error was harmless. We have considered this matter very carefully, and we simply cannot say that the State has carried this burden.

The State's principal argument in support of the position that it has properly borne its burden here is that the evidence of defendant's guilt of these two heinous murders is simply overwhelming. We concede that there is substantial evidence of this defendant's guilt of the crimes charged. However, in the context of the historical importance of the constitutional right implicated by the omitted instruction and, even more significantly, the tactics employed by defendant's counsel at trial, we cannot agree that the State has proven the trial judge's error harmless beyond a reasonable doubt.

The fifth amendment to the United States Constitution provides that no person shall be compelled in any criminal case to be a witness against himself. Many of the nation's courts, most significantly the United States Supreme Court, have noted the importance of this right, and by extension, the importance of jury

instructions concerning this right. It is the opinion of many that this right is particularly important because the state of affairs it seeks to ensure—namely, that we not draw an adverse inference from a criminal defendant's failure to testify in his own defense—is counterintuitive.

In *Carter v. Kentucky*, 450 U.S. 288, 67 L.Ed. 2d 241, for example, the United States Supreme Court addressed this point as follows:

> Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law. *Such instructions are perhaps nowhere more important than in the context of the Fifth Amendment privilege against compulsory self-incrimination, since "[t]oo many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are . . . guilty of crime . . . ." Ullman v United States*, 350 US 422, 426, 100 L Ed 511, 76 S Ct 497, 53 ALR2d 1008.

Id. at 302, 67 L.Ed. 2d at 252 (emphasis added). The State's argument that the trial judge's error in this case was harmless beyond a reasonable doubt can only be properly considered in the context of this solemn admonishment.

Also crucial to this determination as to prejudice are the trial tactics employed below by defendant's attorney. As we noted earlier in our survey of the facts of this case, during the jury selection, and again during the opening statement, defendant's attorney forecast self-defense as defendant's theory of the case. Ultimately, defendant did not testify, nor did he present any evidence at all, during the guilt-innocence phase of the proceeding below.

The jury, having been told at the outset of this case essentially that this defendant committed the killings, but did so only in defense of his own life, had an expectation that was never met—namely, that defendant would present evidence as to why he killed the victims. It cannot be gainsaid that, when the jury's expectation was not met, the omitted jury instruction loomed particularly large. This case-specific scenario, together with the above-discussed general importance of the constitutional right im-

plicated by the omitted instruction, leads us to find unpersuasive the State's argument that the trial judge's error was harmless beyond a reasonable doubt.

In an additional argument that the trial judge's error here was harmless beyond a reasonable doubt, the State asserts that, since neither lawyer noticed the trial judge's omission at trial, so too must the jury have failed to notice, thereby rendering the error's effect nugatory. We find this argument from the State unpersuasive. In any criminal case, even in one less unusual than this one, it is manifest that the jury will notice a given defendant's failure to testify in his own defense. Justice Stewart, in his dissent in *Griffin v. California*, 380 U.S. 609, 14 L.Ed. 2d 106, *reh'g denied*, 381 U.S. 957, 14 L.Ed. 2d 730 (1965), addressed this point in the following manner:

> It is not, as I understand the problem, that the jury becomes aware that the defendant has chosen not to testify in his own defense, for *the jury will, of course, realize this quite evident fact, even though the choice goes unmentioned.*

Id. at 621, 14 L.Ed. 2d at 113 (emphasis added). Here, where the jury was promised at the outset of the case evidence concerning a self-defense theory only to have the guilt-innocence phase of the trial end without any such evidence, the State's argument is even less persuasive.

In a final argument in support of its position that the trial judge's error here was harmless, the State notes that, although the trial judge omitted the instruction in question, he did give an instruction concerning the presumption of innocence, thus rendering the omission somehow less harmful. The State's argument is again without merit. The United States Supreme Court dealt with this very assertion in *Carter v. Kentucky*, 450 U.S. 288, 67 L.Ed. 2d 241. There, Justice Stewart stated, and we quite agree:

> *Although the jury was instructed that "[t]he law presumes a defendant to be innocent," it may be doubted that this instruction contributed in a significant way to the jurors' proper understanding of the petitioner's failure to testify.* Without question, the Fifth Amendment privilege and the presumption of innocence are closely aligned. But these principles serve different functions, and *we cannot say that the*

jury would not have derived "significant additional guidance," Taylor v Kentucky, 436 US 478, 484, 56 L Ed 2d 468, 98 S Ct 1930, *from the instruction requested.*

Id. at 304, 67 L.Ed. 2d at 253 (emphasis added).

In conclusion, we have reviewed the entire record and each of defendant's assignments of error in this case. We hold, pursuant to our discussion above, that the trial judge committed error in failing to give the requested and subsequently promised jury instruction concerning defendant's decision not to testify during the guilt-innocence phase of the trial below. We hold further that, because of the historical importance of the right affected and the trial tactics employed by defendant's attorney, the trial judge's error was prejudicial to defendant's cause. Accordingly, the result is a

New trial.

Justice MARTIN dissenting.

I dissent from the holding of the majority that defendant is entitled to a new trial of this double murder case because of the failure of the trial judge to instruct the jury in accord with N.C.P.I.—Crim. 101.30. *See* N.C.G.S. § 8-54 (1986); *State v. Randolph*, 312 N.C. 198, 321 S.E. 2d 864 (1984).

It is to be noted that this issue applies only to the guilt phase of the trial as defendant testified at the sentencing hearing, relating many inculpatory statements.

The state concedes that this failure by the trial judge was error but insists that the error was harmless beyond a reasonable doubt. Failure to so instruct upon timely request by defendant has been held to violate defendant's rights under the United States Constitution. *Carter v. Kentucky*, 450 U.S. 288, 67 L.Ed. 2d 241 (1981).

Defendant also enters the harmless error battleground in his brief, and the majority opinion turns upon that issue. The United States Supreme Court has never held that this instructional error was not subject to a harmless error analysis; therefore it is appropriate for this Court to apply a harmless error analysis. We

are required to be satisfied beyond a reasonable doubt that the constitutional error complained of did not contribute to the verdict obtained. *Chapman v. California*, 386 U.S. 18, 17 L.Ed. 2d 705, *reh'g denied*, 386 U.S. 987, 18 L.Ed. 2d 241 (1967); N.C.G.S. § 15A-1443(b) (1983).

In my view the state has the better side of the dispute. It has long been held by this Court that it is the better practice not to instruct on defendant's failure to testify, absent a specific request by defendant. *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976); *State v. Bryant*, 283 N.C. 227, 195 S.E. 2d 509 (1973). This is true because such instructions emphasize to the jurors the fact that defendant did not testify. The reason for the rule not allowing comment on defendant's failure to testify is to assure a fair trial to defendant. Here, it is clear to me that defendant received a fair trial; defendant did not testify and no one commented or alluded to this fact. The failure of the trial judge to give the requested instruction could not have contributed in any way to the verdict.

Not only was defendant's trial fair, but no reasonable jury could fail to convict defendant of murder in the first degree on the mass of evidence arrayed against him. Defendant's homosexual relationship with several teenage boys in the neighborhood was fully established. Defendant maintained this relationship in part by the payment of money to the boys. The Buchanan boy realized that defendant was susceptible to extortion. Tensions were created that led to violence.

After the crimes defendant attempted to "cover up" and remove evidence of his guilt by cleaning carpet and trying to buy a new carpet to replace the one stained by the blood of his victims. Even more damning evidence was defendant's statements to the officers telling them where to look for the bodies, which were found in the grease pit. He further gave permission for the search of his house, where the murder pistol was found hidden behind some books. The bullets that caused the deaths of the two boys were fired from defendant's pistol. Gary Bailey was shot in the head, back, and abdomen; Richard Buchanan was shot twice in the brain at contact range and also in the back and arm. Blood on the pistol was identified as being from Buchanan, and sticking to that blood was head hair from him and pubic hair from the de-

fendant indicating that defendant executed Buchanan while engaged in a homosexual act with him.

When balanced against the trial judge's instructional error, the evidence of defendant's guilt engulfs him beyond any reasonable doubt. There is no reasonable basis to find that the trial judge's error contributed to the verdicts of guilty of murder in the first degree. The only other possible verdicts were murder in the second degree and not guilty. If this issue were applicable to the *punishment* phase of the trial, defendant's argument might be somewhat more persuasive, but such is not the case here.

Despite the best efforts of the majority, I can find no rational basis to hold that the error contributed to the verdict of guilt and am convinced beyond a reasonable doubt that the error was harmless.

Justice WHICHARD joins in this dissenting opinion.

BRENDA LEMONS v. OLD HICKORY COUNCIL, BOY SCOUTS OF AMERICA, INC.

No. 438PA87

(Filed 5 May 1988)

1. **Process § 3; Rules of Civil Procedure § 6— service of summons—retroactive extension of time after summons functus officio**

   Rule 6(b) gives trial courts the discretion, upon a finding of "excusable neglect," retroactively to extend the time provided in Rule 4(c) for serving a summons after it has become *functus officio*.

2. **Appeal and Error § 63— failure to exercise discretion—mistake of law—remand**

   When a trial court has failed to exercise its discretion regarding a discretionary matter and has ruled on it under the mistaken impression it is required to rule a particular way as a matter of law, its holding must be reversed and the matter remanded for the trial court to exercise its discretion.

Justice MARTIN dissenting.

Chief Justice EXUM and Justice MEYER join in this dissent.

ON plaintiff's petition for discretionary review pursuant to N.C.G.S. § 7A-31 of an unpublished decision of the Court of Ap-

peals, 86 N.C. App. 376, 358 S.E. 2d 139 (1987), affirming an order entered by *Rousseau, J.*, at the 21 October 1986 Civil Session of Superior Court, FORSYTH County. Heard in the Supreme Court on 10 February 1988.

Bailey & Dixon, by David M. Britt, Gary S. Parsons, and Alan J. Miles; Bell, Davis & Pitt, P.A., by William K. Davis, for the plaintiff appellant.

Petree, Stockton & Robinson, by G. Gray Wilson and R. Rand Tucker, for the defendant appellee.

MITCHELL, Justice.

This is an action involving interpretation of the statutory time periods for service of process under the North Carolina Rules of Civil Procedure. Specifically, we must decide in this case whether the Court of Appeals erred in affirming the trial court's order that denied the plaintiff's motion for an extension of time to serve an alias summons and dismissed the action. The trial court's order was based upon its conclusion that, as a matter of law, it was without authority to grant the plaintiff's motion for an extension of time under N.C.G.S. § 1A-1, Rule 6(b) to serve an alias summons on the defendant. In this case of first impression, we conclude that Rule 6(b) gives our trial courts the discretion to extend the time provided in Rule 4(c) for service of a summons. Accordingly, we reverse the Court of Appeals' decision.

The plaintiff, Brenda Lemons, allegedly was injured on 15 May 1982 when a twenty-foot wooden log being used as a flagpole fell and struck her on the head while it was being taken down under the defendant's supervision. The plaintiff contends that her injuries were caused by the negligence of the defendant, its agents, and its employees.

On 21 March 1984, the plaintiff commenced an action against the defendant seeking to recover for her injuries. This action was terminated on 6 February 1985 by voluntary dismissal without prejudice pursuant to N.C.G.S. § 1A-1, Rule 41(a)(1).

The present action was commenced on 6 February 1986 by the filing of a complaint and issuance of a summons. The initial summons was returned unserved, and an alias summons was is-

sued on 2 May 1986. This alias summons was delivered to the Forsyth County Sheriff's Office on 2 June 1986 for service and was served on 5 June 1986, after the thirty days allowed for service of process under Rule 4(c) had expired.

On 23 June 1986, the defendant filed a motion to dismiss for failure to state a claim upon which relief could be granted, lack of personal jurisdiction, insufficient process, and insufficient service of process. The defendant subsequently was served with an alias summons issued on 10 September 1986. Because this summons was not obtained within ninety days after the issuance of the last preceding summons, however, the action did not relate back to the original summons under Rule 4(d), and the statute of limitations had expired.

On 13 October 1986, the plaintiff filed a motion for a retroactive extension of time, *nunc pro tunc*, from 2 June to 6 June 1986 to serve the 2 May 1986 alias summons. After hearing the motions, the trial court found that the alias summons served on the defendant was issued on 2 May 1986 and that the plaintiff's failure to obtain service of this summons until 5 June 1986 resulted from "excusable neglect." The court nonetheless denied the plaintiff's motion for an extension of time and allowed the defendant's motion to dismiss, noting that Rule 4(c) requires that service of a summons be accomplished within thirty days after its issuance. The trial court specifically stated in its order dismissing the action that, if permitted under Rule 6(b), it would exercise its discretion and enlarge the time for service of the alias summons in question. The trial court concluded, however, that "as a matter of law, Rule 6(b) of the North Carolina Rules of Civil Procedure does not confer upon the Court the authority to permit an enlargement of the time within which service is to be completed pursuant to Rule 4(c) and (d) . . . ." The Court of Appeals, in an unpublished decision, affirmed the trial court's order dismissing this action.

[1] On appeal the plaintiff argues that under Rule 6(b) trial courts have discretionary authority to extend the time provided in Rule 4(c) for service of a summons. Therefore, she argues that the trial court erred in ruling as a matter of law that it was without authority to grant her motion.

The defendant argues, however, that the plaintiff's contention that Rule 6(b) gives the trial courts broad authority to enlarge the time period provided in Rule 4(c) for the service of a summons is misplaced. Rule 4(c) requires that personal service of a summons be made in cases such as this within thirty days after its issuance. Yet the alias summons in the present case was not served until thirty-four days after its issuance. It is well settled that when a summons is not served within the required thirty days of issuance, it loses its effectiveness and becomes *functus officio*, *Greene v. Chrismon*, 223 N.C. 724, 28 S.E. 2d 215 (1943), and service obtained thereafter does not confer jurisdiction over the defendant upon the trial court. *Webb v. R.R.*, 268 N.C. 552, 151 S.E. 2d 19 (1966); *Hatch v. R.R.*, 183 N.C. 618, 112 S.E. 529 (1922); *Cole v. Cole*, 37 N.C. App. 737, 247 S.E. 2d 16 (1978). The defendant argues that Rule 6(b) was not intended to give the trial court authority to breathe life back into a summons that has become *functus officio*, and that there is no authority within the North Carolina Rules of Civil Procedure for the service of a summons after the date therein fixed for its return. Therefore, the defendant concludes that the trial court was correct in ruling that it had no authority to enlarge the time within which the 2 May 1986 alias summons was required to be served. We disagree.

We begin our analysis by noting that the line of authority to the effect that a summons not served within the time prescribed is rendered *functus officio* was well established long before the adoption of the new Rules of Civil Procedure, which became effective 1 January 1970. *E.g.*, *Webb v. R.R.*, 268 N.C. 552, 151 S.E. 2d 19 (1966); *Greene v. Chrismon*, 223 N.C. 724, 28 S.E. 2d 215 (1943). More importantly, to say that a summons becomes *functus officio* or legally defunct in such circumstances entirely begs the question presented in this case: whether by adopting Rule 6(b), the General Assembly has given our trial courts authority to breathe new life and effectiveness into such a summons retroactively after it has become *functus officio*. We conclude that the General Assembly has given our trial courts such authority by enacting Rule 6(b).

The Rules of Civil Procedure were adopted by the General Assembly at the urging of the North Carolina Bar Association "to eliminate the sporting element from litigation." W. Shuford, N.C.

Civil Practice and Procedure, § 1-3 (3d ed. 1988). The philosophy underlying these rules was that:

> Technicalities and form are to be disregarded in favor of the merits of the case. One of the purposes of the rules was to take the sporting element out of litigation. *No single rule is to be given disproportionate emphasis over another rule which also has application.* Rather, *the rules are to be applied as a harmonious whole.* The rules are designed to eliminate legal sparring and fencing and surprise moves of litigants. The aim is to achieve simplicity, speed and financial economy in litigation. Liberality is the canon of construction.

Sizemore, *General Scope and Philosophy of the New Rules*, 5 Wake Forest Intra. L. Rev. 1, 6 (1968) (emphasis added).

Rule 4 provides for service of process. It requires in cases such as this that a summons be served within thirty days of issuance. If the summons is not served within thirty days, Rule 4(d) permits the action to be continued, so as to relate back to the date of issue of the original summons, by an endorsement from the clerk or issuance of an alias or pluries summons within ninety days of the issuance of the last preceding summons. Any such alias or pluries summons, like the original summons, must be served within thirty days of issuance. Rule 4(e) provides that when there is neither an endorsement nor an alias or pluries summons issued, the action is discontinued as to any defendant who was not served within the time allowed. An endorsement or alias or pluries summons may be obtained thereafter, but the action is deemed to have commenced, as to such a defendant, on the date of the endorsement or the issuance of the alias or pluries summons.

The Rules of Civil Procedure "must be construed in *pari materia*." *Estrada v. Burnham*, 316 N.C. 318, 323, 341 S.E. 2d 538, 542 (1986). Rule 4 cannot be construed in isolation; rather, it must be interpreted in conjunction with Rule 6, which addresses the computation of any time period prescribed by the Rules of Civil Procedure. Specifically, Rule 6(b) provides:

> When by these rules . . . *an act* is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion with or without motion or

> notice order the period enlarged if request therefor is made before expiration of the period originally prescribed or as extended by a previous order. Upon motion made *after the expiration of the specified period,* the judge *may permit the act to be done where the failure to act was the result of excusable neglect.* Notwithstanding any other provisions of this rule, the parties may enter into binding stipulations without approval of the court enlarging the time, not to exceed in the aggregate 20 days, within which an act is required or allowed to be done under these rules, *provided,* however, that *neither the court nor the parties may extend the time for taking any action under Rules 50(b), 52, 59(b), (d), (e), 60(b),* except to the extent and under the conditions stated in them.

N.C.G.S. § 1A-1, Rule 6(b) (1983) (emphasis added).

Rule 6(b) grants our trial courts broad authority to extend any time period specified in any of the Rules of Civil Procedure for the doing of any act, after expiration of such specified time, upon a finding of "excusable neglect." Expressly excepted from this general grant of authority are the time periods specified for motions for judgment notwithstanding the verdict under Rule 50(b), motions to amend findings or to make additional findings under Rule 52, motions for a new trial under Rule 59(b), ordering a new trial on the Court's initiative under Rule 59(d), motions to alter or amend a judgment under Rule 59(e), and motions for relief from judgment under Rule 60(b).

When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning. *Utilities Commission v. Edmisten, Attorney General,* 291 N.C. 451, 232 S.E. 2d 184 (1977); *Underwood v. Howland, Commissioner of Motor Vehicles,* 274 N.C. 473, 164 S.E. 2d 2 (1968). Here, the statutory language of Rule 6(b) is clear and provides that the trial court may extend the time for performance of any acts except those expressly mentioned in the proviso to the rules. By setting out these specific exceptions to the trial court's discretionary power to extend the time specified for doing any act, the General Assembly implicitly excluded all other exceptions. *See Campbell v. Church,* 298 N.C. 476, 482, 259 S.E. 2d 558, 563 (1979) (under the maxim *expressio unius est exclusio alterius,* mention of specific exceptions in a

statute implies the exclusion of others). If the General Assembly had intended to prohibit our trial courts from extending the time for service of a summons, we must assume that it would have inserted such an exception among the limitations it created in the proviso to Rule 6(b), limiting the authority of trial courts to extend time periods for performing certain specified acts. The General Assembly, of course, is always free to add such an exclusion if it desires. Therefore, we hold that pursuant to Rule 6(b) our trial courts may extend the time for service of process under Rule 4(c). *Cf. Norlock v. City of Garland*, 768 F. 2d 654, 658 (5th Cir. 1985) (time limits in Federal Rule 4 may be enlarged by court pursuant to Rule 6(b)); 4A Wright & Miller, Federal Practice & Procedure, § 1137 at 383-84 (1987).

[2] Here, the trial court mistakenly concluded it was without authority to extend the time for service of the alias summons and, therefore, denied the plaintiff's motion. When a trial court has failed to exercise its discretion regarding a discretionary matter and has ruled on it under the mistaken impression it is required to rule a particular way as a matter of law, its holding must be reversed and the matter remanded for the trial court to exercise its discretion. *State v. Cotton*, 318 N.C. 663, 351 S.E. 2d 277 (1987); *Henry v. Deen*, 310 N.C. 75, 310 S.E. 2d 326 (1984); 1 Brandis on North Carolina Evidence § 28 (1982). Accordingly, the decision of the Court of Appeals, affirming the order of the trial court, must be reversed and this case remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Justice MARTIN dissenting.

By holding that a superior court judge may blow the breath of life into a functus officio summons, the majority today has overthrown a constant line of authority extending to the opening of this Court in 1819.

The alias summons in this case was issued on 2 May 1986 and served on 5 June 1986, admittedly not within the time required by statute. Thus, the alias summons became functus officio and plaintiff must then cause a pluries summons to be issued and served in order to avoid a discontinuance of the action. *Williams*

v. Bray, 273 N.C. 198, 159 S.E. 2d 556 (1968). Service of a summons after the date of its return is a nullity and the court does not acquire jurisdiction. *Webb v. R.R.*, 268 N.C. 552, 151 S.E. 2d 19 (1966).

The majority states that the above authorities are no longer binding because under Rule 6(b) of the North Carolina Rules of Civil Procedure the trial courts now have authority to "breathe new life and effectiveness into such a summons retroactively after it has become *functus officio*." The majority overlooks the fact that Rule 6(b) is nothing new to our courts; it basically carries forward the provision of former N.C.G.S. § 1-152 which permitted the trial judges in their discretion to enlarge the time for the doing of any act. *See* N.C.G.S. § 1A-1, Rule 6(b) comment. Although this discretionary power by statute has existed since well before the turn of the century, *see Austin v. Clarke*, 70 N.C. 458 (1874), this is the first time this Court has sought to apply it to a nullity, a functus officio summons. Even with this discretionary authority vested in trial judges, they are not empowered to make something out of nothing.

It is well settled that where the requirements of service are not satisfied, the court is without jurisdiction over the defendant. *Sink v. Easter*, 284 N.C. 555, 202 S.E. 2d 138 (1974). Where the process is void, generally it cannot be amended, because it confers no jurisdiction. *Harris v. Maready*, 311 N.C. 536, 319 S.E. 2d 912 (1984). As Justice Meyer stated in his dissent in *Smith v. Starnes*, 317 N.C. 613, 619, 346 S.E. 2d 424, 428 (1986):

> " '[W]here a statute provides for service of summons or notices in the progress of a cause by certain persons or by designated methods, the specified requirements must be complied with or there is no valid service.' " *Guthrie v. Ray*, 293 N.C. 67, 69, 235 S.E. 2d 146, 148 (1967) (quoting *S. Lowman v. Ballard & Co.*, 168 N.C. 16, 18, 84 S.E. 21, 22 (1915)).

Rule 4 of the North Carolina Rules of Civil Procedure clearly and specifically sets out the methods for obtaining jurisdiction by the service of process, and this procedure stands alone. By applying Rule 6(b) to revalidate a defunct summons, the majority has in effect amended Rule 4. Rule 6(b) does not address the legal validity of an instrument of process such as a summons but deals with such matters as extensions of time to file pleadings in various

cases. Rule 4 provides a comprehensive, statutory framework for process and extension of time for service that requires no supplement from any other rule. Rule 6 cannot be interpreted to authorize a court to adjudicate matters beyond its jurisdiction, which the court would be attempting to do if it endeavored to authorize the service of a summons beyond the period allowed by statute.

The majority has permitted the trial judge to set aside the statute of limitations in this case retroactively by invoking Rule 6(b). Surely this was not the intent of the General Assembly in adopting the rule.

The majority states that the purpose of the rules was to take the "sporting element" out of the trial of lawsuits. Indeed, this is one of the goals sought by the rules, and close adherence to Rule 4 would serve this purpose by removing the "sporting element" from determining when the court has obtained jurisdiction over the person. Authorizing the trial judge to amend in his discretion the rules with respect to the service of summons after the time for the serving of the summons has expired would indeed foster and encourage the "sporting element" in the trial of lawsuits. Lawyers need definite rules to guide them with respect to the commencement of lawsuits and obtaining jurisdiction over parties. This is done by Rule 4. Injecting the discretionary actions of the trial judge through Rule 6(b) defeats this legislative purpose.

I find that service in this case was obtained upon the defendant on 10 September 1986 and the superior court did not obtain jurisdiction prior to that time. I vote to affirm the decision of the Court of Appeals.

Chief Justice EXUM and Justice MEYER join in this dissent.

STATE OF NORTH CAROLINA v. ROBERT LEE TAYLOR

No. 512A87

(Filed 5 May 1988)

1. **Criminal Law § 138.23— burglary—aggravating factor—armed with deadly weapon—not improper finding of use of weapon**

The trial judge's statement that he found that defendant was "armed" with a hammer and that he "used it horribly," together with the judge's reference to "those statutory items," did not amount to findings of both possession and use of the weapon as two distinct aggravating factors where the findings sheet upon which the aggravating and mitigating factors were recorded unambiguously reveals that the weapon used by defendant in perpetrating the crime gave rise only to the aggravating factor that "defendant was armed with a deadly weapon at the time of the crime" and that "use" of the weapon was not found by the court in its consideration of the appropriate punishment.

2. **Criminal Law § 138.23— armed with deadly weapon—element of felonious assault—use to aggravate burglary sentence**

The trial court did not violate N.C.G.S. § 15A-1340.4(a)(1) by using an element of a joined felonious assault offense—that defendant was armed with a deadly weapon—as a factor in aggravation of defendant's sentence for first degree burglary, since the phrase "the offense" as used in that statute refers to the offense for which the defendant is convicted or to which defendant tenders a plea of guilty.

3. **Criminal Law § 138.29— nonstatutory aggravating factor—purposes of sentencing—sufficiency of evidence**

The trial court did not err in finding as a nonstatutory aggravating factor for first degree burglary that defendant "had inside information, knowing when that lady was alone in a rural area and took advantage of it with the keys" on the basis of evidence that defendant, the victim's next-door neighbor, had inquired of the victim as to whether the victim's daughter was staying elsewhere on the evening of the crime, and evidence that defendant used keys to the victim's mobile home surreptitiously copied from the victim's keys while they were entrusted to his wife, since (1) this nonstatutory factor was clearly related to the purposes of sentencing in that defendant's behavior was of the type from which the public should be protected and from which possible future offenders should be deterred, and (2) this factor was amply supported by the evidence.

APPEAL as 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 life sentence entered by *Preston, J.*, at the 28 May 1987 Criminal Session of Superior Court, ROBESON County, upon defendant's plea of guilty

of first-degree burglary. On 20 October 1987, the Supreme Court allowed defendant's petition to bypass the Court of Appeals on his appeal from a second judgment imposing a six-year term upon defendant's plea of guilty of assault with a deadly weapon with intent to kill inflicting serious injury. Decided on the briefs pursuant to Rule 30(d) of the North Carolina Rules of Appellate Procedure.

Lacy H. Thornburg, Attorney General, by Laura E. Crumpler, Assistant Attorney General, and Barbara S. McClure, Associate Attorney General, for the State.

Donald W. Bullard for defendant-appellant.

MEYER, Justice.

Defendant Robert Lee Taylor pled guilty to one count of first-degree burglary and one count of assault with a deadly weapon with intent to kill inflicting serious injury. Pursuant to these pleas, defendant was sentenced to the maximum term of life imprisonment on the burglary conviction and to a six-year term on the felonious assault conviction. In his appeal to this Court, defendant forwards for our consideration three assignments of error relative to the proceeding below. We have carefully considered the entire record and each of his assignments in turn, and we find no error. Accordingly, we leave undisturbed defendant's convictions and the accompanying sentences.

Evidence presented by the State in support of defendant's plea of guilty tended to show the following series of relevant facts and circumstances. On 12 April 1987, the victim lived in a mobile home in Lumberton, North Carolina. During the early morning hours on that day, the victim was awakened by the presence of a man "standing in [her] bed." While the victim screamed, the intruder grabbed the victim and began to strike her in the face with both his fist and a hammer. At one point during the attack, the intruder ground his bare foot into the victim's already cut and bleeding face.

During the course of the attack, the victim continued to scream and to beg for her life. The victim noticed, among other things, that her assailant had only one hand and that he was not wearing any shoes. Ultimately able to free herself and to break

away from the intruder, the victim hurled a clock radio at the man, prompting him finally to end his violent assault and to flee the mobile home. The victim immediately telephoned for help and told the deputy sheriff, upon his arrival, that the intruder was her next-door neighbor, the defendant.

An investigation of defendant's home revealed numerous items of highly incriminating evidence. Among other things, a bloody hammer was found by investigators on the back steps of the defendant's home. Investigators also located at defendant's home a set of keys which fit the locks on doors of the victim's mobile home. The keys did not appear to be originals, but rather were apparently duplicated from an original set. The victim testified that, two years earlier, she had given defendant's wife a set of keys to her mobile home so that she could walk the victim's dog while the victim was away at her job. The victim had subsequently gotten the keys back.

The State also introduced into evidence the statement of another of the victim's neighbors. Bradley Locklear indicated in his statement that, about a month before the events of 12 April, he saw defendant enter the back door of the victim's mobile home at a time when the victim was apparently absent. The victim testified, in addition, that defendant asked her during the day preceding the night of the attack whether the victim's sixteen-year-old daughter would be at home with her on that evening. The victim told defendant on that occasion that her daughter would be staying with her cousin that night.

Defendant, for his part, presented no evidence concerning his participation in the crime in question. However, he did present evidence in an effort to support certain factors in mitigation of sentence. Specifically, defendant presented the testimony of several witnesses that defendant was possessed of a good character and that he had a good reputation in the community. In addition, defendant put on other evidence to the effect that defendant was mildly mentally retarded, that his wife had been crippled and unable to work for many years, and that his oldest child was mentally retarded.

At the close of all the evidence, the trial court found as factors in mitigation of sentence on the first-degree burglary conviction, first, that defendant has been a person of good character and

reputation in the community in which he lives and, second, that defendant has an infirm wife and a retarded son—a state of affairs bearing upon his mental condition. The court found as aggravating factors, first, that defendant was armed with a deadly weapon at the time of the crime and, second, that defendant obtained and used inside information that the victim was alone in a rural area. The trial court found further that the aggravating factors outweighed the mitigating factors, and pursuant to that finding, it imposed upon defendant the maximum sentence of life imprisonment.

The trial court made no findings concerning factors in mitigation or aggravation of sentence with regard to defendant's conviction of assault with a deadly weapon with intent to kill inflicting serious injury. Accordingly, it thereupon imposed the presumptive six-year term, that term to run consecutive to the life sentence imposed on the first-degree burglary conviction.

In his appeal to this Court, defendant brings forward three assignments of error concerning the proceeding below. They are: first, that the trial court committed reversible error in improperly considering one statutory aggravating factor as two distinct aggravating factors; second, that the trial court committed reversible error in using an element of the offense of first-degree burglary as an aggravating factor; and third, that the trial court committed reversible error in finding an aggravating factor which was not supported by the evidence. We deal with each of defendant's assignments in turn, and we find all three to be without merit.

I.

[1] In his first assignment of error, defendant asserts that the trial court committed reversible error in considering as two distinct factors in aggravation of the first-degree burglary conviction a single statutory aggravating factor. Defendant argues here that the trial court erred in including an additional aggravating factor which may have played a significant part in compelling its finding that the aggravating factors present in the case outweighed the factors in mitigation. Moreover, argues defendant, the trial court's error may also have caused it to order the sentence in the felonious assault case to run consecutive to that in the burglary case. We find the record in the case to be com-

pletely devoid of any support for defendant's argument, and accordingly, we overrule this first of defendant's assignments of error.

At the conclusion of the proceeding below, and immediately after finding two factors in mitigation of sentence, Judge Preston stated as follows:

> In aggravation, I find that the defendant, in committing this first degree burglary, *was armed with a deadly weapon;* to-wit: a knife—to-wit: a hammer, and that *he used it horribly.* And in addition to *those statutory items,* Madam Clerk, I find in aggravation that he had inside information, knowing when that lady was alone in a rural area and took advantage of it with the keys.

(Emphasis added.)[1] Defendant contends specifically here that the trial court's finding that defendant was "armed" with a hammer and that he "used it horribly," together with its reference to "those statutory items," amounted to findings by the trial court of both the *possession* and the *use* of the weapon as two distinct statutory aggravating factors. Defendant's argument is without merit.

The record in the case at bar, particularly the findings sheet on which the trial court recorded its findings with regard to aggravating and mitigating factors, unambiguously reveals that the weapon used by defendant in perpetrating the crime gave rise to but one aggravating factor—namely, that "the defendant was armed with a deadly weapon at the time of the crime." Moreover, this same record reveals that the aggravating factor complained of by defendant—that defendant "used" a deadly weapon at the time of the crime—was *not* found by the court in its consideration of the appropriate punishment. It is therefore clear that the trial

1. We note here that, in stating his findings at the close of the proceeding below, the trial judge initially erroneously identified the deadly weapon in the case as a knife. This same erroneous reference appears on the findings sheet which is a part of the record accompanying the case. We have reviewed the transcript in this case very carefully, and we find it devoid of any evidence whatever of either the presence or the use of a knife. Our finding in this regard is consistent with the trial judge's abrupt correction of his misstatement—specifically, his correct and immediately subsequent statement that the relevant deadly weapon was in fact a hammer.

court's reference during the proceeding below to "*those* statutory items" (emphasis added) constituted merely a *lapsus linguae* and is therefore of no legal significance whatever. Accordingly, defendant's first assignment of error is without merit, and it is hereby overruled.

II.

[2] In his second assignment of error, defendant asserts that the trial court committed reversible error in using an element of one of the charged offenses—the felonious assault—as an aggravating factor in the sentencing of defendant for the separate, though joined, second offense—the burglary. In this case, the trial court used an element of the felonious assault—namely, that defendant was armed with a deadly weapon—as a factor in aggravation of defendant's sentence on the first-degree burglary conviction. Defendant relies here upon N.C.G.S. § 15A-1340.4(a)(1), which provides in pertinent part:

> Evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation, and the same item of evidence may not be used to prove more than one factor in aggravation.

Defendant contends that the above-quoted statute was violated, at least in spirit, by the trial court's decision to aggravate the sentence on the burglary offense with an element of the felonious assault offense. We find, among other things, that defendant misreads the statute in question. When correctly read, this statute offers no support for defendant's position on this issue, and we overrule this second assignment of error.

As it is used in N.C.G.S. § 15A-1340.4(a)(1), the phrase "the offense" clearly refers to the offense for which the defendant is convicted or to which defendant tenders a plea of guilty. *State v. Melton*, 307 N.C. 370, 298 S.E. 2d 673 (1983). Here, the trial court did not use any element of the burglary offense to aggravate the sentence on the conviction for burglary. Rather, the trial court employed an element of the joined felonious assault offense—that defendant committed the offense while armed with a deadly weapon—to aggravate defendant's sentence on the burglary conviction. Accordingly, the trial court's decision to aggravate defendant's sentence on the first-degree burglary conviction on the

basis of an element of the joined felonious assault offense, contrary to defendant's claims, is completely consistent with the statute in question.

This Court has specifically held that a trial court may use the possession of a deadly weapon to aggravate the sentence on a burglary conviction, notwithstanding the use of the weapon to commit a separate, though joinable, offense. *State v. Toomer*, 311 N.C. 183, 316 S.E. 2d 66 (1984); *State v. Chatman*, 308 N.C. 169, 301 S.E. 2d 71 (1983). In the *Toomer* case, for example, although he did not use the weapon in order to effect his illegal entry, defendant entered the victim's apartment while armed with a handgun. Thereafter, defendant threatened the victim with the gun during the commission of a sexual assault, and the use of the weapon ultimately was an element of the charged offense of first-degree sexual offense. This Court held that, since defendant possessed the deadly weapon at the time of his commission of the burglary, the trial court properly found the presence of the weapon to be a factor in aggravation of defendant's sentence on the first-degree burglary conviction.

The facts of the case at bar are nearly on all fours with those of *Toomer*. Here, defendant possessed the deadly weapon—namely, a hammer—at the time he illegally entered the victim's mobile home. He subsequently used the hammer in an attack upon the victim which thereafter formed the basis for the felonious assault charge. As in *Toomer*, it was proper for the trial court in this case to use the presence of the deadly weapon as a factor in aggravation of defendant's sentence on the burglary conviction. Defendant's argument is without merit, and his second assignment of error is hereby overruled.

III.

[3] In his third and final assignment of error, defendant asserts that the trial court committed reversible error in its finding of a nonstatutory factor in aggravation of defendant's sentence on the burglary conviction—specifically, that defendant "had inside information, knowing when that lady was alone in a rural area and took advantage of it with the keys." Defendant argues here that this finding was in essence a finding of the statutory aggravating factor found at N.C.G.S. § 15A-1340.4(a)(1)(n), which provides as follows:

> The defendant took advantage of a position of trust or confidence to commit the offense.

Defendant argues further that there was no evidence presented at the proceeding below to support the trial court's finding of this aggravating factor. We find otherwise, and accordingly, we overrule this last of defendant's assignments of error.

As an initial matter, we note that defendant is plainly incorrect in his assertion that the trial court in fact found the statutory aggravating factor quoted above—namely, that defendant took advantage of a position of trust or confidence. In the record in this matter, this aggravating factor is plainly and clearly *not* indicated by the trial court. In addition, the record quite clearly shows that a nonstatutory aggravating factor—that the defendant had "inside information that the victim was alone in a rural area"—was separately typed on the findings sheet and was therefore explicitly found by the trial court in this instance. Accordingly, the precise issue before the Court pursuant to this assignment of error is whether the trial court committed error in finding the *nonstatutory* aggravating factor in question here. We find that it clearly did not.

Pursuant to the Fair Sentencing Act, the trial court is not confined to consideration of statutory factors only, but may consider nonstatutory factors to the extent they are (1) related to the purposes of sentencing and (2) supported by the evidence in the case. N.C.G.S. § 15A-1340.4(a) (1983). Amongst the purposes of sentencing explicitly identified in N.C.G.S. § 15A-1340.3 are "to protect the public by restraining offenders" and "to provide a general deterrent to criminal behavior." Here, the trial court aggravated defendant's sentence on the basis of defendant's use of information gained as a result of his inquiry to determine whether the victim would be alone and defendant's use of keys surreptitiously copied while they were entrusted to his wife. It is certainly reasonable to conclude that this is the type of behavior from which the public should be protected and from which possible future offenders should be deterred. Thus, the trial court's finding of the nonstatutory aggravating factor in question was clearly related to the purposes of sentencing.

Moreover, it cannot be gainsaid that in this case the trial court's finding was amply supported by the evidence. The State's

evidence in the proceeding below indicated that the victim, who shared a mobile home with her sixteen-year-old daughter, was defendant's next-door neighbor. Approximately two years before the crime, the victim gave an extra set of her mobile home door keys to defendant's wife so that she could walk the victim's dog while the victim was away at her job. Though she eventually retrieved that set of keys, a post-crime search of defendant's home produced a duplicate set. The evidence also showed that, on the day preceding the night of the crime, defendant inquired of the victim as to whether the victim's daughter was staying elsewhere that evening. The trial court acted properly in finding this nonstatutory aggravating factor, and this third and final assignment of error is hereby overruled.

In conclusion, having carefully reviewed the record and each of defendant's assignments of error, we find that the proceeding below was free of error. Accordingly, we leave undisturbed defendant's convictions for first-degree burglary and for assault with a deadly weapon with intent to kill inflicting serious injury and the accompanying sentences.

Affirmed.

STATE OF NORTH CAROLINA v. LINWOOD JOHNSON

No. 511A87

(Filed 5 May 1988)

Criminal Law § 75.14— first degree murder—waiver of rights—findings as to mental capacity sufficient

The trial court in a first degree murder prosecution did not err in finding that defendant was not depressed and in concluding that defendant freely, knowingly and intelligently waived his constitutional rights where the majority of officers present during different stages of the interrogation testified that defendant appeared normal; there was substantial evidence tending to show that defendant was not actively suicidal at the time he arrived at the police station and rendered his confession; a psychiatrist testified during cross-examination that although defendant had a feeling he should be punished for what he had done, he was still aware of his rights and what he could do to protect those rights at the time he made his confession; defendant was advised on three separate occasions of his constitutional rights and the consequences flowing from a waiver of those rights; and defendant testified that at the time he

confessed he knew that he did not have to speak to the officers, that he had the right to legal representation, and that he could stop the interrogation at any time.

APPEAL by defendant from judgment imposing sentence of life imprisonment entered by *Read, Jr., J.*, at the 27 April 1987 Criminal Session of Superior Court, CUMBERLAND County, upon a jury verdict of murder in the first degree. Heard in the Supreme Court 16 March 1988.

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

Mary Ann Talley for defendant-appellant.

FRYE, Justice.

The sole issue on this appeal is whether the trial court erred in finding that defendant knowingly and understandingly waived his *Miranda* rights at the time he confessed to killing the victim. We hold that the trial court did not err.

On the evening of 1 January 1986, defendant walked into the Fayetteville, North Carolina, Law Enforcement Center and presented himself to the desk officer on duty. Defendant identified himself and told the officer that he was there to turn himself in. Officer Davis had been monitoring the police radio and was aware that defendant was a suspect in an assault that had occurred earlier that evening. Upon asking defendant to place his hands on the counter, the officer noticed that defendant's hands were covered with blood and that there was blood splattered on his clothing. However, defendant did not appear to be bleeding. After quickly frisking defendant, Officer Davis handcuffed defendant's wrists behind his back, informed him he was under arrest, and read him his *Miranda* rights. In response to the officer's questions defendant stated that he understood his rights. He was then handcuffed to a chair where he remained for the next fifteen to twenty minutes.

After defendant had been in custody for approximately sixteen minutes, Sergeant Scearce of the Fayetteville Police Department arrived at the law enforcement center and assumed custody of defendant. While taking defendant from the front desk area to

the watch commander's office, Sergeant Scearce noticed some very minor cuts on defendant's wrists. He therefore called the emergency medical technicians and asked them to come to the law enforcement center to attend to defendant. After calling the medical technicians, Sergeant Scearce used a preprinted form to once again advise defendant of his *Miranda* rights. After being read each statement of his rights, defendant indicated that he understood that right by initialing the applicable statement. At the end of that process defendant signed the form indicating that he had read the statement of his rights, understood those rights, and was voluntarily waiving them without coercion or promise of any kind. While defendant was in Sergeant Scearce's custody he asked whether the victim was dead yet, but Sergeant Scearce did not respond since he did not know whether the victim had died.

The medical technicians arrived shortly after defendant had executed the waiver of rights form. The medical technician who treated the defendant noticed that defendant had minor wounds on the underside of both of his wrists, but the wounds were not bleeding at that time. After bandaging the wounds, the medical technician advised the police officers present that although the cuts were not life threatening, they should be treated by a doctor. This was subsequently done.

Sergeant Pulliam of the Fayetteville Police Department then took defendant from the watch commander's room to an interrogation room in the law enforcement building. Once in the interrogation room, Sergeant Pulliam reviewed the waiver of rights form with defendant. Having satisfied himself that defendant understood all of his rights and had voluntarily waived those rights, Sergeant Pulliam asked defendant to relate to him in defendant's own words the events preceding defendant's arrival at the law enforcement center. Sergeant Pulliam then asked defendant to repeat his statement while Pulliam wrote it down. Finally, Sergeant Pulliam reviewed the written statement with defendant who then signed it.

In his confession defendant stated that he had been in love with the victim, Alicia Council, and that after four months of dating her, she had a baby and informed defendant that he was the father. A few months before the killing, however, she told him that the baby was not his. A few days before the killing

someone had told defendant that Alicia was seeing another man. When defendant confronted Alicia with that information she lied to him and said that the other man was just a friend of a friend. By that time defendant "was beginning to realize that she was just using [him]." On the morning of 1 January 1986, Alicia came to defendant's house to borrow a jacket and defendant loaned it to her. After she left his house defendant decided to follow her. Defendant's confession continues as follows:

> I knew she was probably meeting someone there. I returned home and waited for her. I made up my mind that I was going to take care of the problem once and for all.
>
> I got my army dagger and I waited for her to come back to my house to bring back my jacket. It was about 7:30 p.m. or 7:45 p.m. when she returned. Her sister, Sheila, was with her. Her sister said she was going to the package store and she left. I was upset. I stabbed her, Alicia, at least twice. I really don't know how many times. I know I stabbed her in the stomach and in the back. She fell to the ground.
>
> I went into the house and got a blanket and placed the blanket over her. Sheila came back from the store. Sheila asked what was wrong with Alicia. I still had the knife in my hand standing over top of Alicia. I told Sheila Alicia was dead, and I told her to go get her mother. I decided to go and turn myself in to the police.
>
> I went down Phillips Street to the railroad tracks and then followed the railroad tracks on in to town. I still had the knife with me. I thought about what I had done and decided to take my own life. And when I got near Vick's Drive-in, I cut both my wrists. I threw the knife behind one of the dumpsters. I left there and continued to walk to the police station.
>
> I walked in and told an officer, I came to turn myself in to him.

After receiving defendant's confession and upon learning that the victim had died, the Fayetteville Police served warrants on defendant, charging him with the murder of Alicia Council. Defendant was then indicted for first degree murder. Pursuant to defendant's motion, the case was declared non-capital, the court

having found that there were no aggravating circumstances as described in N.C.G.S. § 15A-2000 applicable to this case. Defendant was tried by a jury and was found guilty of murder in the first degree. The trial judge sentenced defendant to life imprisonment.

Prior to trial defendant filed a motion to suppress the confession. At the suppression hearing, after receiving evidence concerning defendant's motion to suppress, the trial judge found, *inter alia*, that defendant "made a voluntary and understanding statement to Officer Pulliam which was reduced to writing by Officer Pulliam and introduced into evidence at [the] hearing as State's Exhibit No. 2VD. That at this time the Defendant was not depressed or suicidal and he was in contact with reality." The court then concluded that defendant had freely, knowingly and intelligently waived his constitutional rights and that the statements to the officers were freely, voluntarily and understandingly made. The motion to suppress was accordingly denied.

On appeal defendant contends that the trial court erred in its finding of fact that defendant was not depressed at the time he waived his constitutional rights and therefore erred in ruling that the waiver and statement were knowingly and understandingly made.

In determining whether an in-custody confession is admissible "the totality of the circumstances surrounding the interrogation" must be examined. *Moran v. Burbine*, 475 U.S. 412, 421, 89 L.Ed. 2d 410, 421 (1986). An inculpatory statement made to law enforcement officers while a defendant is in custody is admissible as evidence of a defendant's guilt whenever the totality of the circumstances shows that the defendant knowingly, voluntarily and intelligently waived his constitutional rights. *State v. Reese*, 319 N.C. 110, 353 S.E. 2d 352 (1987). In assessing the totality of the circumstances the basis of the inquiry is two-dimensional:

> First, the relinquishment of the right must have been voluntary in the sense that it was a product of a free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it.

Moran v. Burbine, 475 U.S. at 421, 89 L.Ed. 2d at 421.

Defendant does not contend that his waiver and confession was a result of intimidation, coercion or deception. Instead, defendant's argument addresses the second prong of the test set out in *Burbine*. More specifically, defendant argues that the evidence shows that he was depressed at the time of the interrogation and that his depression impaired both his ability to make a knowing and understanding abandonment of his rights against self-incrimination and his ability to understand the consequences of the decision to abandon these rights. Essentially defendant contends, in light of the evidence presented at the suppression hearing, that the trial court's finding of fact that defendant was not depressed was erroneous.

If there is competent evidence to support a trial court's finding of fact, that finding is binding on this Court. *State v. Hill*, 294 N.C. 320, 240 S.E. 2d 794 (1978). Moreover, merely because there is evidence from which a different conclusion could have been reached does not warrant a reversal of the trial court's finding of fact. *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335 (1983). It is the trial court's duty to resolve any conflicts and contradictions that may exist in the evidence. *State v. Reese*, 319 N.C. 110, 353 S.E. 2d 352.

Defendant contends that the evidence at the suppression hearing belies the validity of the trial court's findings of fact and conclusion of law. He argues that the following evidence shows that at the time he confessed he was suffering from depression which impaired his judgment and therefore the trial court's finding to the contrary is not supported by the evidence: During the interrogation, Officer Pulliam was aware that defendant had made a suicide attempt before turning himself in to law enforcement officers; paramedics were called to treat defendant's wounds; and Investigator Willis Stone testified that defendant appeared "somewhat depressed." Further, after defendant was charged with murder, he was taken to the hospital and then to the jail, where a psychiatrist prescribed some anti-depressant medication, and where defendant was placed on suicide watch. Finally, Dr. Levenberg, a psychiatrist who examined defendant twenty days after he gave his confession, testified that, in his opinion, defendant was depressed at the time he made the confession and his depression would have clouded his judgment. He testified further that, in his opinion, a person who is actively suicidal would not be

terribly concerned about the impact of a confession, whether it could hurt him at a later time.

If there is substantial evidence to support the trial court's finding of fact it will not be disturbed on appeal, notwithstanding the fact that there was evidence from which a different finding could have been made. *See State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335. We thus consider whether there was substantial evidence to support the trial court's finding of fact that defendant was not depressed.

The majority of the officers present during different stages of the interrogation testified that defendant appeared normal: Officer Davis testified that although defendant appeared slightly nervous, he also appeared to be in full control of what he was saying and doing; Officer Scearce testified that defendant appeared nervous, but in touch with reality; Officer Pulliam testified that defendant appeared like a normal person in every respect; Officer Stone, who was with Officer Pulliam during the interrogation, while testifying that defendant seemed somewhat depressed but not suicidal, also testified that defendant appeared normal—cooperative, polite, and calm—and completely aware of everything going on. Also, the emergency medical technician testified that defendant appeared calm and cooperative.

Furthermore, there is substantial evidence which tends to show that defendant was not actively suicidal at the time he arrived at the police station and rendered his confession: defendant was not bleeding when he arrived at the police station; the emergency medical technician attending defendant testified that defendant's wounds to his wrists were quite minor and not life threatening; the wounds did not require any sutures and were simply bandaged; placing defendant on a suicide watch after he was in jail was done, not because there was any substantial belief that defendant was suicidal, but as a routine practice followed when someone such as defendant has wounds that appear to be self-inflicted; and, although there is no evidence as to when the anti-depressant medication was prescribed, the evidence does show it was not prescribed until defendant was placed in jail, a substantial time after defendant confessed and after he was told that the victim had died and that he was charged with first degree murder.

Thus, the evidence before the trial court does not conclusively support Dr. Levenberg's opinion that defendant was actively self-destructive or psychotic. Moreover, during cross-examination, Dr. Levenberg testified that although defendant had a feeling that he should be punished for what he had done, he was still aware of his rights and what he could do to protect those rights at the time he made his confession. Furthermore, prior to making his confession, defendant was advised on three separate occasions of his constitutional rights and the consequences flowing from any waiver of those rights. Finally, defendant testified that at the time he confessed he knew that he did not have to speak to the officers, that he had the right to legal representation, and that he could stop the interrogation at any time.

Thus, under the totality of the circumstances, there is substantial evidence to support the trial court's findings of fact. It is the trial court's duty to resolve any conflicts and contradictions existing in the evidence. We hold, therefore, that the trial court did not err in finding that defendant was not depressed and in concluding that defendant freely, knowingly and intelligently waived his constitutional rights. Since defendant was fully aware of the nature of the rights he was abandoning and the consequences of his decision, the trial court did not err in denying defendant's motion to suppress his confession.

No error.

IN THE MATTER OF NATHANIEL JOSEY v. EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

No. 627PA87

(Filed 5 May 1988)

1. Master and Servant § 111— appeal of Employment Security Commission decision—properly before Supreme Court

An appeal from a superior court review of an Employment Security Commission decision was properly before the Supreme Court where, although claimant's original petition to the Commission may be interpreted to ask only that the Commission exercise its discretion to reduce his period of disqualification, his memorandum of law asked the Commission to interpret N.C.G.S. § 96-14(10), the Commission interpreted that statute to hold that his 1984 dis-

qualification was not suspended by his 1987 entitlement, and, although claimant did not except to the failure of the Commission to exercise its discretion, that is not a ground upon which relief was sought on appeal.

2. **Master and Servant § 108.2— unemployment compensation—prior disqualification—not removed**

The Employment Security Commission did not err by ruling that appellant's permanent disqualification in 1984 was not removed by his earning a new entitlement to unemployment compensation in 1987 where claimant was at fault for the 1987 discharge. The plain words of N.C.G.S. § 96-14(10) provide that disqualification may be removed by later employment and a discharge through no fault of the claimant.

3. **Master and Servant § 108.1— unemployment compensation—permanent disqualification not removed by subsequent entitlement—no violation of federal law**

The Employment Security Commission's holding that appellant's prior disqualification for unemployment benefits was not removed by his earning a new entitlement where he was at fault for his second discharge did not violate federal law because appellant was not administratively determined to be eligible for unemployment compensation after his second discharge. Furthermore, a federal district court decision holding a Michigan statute which imposed a penalty on subsequent unemployment compensation after obtaining benefits by fraud to be in violation of federal requirements was not binding or persuasive.

Justice MARTIN dissenting.

Chief Justice EXUM and Justice FRYE join in this dissenting opinion.

ON discretionary review pursuant to N.C.G.S. § 7A-31, prior to determination by the North Carolina Court of Appeals, from a decision by *Barefoot, J.*, at the 28 September 1987 Session of Superior Court, NEW HANOVER County. Heard in the Supreme Court 13 April 1988.

This is a case involving the qualification of the petitioner for unemployment benefits. The following facts are not in dispute. On 12 December 1984 the respondent Employment Security Commission entered an order disqualifying the petitioner from receiving unemployment benefits for the duration of his unemployment because the Commission found the petitioner was discharged for substantial fault on his part. The petitioner had been employed by Gold Bond Products. Petitioner was then employed by Gang-Nail from 3 March 1986 until 23 January 1987 at which time he was discharged. On 13 March 1987 the respondent disqualified the petitioner from receiving unemployment benefits from 25 January 1987 until 21 February 1987 for substantial fault with mitigating circumstances in his discharge from Gang-Nail.

The petitioner thereafter became aware that the Commission considered the disqualification ordered in 1984 to still be effective and that he was not to receive benefits. The petitioner then filed a petition with the Commission for a reduction of disqualification. In his petition he asked that the Commission exercise its discretion and reduce his 1984 disqualification. In his memorandum of law in support of the petition he argued that his 1984 disqualification did not extend to his 1987 entitlement.

The Commission on 16 June 1987 denied the petition for reduction of disqualification, holding that the permanent disqualification was not removed by the claimant's 1986-1987 employment and refused to exercise its discretion to reduce the disqualification. The claimant filed a petition for review with the superior court and requested in the petition a declaratory judgment that the respondent was in error in holding the duration of his unemployment after his discharge from Gold Bond extended through subsequent periods of unemployment and that the respondent erred in holding that its discretion to reduce permanent disqualifications was limited to "extraordinary and compelling reasons such as cases involving one spouse's leaving work to accompany the other spouse to another area too distant for reasonable commuting."

The superior court granted the respondent's motion for summary judgment. The petitioner appealed.

Legal Services of the Lower Cape Fear, by Richard M. Klein and James J. Wall, for claimant appellant.

T. S. Whitaker, Chief Counsel, and V. Henry Gransee, Jr., Deputy Chief Counsel, for the Employment Security Commission of North Carolina.

WEBB, Justice.

[1] The first question posed by this appeal is whether the appellant is properly in this Court. The appellee argues that in his petition to the Employment Security Commission the appellant asked only that the respondent exercise its discretion pursuant to N.C.G.S. § 96-14(10) and reduce the period of his disqualification. He did not petition the Commission to interpret N.C.G.S. § 96-14(10) and hold that the 1984 disqualification did not apply to

his 1987 entitlement. The appellee says that because the petitioner did not ask the Commission to interpret the statute he cannot ask the courts to do so on appeal. For this reason the appellee argues the appeal should be dismissed.

It is true the claimant's petition to the Commission may be interpreted to ask only that the Commission exercise its discretion to reduce his period of disqualification but in his memorandum of law in support of the petition he asked the Commission to interpret the statute and hold that the 1984 disqualification did not affect his later entitlement. The Commission interpreted the statute to hold that the 1984 disqualification was not suspended by the 1987 entitlement. The Commission has passed on the question which the appellant argues in this Court. We have jurisdiction to determine it.

The appellee also contends that in his petition to the superior court for review the appellant did not allege that the Commission abused its discretion in not reducing his disqualification. The appellee, relying on *In re Employment Security Comm.*, 234 N.C. 651, 68 S.E. 2d 311 (1951), says that the appellant by failing to allege the Commission had abused its discretion has not taken exception to the findings of the Commission. For that reason, says the appellee, the appellant's case may not be determined in the courts. *Employment Security Comm.* is not helpful to the appellee. In that case the employee's claim was dismissed because he did not file a statement of the grounds for which review was sought. In this case the appellant filed a paper which set forth the grounds upon which he sought review. It is true he did not except to the failure of the Commission to exercise its discretion but that is not a ground upon which relief was sought in the appeal. The superior court was correct in hearing the case and the appeal is properly in this Court.

[2] The Commission has ruled that the appellant's permanent disqualification in 1984 was not removed by his earning a new entitlement to unemployment compensation in 1987. The Commission's determination depends on the interpretation of N.C.G.S. § 96-14 which provides in pertinent part:

> An individual shall be disqualified for benefits:
>
> . . . .

(2) For the duration of his unemployment . . . if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because he was discharged for misconduct connected with his work.

. . . .

(10) Any employee disqualified for the duration of his unemployment due to the provisions of . . . (2) . . . above may have that permanent disqualification removed if he meets the following three conditions:

a. Returns to work for at least five weeks and is paid cumulative wages of at least 10 times his weekly benefit amount;

b. Subsequently becomes unemployed through no fault of his own; and

c. Meets the availability requirements of the law.

We hold that the plain words of this statute require that the order of the Commission be affirmed. N.C.G.S. § 96-14(2) provides that the appellant be denied unemployment benefits for the duration of his unemployment if he is discharged for misconduct connected with his work. This is what happened to the petitioner. An unemployed person may have this disqualification removed under N.C.G.S. § 96-14(10) if he meets three requirements, one of which is that he subsequently becomes unemployed through no fault of his own. The appellant did not subsequently become unemployed through no fault of his own. We believe N.C.G.S. § 96-14(10) fits this case specifically. It refers to a subsequent employment which will remove disqualification under certain circumstances. Those circumstances did not occur and the disqualification was not removed.

The appellant contends there is no reason to believe the General Assembly intended the words "duration of unemployment" in N.C.G.S. § 96-14(2) to include periods of unemployment two or more years after the appellant's original period of unemployment. He argues that the "duration of unemployment" refers to the unemployment from the job at Gold Bond. He established a new eligibility at Gang-Nail and he says the disqualification from his Gold Bond employment does not affect it.

The difficulty with this argument is that it ignores the plain words of the statute. The statute provides that disqualification may be removed by later employment and a discharge through no fault of the claimant. There was a later employment in this case but the claimant was at fault for this discharge.

[3] The appellant next contends the interpretation of the statute by the Commission violates federal law. The federal government provides a part of the funds for unemployment compensation and the state law has to comply with federal requirements in the administration of the employment security funds. The appellant, relying on *California Dept. of Human Resources v. Java*, 402 U.S. 121, 28 L.Ed. 2d 666 (1971), argues that the disqualification to receive benefits based on his 1987 entitlement because of his 1984 disqualification violates the requirements of 42 U.S.C. §§ 501-503. In *Java* the United States Supreme Court held that a federal requirement of state employment security programs is that payments must commence when they are first administratively allowed after a hearing of which the parties have notice and are permitted to present their respective positions. In this case the appellant has not been administratively determined to be eligible for unemployment compensation. He was not so determined, as contended by the appellant, when the appeals referee found on 13 March 1987 that he was discharged from Gang-Nail for substantial fault with mitigating circumstances. At that time he was ineligible for compensation because of his discharge from Gold Bond. *Java* has no application to this case.

The appellant also relies on *Intern. Union v. Michigan Employment Comm.*, 517 F. Supp. 12 (E.D. Mich. 1980). In that case a Michigan statute provided that if a person obtained unemployment benefits by fraud he would be penalized in certain circumstances if he subsequently received unemployment compensation by not receiving the first six weeks of compensation. A federal district court held that this provision violated the federal requirements. We are not bound by this case and its reasoning is not persuasive to us.

The judgment of the superior court is

Affirmed.

Justice MARTIN dissenting.

I respectfully dissent from the majority opinion. The issue before this Court is one of statutory construction of a disqualification clause of the Employment Security Act. We must strictly construe in favor of the claimant those sections of the Act that impose disqualifications, and disqualifications should not be enlarged by implication. *In re Watson*, 273 N.C. 629, 161 S.E. 2d 1 (1968). Upon applying that rule of construction here, I find that claimant is not barred from benefits accruing from his employment with Gang-Nail upon his discharge in 1987.

It is clear to me that the phrase "for the duration of his unemployment" in N.C.G.S. § 96-14(2) applies in this case only to claimant's unemployment resulting from his discharge from Gold Bond in 1984. This period of unemployment ended upon Josey's employment with Gang-Nail on 3 March 1986. The clear purpose of the statute is to prevent Josey from receiving benefits from his employment with *Gold Bond* until he complies with N.C.G.S. § 96-14(10). To construe the statute otherwise requires an expansion of the disqualification by implication. Such construction violates the legislative purposes of the Act. N.C.G.S. § 96-2 (1985).

A strict construction of the phrase "for the duration of his unemployment" limits the disqualification to the period of unemployment from Gold Bond and does not apply to Josey's subsequent unemployment from Gang-Nail. It is to be remembered that Josey worked for Gang-Nail the required time periods to establish his rights to unemployment benefits. Further, he received penalties arising from his discharge from Gang-Nail by being denied four weeks of his benefits.

The majority opinion results in a most bizarre predicament. Had Josey not applied for benefits following his discharge from Gold Bond, he would be entitled to benefits from his unemployment from Gang-Nail. Thus, a situation results that if a claimant seeks his benefits for unemployment where he may be and is found to be substantially at fault, the majority holds he cannot thereafter receive benefits from *any subsequent unemployment* until he has complied with N.C.G.S. § 96-14(10). Conversely, if a claimant does not seek benefits from his first unemployment where he may be found to be substantially at fault, he is free to receive benefits during his second unemployment period. This

Court should not place such an incongruous result within the legislative intent of the General Assembly.

The fair result, which complies with our rules of statutory construction in unemployment compensation cases, is to deny Josey unemployment benefits arising from his unemployment with Gold Bond because he has failed to comply with N.C.G.S. § 96-14(10) with respect to that unemployment. However, the 1984 disqualification should not be applied to Josey's 1987 unemployment from Gang-Nail, where he has built a new basis for benefits separate and apart from his employment with Gold Bond.

My vote is to reverse the summary judgment granted by the superior court.

Chief Justice EXUM and Justice FRYE join in this dissenting opinion.

STATE OF NORTH CAROLINA v. BERNARD DARRILL DEGREE

No. 635A87

(Filed 5 May 1988)

1. **Rape and Allied Offenses § 4.3— victim's sexual behavior—impeachment of testimony—exclusion of expeditionary questions**

Even though the State, by eliciting testimony of a rape victim on direct examination that she had not had intercourse with any man other than defendant prior or subsequent to the date of the crime, may have opened the door to defendant's introduction of evidence for impeachment purposes regarding the victim's sexual behavior, mere expeditionary questions which defendant asked the victim on cross-examination were properly excluded by the trial court under the rape shield statute. N.C.G.S. § 8C-1, Rule 412(b) (1986).

2. **Criminal Law § 169.3— defendant's statement of birthdate—absence of Miranda warnings—erroneous admission cured by other evidence**

Assuming, *arguendo*, that the court in a first degree rape case erred in admitting defendant's statement to an officer as to his birthdate because defendant had not been given the *Miranda* warnings, such error was harmless beyond a reasonable doubt in view of testimony as to defendant's age, birthdate, or both by the victim and by defendant's mother, father, sister and niece.

3. **Rape and Allied Offenses § 11— rape of child under age thirteen—sufficiency of evidence**

The evidence was sufficient to support defendant's conviction of first degree rape under N.C.G.S. § 14-27.2(a)(1) (1986) where the victim testified that

in September 1986 defendant penetrated her vagina with his penis for a period of five to ten minutes, that she was born on 7 January 1975, and that she was eleven years old in September 1986, and where several witnesses testified that defendant was born on 20 July 1968, thus making him eighteen years old and more than four years older than the victim at the time of the offense.

APPEAL of right by defendant pursuant to N.C.G.S. § 7A-27(a) (1986) from a conviction of first degree rape before *Gudger, J.*, and the imposition of a life sentence, at the 13 July 1987 Criminal Session of Superior Court, CATAWBA County. Heard in the Supreme Court 12 April 1988.

Lacy H. Thornburg, Attorney General, by Linda Anne Morris, Associate Attorney General, for the State.

E. X. de Torres for defendant-appellant.

WHICHARD, Justice.

Defendant was convicted of first degree rape, N.C.G.S. § 14-27.2(a)(1) (1986), and sentenced to life imprisonment. We find no error.

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

On 13 September 1986 the victim, age eleven, spent the night with defendant's sister, Tenisha Degree, age twelve, at the home of defendant's mother. The victim slept in a bed with the sister, but the sister got up and left the room sometime during the night.

Defendant came into the room and lay down on top of the victim. He tried to pull up the victim's skirt, to pull down her underclothes, and to insert his penis into her vagina. The victim resisted, but defendant ultimately "got it in [and] start[ed] moving around."

The victim tried to push defendant off, but he would not get up. She felt defendant's penis moving around in her vagina. Defendant was on top of her with his penis inside her vagina for about five or ten minutes. The following morning the victim told Danielle Kee, defendant's niece: "[L]ast night [defendant] got me."

The victim had not been "seeing" or "dating" defendant. She had not had previous or subsequent intercourse with anyone other than defendant.

In January 1987 the victim went to the health department because she had been feeling sick and sleeping a lot. She was found to be approximately twenty-one weeks pregnant. She told her mother that defendant was the father. The baby was born on 27 May 1987.

An investigating officer with the Hickory Police Department testified that the victim told him that defendant had intercourse with her on approximately 13 September 1986. He further testified that defendant told him that defendant's birthdate was 20 July 1968.

Defendant presented the following pertinent evidence:

Danielle Kee, defendant's niece, denied that the victim had told her that defendant "got her." She testified that on the morning following the alleged incident, the victim did not seem upset and did not mention that anything had happened. She further testified that defendant had requested that she ask the victim why she had told "that lie" on him. When she did, the victim responded: "I didn't tell no lie. My momma told that lie." On cross-examination Kee testified that defendant was eighteen years old.

Tenisha Degree, defendant's sister, testified that the victim had not told her that defendant had done anything to her. She had not noticed anything indicating that the victim was upset. On cross-examination she testified that defendant's birthdate was 20 July 1968 and that he was eighteen years old at the time of trial.

Sonya Kee, defendant's niece, testified that the victim had not mentioned the incident to her. She further testified that defendant had never told her that he had sex with the victim.

Minnie Degree, defendant's mother, testified that on the day following the alleged incident she had not noticed anything unusual about the victim. Defendant had never told her that he had sex with the victim that evening.

On cross-examination, however, she testified that when she asked defendant if he had intercourse with the victim, he said nothing but "just walked away." She further testified on cross-examination that defendant's birthdate was 20 July 1968 and that he was eighteen years old at the time of trial.

Leroy Gantt, defendant's father, testified that when he "got on [defendant's] case" about having "sex with this girl," defendant denied it. He testified on cross-examination that defendant was born on 20 July 1968.

[1] On cross-examination of the victim, defense counsel asked:

> Q. Now, isn't it true that you'd dated several boys previous to September of '86?

The prosecutor objected. Before the trial court ruled, the victim answered: "No." The court then overruled the objection.

Defense counsel next asked:

> Q. Have you ever dated Marcus Hannah?

The prosecutor again objected, the court sustained the objection, and the victim nevertheless responded in the negative.

Defense counsel's next question was:

> Q. Now, isn't it true that your mother had to chase some boys out of your bedroom at your house?

The court sustained the prosecutor's objection and thereupon excused the jury. Following discussion in the absence of the jury, the court indicated to counsel that, absent prior inconsistent statements of the victim that would impeach her declaration on direct examination that she had had no prior sexual relations, evidence of the type defense counsel sought to elicit would be excluded. Defendant assigns error to this exclusion.

Nothing else appearing, the exclusion was proper under Rule 412(b), which provides:

> (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). The exceptions to inadmissibility contained in the rule are inapplicable here; indeed, defendant does not contend otherwise. He argues, instead, that the State opened the door to questions of this nature by asking the victim on direct examination whether she had had intercourse with any man other than defendant prior or subsequent to 13 September 1986, and that he thus should have been allowed to impeach the victim's negative answer for the purpose of casting doubt on her credibility.

In the absence of the jury, the trial court stated to defense counsel that it "might allow . . . a prior inconsistent statement concerning events relating to other people for the purpose of impeachment only." Defense counsel indicated that "[t]here are no statements other than what [the victim] has said on the stand."

Assuming that the State could, and did, open the door—for impeachment purposes—to the introduction of evidence regarding the victim's sexual behavior, defendant clearly had no such evidence to offer. By the questions asked, he sought to embark upon a fishing expedition, hoping it would yield the desired evidence. Had defendant possessed evidence of the victim's sexual behavior which he contended was relevant for impeachment purposes, he could have requested an in camera hearing to determine its relevancy and admissibility. N.C.G.S. § 8C-1, Rule 412(d) (1986). He made no such request, however, and absent such request exclusion of his merely expeditionary questions accords with the letter and the purpose of the rape shield statute. *Id.*

Defendant next contends that the trial court erred in allowing testimony from an officer in response to a leading question

which contained facts not in evidence. The question related to a reference on the police case folder to an incorrect date of the alleged offense. The matter in question was inconsequential, and this argument is frivolous.

[2] Defendant next contends that the trial court erred in allowing his statement, which included his birthdate, into evidence. The basis of the argument is that the statement served to establish an element of the offense, and the officer had not given defendant the required warnings. *See Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694 (1966).

The following witnesses also testified to defendant's age, birthdate, or both: (1) the victim; (2) defendant's niece; (3) defendant's sister; (4) defendant's mother; and (5) defendant's father. In view of this evidence, assuming, *arguendo*, that the court erred in admitting defendant's statement as to his birthdate, we find the error harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1983); *Chapman v. California*, 386 U.S. 18, 17 L.Ed. 2d 705 (1967).

[3] Defendant next contends that the trial court erred in denying his motion to dismiss made at the close of the State's evidence. We recently stated:

> A motion to dismiss for insufficiency of the evidence is tantamount to a motion for nonsuit under N.C.G.S. [§] 15-173. *State v. Greer*, 308 N.C. 515, 519, 302 S.E. 2d 774, 777 (1983). Under N.C.G.S. [§] 15-173, a defendant who introduces evidence waives any motion for dismissal or nonsuit made prior to the introduction of his evidence and cannot urge the prior motion as ground for appeal. N.C.G.S. [§] 15-173 (1983); *State v. Bruce*, 315 N.C. 273, 280, 337 S.E. 2d 510, 515 (1985); *see also* N.C.R. App. P. 10(b)(3).

State v. Stocks, 319 N.C. 437, 438, 355 S.E. 2d 492, 492-93 (1987). Defendant offered evidence following the denial of his motion to dismiss at the close of the State's evidence. The denial of that motion is thus not properly before us for review.

Defendant further contends, however, that the trial court erred in denying his renewed motion to dismiss made at the close of all the evidence. In considering this motion, the trial court was required to view the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference

to be drawn from it. *State v. Williams*, 319 N.C. 73, 79, 352 S.E. 2d 428, 432 (1987) (quoting *State v. Young*, 312 N.C. 669, 680, 325 S.E. 2d 181, 188 (1985). If there was substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged was committed and that defendant committed it, the case was for the jury, and the motion to dismiss was properly denied. *Id.*

To convict defendant of the offense charged, the State had to prove that he engaged in vaginal intercourse with a victim under the age of thirteen years, when he was at least twelve years old and at least four years older than the victim. N.C.G.S. § 14-27.2(a)(1) (1986). Viewed in the light most favorable to the State, as required, the evidence sufficed to meet the State's burden. The victim testified that she was born on 7 January 1975, that she was eleven years old in September 1986, and that in September 1986 defendant penetrated her vagina with his penis for a period of five to ten minutes. Several witnesses testified that defendant was born on 20 July 1968, thus making him eighteen years old—and more than four years older than the victim—at the time of the offense. There was substantial evidence of all elements of the offense charged and of defendant as the perpetrator. Indeed, defendant does not contend otherwise; he only argues alleged inconsistencies, discrepancies, and weaknesses in the State's case. These, however, were for the jury to resolve. The State had met its burden of proof, and the motion to dismiss was properly denied. For the same reasons, defendant's oral post-trial "Motion for Appropriate Relief . . . and . . . to set aside the verdict as contrary to the weight of the evidence" was also properly denied.[1]

Defendant finally contends that a mandatory sentence of life imprisonment, under the facts of this case, violates the eighth and

1. Defendant has included in the appendix to his brief a written motion for appropriate relief dated 22 October 1987 and signed by counsel other than his counsel on appeal. The motion is captioned in the Superior Court Division, Catawba County, and apparently has been filed in that division. Defendant acknowledges that this motion has not been heard or ruled upon by the trial court, but nevertheless asks that we consider the "additional evidence" contained therein in passing upon the propriety of the denial of his oral motion at trial for appropriate relief and to set aside the verdict.

So far as the record before us reveals, the Superior Court, Catawba County, has not passed upon that motion. Matters contained therein thus are not properly before us, and we have not considered them.

fourteenth amendments to the United States Constitution and Article I, section 27 of the North Carolina Constitution. Defendant did not present this argument in the trial court, however, and it is well-established that appellate courts ordinarily will not pass upon a constitutional question unless it was raised and passed upon in the court below. *State v. Hunter*, 305 N.C. 106, 112, 286 S.E. 2d 535, 539 (1982); *State v. Dorsett and State v. Yow*, 272 N.C. 227, 229, 158 S.E. 2d 15, 17 (1967). We thus do not pass upon the question.

We note, however, that we have held that a mandatory sentence of life imprisonment for first-degree sexual offense is not so disproportionate as to constitute a violation of the eighth amendment to the Constitution of the United States. *State v. Higginbottom*, 312 N.C. 760, 324 S.E. 2d 834 (1985). *See also State v. Cooke*, 318 N.C. 674, 351 S.E. 2d 290 (1987) (refusal to reconsider eighth amendment holding in *Higginbottom*). "Since it is the function of the legislature and not the judiciary to determine the extent of punishment to be imposed, we accord substantial deference to the wisdom of that body." *State v. Higginbottom*, 312 N.C. at 763-64, 324 S.E. 2d at 837.

No error.

STATE OF NORTH CAROLINA v. WILLIAM JESS REID

No. 540A87

(Filed 5 May 1988)

1. Criminal Law §§ 53, 162.2— sexual offenses—opinion of treating physician—objection too late

There was no plain error in a prosecution for first degree sexual offense, attempted first degree sexual offense, and armed robbery where defendant challenged the admissibility of a doctor's opinion that some event had happened which led to the mental state of the victim, but defendant's objection and motion to strike were made after the prosecutor had asked the doctor for his opinion, the doctor had responded, and the prosecutor had proceeded to the next question. The Supreme Court was unable to conclude that any error caused the jury to reach a different verdict, and declined defendant's invitation to suspend the rules of appellate procedure. N.C.G.S. § 15A-1443, N.C.G.S. § 8C-1, Rule 103(a)(1) (1986), N.C. Rules of App. Procedure, Rule 2.

2. Criminal Law § 73.4— destruction of evidence—explanation—present sense impression exception to hearsay rule

The trial court did not err in a prosecution for first degree sexual offense, attempted first degree sexual offense, and armed robbery by admitting a detective's testimony as to what the captain of the identification bureau had said while destroying the rape kit. Assuming that the testimony was hearsay, it came within the present sense impression exception of N.C.G.S. § 8C-1, Rule 803(1) because the event and the statement occurred simultaneously and the statement was in explanation of the event.

APPEAL as of right by the defendant pursuant to N.C.G.S. § 7A-27(a) from judgments imposing two sentences of life imprisonment entered by *Lamm, J.*, at the 22 June 1987 Criminal Session of Superior Court, GASTON County. Heard in the Supreme Court on 11 April 1988.

Lacy H. Thornburg, Attorney General, by James B. Richmond, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Staples Hughes, Assistant Appellate Defender, for the defendant appellant.

MITCHELL, Justice.

The defendant, William Jess Reid, was tried on separate bills of indictment charging him with three counts of sexual offense and one count of robbery with a dangerous weapon of a sixteen-year-old male victim. The cases were consolidated for trial, and the jury returned verdicts finding the defendant guilty of two counts of first-degree sexual offense, one count of attempted first-degree sexual offense, and one count of robbery with a dangerous weapon.

On appeal to this Court, the defendant raises two assignments of error relating to the testimony of witnesses. Having reviewed the entire record and the challenged testimony, we find no error in the defendant's trial.

The evidence presented by the State tended to show that on the evening of 13 June 1986, the defendant Reid accosted the victim, a sixteen-year-old male employee of a Food Lion supermarket, while the victim was picking up trash in the parking lot and bringing in shopping carts. Reid forced the victim at the point of

a handgun to go with him to the back of the building. Reid then took the victim's gold ring from his finger, forced him to perform fellatio, attempted to sodomize him, and forced him to perform a second act of fellatio. The victim subsequently was taken to the hospital, where he was examined by a physician, interviewed by police officers, and admitted to the psychiatric unit of the hospital for emotional trauma.

[1] In his first assignment of error, the defendant asserts that the trial court committed reversible error in its ruling on the admissibility of the testimony of Dr. Robert Ladd, the emergency room physician who examined the victim following the attack. Dr. Ladd testified that his examination of the victim essentially revealed no physical evidence of a forcible sexual assault. The history that he obtained from the victim consisted of his statement that he had been forced into performing the sexual acts with the defendant. Dr. Ladd stated that the victim was "a very withdrawn, very quiet young man; and I just didn't seem to get through to him very well. He just stared in space most of the time."

In response to the prosecutor's question concerning what course of treatment the doctor had recommended, the following testimony occurred:

> A. Because that I thought the young man was very emotionally traumatized, I recommended having him admitted to the psychiatric unit at the hospital.
>
> Q. Was he admitted—
>
> A. I referred him to a psychiatrist, and he was admitted.
>
> Q. Based upon your examination and the history that you obtained from Mr. Mills, Dr. Ladd, did you form an opinion satisfactory to yourself as to whether or not he had been physically assaulted?
>
> A. My opinion was that something had happened to this young man that severely and emotionally traumatized him.
>
> Q. Based upon the history—
>
> A. Based upon the history and based upon the way he acted.
>
> THE PUBLIC DEFENDER: OBJECTION AND MOVE TO STRIKE.

THE COURT: Well—

THE DISTRICT ATTORNEY: Your witness.

THE COURT: SUSTAINED as to the question. He broke in. I think he was going to ask him but never did.

The defendant challenges the admissibility of the doctor's opinion that some event had in fact occurred which led to the mental state of the victim, because this statement was unresponsive to the question posed and prejudicial. "If an unresponsive answer produces irrelevant or incompetent evidence, the evidence should be stricken and withdrawn from the jury." *State v. Keen*, 309 N.C. 158, 162, 305 S.E. 2d 535, 537 (1983). In the context of the doctor's testimony, the defendant asserts that the doctor's opinion should have been stricken, because it could only have been taken by the jury as a comment on both the credibility of the victim and the guilt of the defendant.

We find it unnecessary, however, to address the merits of the defendant's argument. Under N.C.G.S. § 15A-1446, an assignment of error ordinarily will not be considered on appellate review unless the error has been brought to the attention of the trial court by appropriate and timely objection or motion. Failure to do so amounts to a waiver. *State v. McDougall*, 308 N.C. 1, 301 S.E. 2d 308, *cert. denied*, 464 U.S. 865 (1983); *State v. White*, 307 N.C. 42, 296 S.E. 2d 267 (1982). Furthermore, under Rule 103 of the North Carolina Rules of Evidence, error may not be predicated on a ruling admitting evidence unless a timely objection or motion to strike appears in the record. N.C.G.S. § 8C-1, Rule 103(a)(1) (1986). Although under this rule no particular form is required to preserve the right to assert the alleged error on appeal, the motion or objection must be timely and clearly present the alleged error to the trial court.

As to the alleged error in the present case, the defendant's objection and motion to strike were made after the prosecutor had asked Dr. Ladd for his opinion, and after Dr. Ladd had responded and the prosecutor had proceeded to the next question. Indeed, during oral arguments before this Court, the defendant conceded with commendable candor that the objection at trial came too late and that this question was not properly preserved for appellate review. Nevertheless, the defendant argues that he

should be granted relief because the admission of the testimony was sufficiently egregious to constitute "plain error." Alternatively, the defendant asks that we consider this assignment of error under our residual powers to suspend the rules of appellate procedure to prevent "manifest injustice." App. R. 2.

We perceive no plain error in the trial court's actions. The plain error rule applies only in truly exceptional cases. Before deciding that an error by the trial court amounts to "plain error," the appellate court must be convinced that absent the error the jury would have reached a different verdict. *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983). This test places a much heavier burden upon the defendant than that imposed by N.C.G.S. § 15A-1443 upon defendants who have preserved their rights by timely objection. *State v. Walker*, 316 N.C. 33, 39, 340 S.E. 2d 80, 83 (1986). From the facts in this case, we are unable to conclude that any possible error committed caused the jury to reach a different verdict than it would have reached otherwise. *See State v. Black*, 308 N.C. 736, 303 S.E. 2d 804 (1983). The defendant has not carried his burden of showing "plain error." *See generally, State v. Walker*, 316 N.C. 33, 340 S.E. 2d 80 (discussing the "plain error" analysis). Moreover, we decline the defendant's invitation to suspend the rules of appellate procedure. Accordingly, this assignment of error is overruled.

[2] In his second assignment of error, the defendant contends that the trial court committed reversible error in its ruling on the admissibility of certain testimony of Detective R. L. Williams. On cross-examination of Dr. Ladd, the defendant's attorney brought out for the first time that Dr. Ladd had performed a standard rape kit examination of the victim and had turned the physical evidence he collected over to a police officer. Detective Williams later testified that Dr. Ladd had turned the rape kit over to him. During direct examination of Detective Williams, the following testimony occurred:

> Q. What happened to the rape kit that you received from Dr. Ladd?
>
> A. It was taken to the Identification Bureau and preserved in a refrigerator.
>
> Q. And how long did you keep it?

A. It was kept until November of 1986.

Q. What happened to it on that day?

A. It was removed from the refrigerator by the Captain of the Identification Bureau and—

Q. Who is he?

A. Captain Marvin Barlow.

Q. And what did Captain Barlaw do with it?

A. He destroyed the evidence. Did not think it was—

Q. Where were you at the time it was destroyed?

A. I was in the Identification Bureau?

Q. What, if anything, did you say or do?

A. I advised him that the case was still pending at that time, and he did not—

THE PUBLIC DEFENDER: OBJECTION to anything he might have said.

THE COURT: Well, SUSTAINED to what he might have said. Well, OVERRULED.

A. He said he did not feel that it would be of sufficient value after that period of time.

Q. Now after—

THE PUBLIC DEFENDER: OBJECTION AND MOVE TO STRIKE, Your Honor.

THE COURT: DENIED.

Captain Barlow's statement, according to the defendant, was not only hearsay, but also incompetent opinion evidence for which no foundation had been laid. The defendant argues that the State was allowed the benefit of expert opinion testimony, not subject to cross-examination or confrontation, which provided an explanation for the destruction of evidence. Thus, the defendant asserts that this statement thwarted his defense argument that the State had unfairly deprived him of the benefit of that evidence and could not be found to have met its burden of proof. We disagree.

Assuming arguendo that the testimony was hearsay, we find that it comes within the "present sense impression" exception provided by Rule 803(1) of the North Carolina Rules of Evidence. This exception allows into evidence a hearsay "statement describing or *explaining an event* or condition made while the declarant was perceiving the event or condition, or immediately thereafter." N.C.G.S. § 8C-1, Rule 803(1) (1986) (emphasis added). The underlying theory of the present sense exception to the hearsay rule is that closeness in time between the event and the declarant's statement reduces the likelihood of deliberate or conscious misrepresentation. *State v. Odom*, 316 N.C. 306, 341 S.E. 2d 332 (1986).

In the present case Captain Barlow made a statement to Detective Williams while destroying the rape kit. Barlow's statement was one "explaining an event," i.e., the destruction of the evidence. Because the event and Barlow's statement occurred simultaneously and the statement was in explanation, we conclude that Detective Williams' testimony concerning Barlow's statement was admissible under the present sense exception to the hearsay rule. Accordingly, this assignment of error is overruled.

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

No error.

STATE OF NORTH CAROLINA v. ROBIN HELMS

No. 9A87

(Filed 5 May 1988)

Criminal Law §§ 33, 35— subornation of testimony against defendant—evidence of motive

In a prosecution for sexual offenses allegedly committed upon defendant's stepsons, defendant's evidence that she, her husband and the oldest stepson consulted a lawyer for the purpose of bringing an action to obtain custody of the stepsons from their natural mother shortly before the mother accused defendant of sexual offenses against them was relevant and admissible under N.C.G.S. § 8C-1, Rule 401 to support and make more plausible defendant's evidence that the natural mother suborned the boys' testimony, and the trial court's exclusion of such evidence was prejudicial error since it is reasonably

possible that there would have been a different result at trial had the evidence not been excluded. N.C.G.S. § 15A-1443(a).

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a life sentence entered by *Davis, J.*, at the 26 January 1987 Criminal Session of Superior Court, IREDELL County, upon defendant's conviction of two first degree sexual offenses. Heard in the Supreme Court 15 March 1988.

Lacy H. Thornburg, Attorney General, by Elizabeth G. McCrodden, Associate Attorney General, for the state.

Malcolm Ray Hunter, Jr., Appellate Defender, by Staples Hughes, Assistant Appellate Defender, for defendant appellant.

EXUM, Chief Justice.

In this case defendant was charged with committing sexual offenses upon two of her stepsons. She denied the charges, claiming that the boys' natural mother suborned their testimony. The sole question we address on appeal is whether the trial court committed reversible error when it precluded defendant from introducing evidence that shortly before she was accused of committing sexual offenses she, one of her stepsons, and her husband, the boys' natural father, consulted a lawyer for the purpose of trying to obtain custody of the boys from their natural mother. We hold exclusion of this evidence constituted reversible error.

I.

The state's evidence tended to show that on 17 February 1986 the Iredell Department of Social Services received a report from Diane Helms Rogers alleging that defendant sexually abused Rogers' two oldest sons. A social worker investigated the report. During the investigation both boys indicated on anatomically correct drawings that defendant forced them to engage in vaginal intercourse and cunnilingus.

The younger victim, age seven at the time of the alleged offense, testified that during the 1985 Christmas season he and his brothers visited their father and defendant for an overnight stay. He stated that while his father was at work defendant told him to get into the bathtub with her and "place his bottom private part on her bottom private part." By this he meant defendant asked

him to insert his penis in her vagina. He did as directed. Defendant then took him into the bedroom and again asked him to do the same thing. She then called his nine-year-old brother into the bedroom to demonstrate how to have intercourse. The older brother complied. Defendant then asked the older brother to hold up a mirror while the younger one imitated him. Defendant then directed both children to perform cunnilingus. After performing these acts the younger brother dressed and left, locking the door behind him.

The older brother corroborated his younger brother's account of the alleged offenses, adding that after the younger brother left he stayed in the room doing "the same things that happened before [my brother] left."

Defendant put on evidence demonstrating that on several occasions before trial the children had recanted their story. The boys' paternal grandfather, W. L. Helms, testified that sometime after Diane Rogers reported the incident the younger brother told him that "there wasn't a word of it so." Herman Rogers, Diane Rogers' father-in-law, testified that when he questioned the boys the younger brother declared "[i]t ain't so," and went on to say that their natural mother "put them up to it." Richard Helms, the boys' natural father, testified that his oldest son also recanted, telling him that his mother asked him "to tell lies on Robin that we sexually assaulted by her. [sic]" Carlton Wilkerson, the social worker to whom the Helms brothers initially made allegations, testified that the older Helms boy told him his original story was not true. Later, at a third interview with Wilkerson, the older brother reaffirmed his original allegations that defendant forced him to perform intercourse and cunnilingus.

Defendant, testifying on her own behalf, denied that she participated in any sexual acts with her stepsons. According to her testimony she was never alone with the boys during the Christmas season. She did not own a hand-held mirror, and the only mirrors in the trailer would have been too heavy for a young child to lift. There was no lock on her bedroom door. Finally, defendant described extensive orthopedic surgery she had undergone just before the 1985 Christmas season to remove malfunctioning stainless steel pins from the sides of both hips. Defendant was hospitalized for the surgery until 29 November 1985 and was

unable to do anything for herself until a few days before Christmas. Even then she needed crutches and was instructed to keep the stitches closing the surgical incisions dry.

II.

Defendant contends the trial court committed reversible error in excluding evidence that she, her husband and the oldest stepson consulted a lawyer, Roger Edwards, for the purpose of bringing an action for custody of the boys against Diane Rogers shortly before Rogers accused defendant of sexual offenses against them. She argues this evidence was relevant because it tended to establish why Ms. Rogers might have suborned her sons' testimony and was therefore admissible under N.C.G.S. § 8C-1, Rule 401. We agree.

The trial court permitted defendant to demonstrate that she, her husband and stepson went to see Mr. Edwards approximately two weeks before the Department of Social Services received a complaint about defendant; however, it prohibited her from showing that they sought Mr. Edwards' assistance for the purpose of bringing an action to gain custody of the Helms boys. Defense counsel asked the older boy "[d]o you remember talking to a lawyer about whether or not you wanted to go live with your father?" He said "yes," whereupon the state objected and moved to strike. The court sustained the state's objection and granted its motion, stating "[m]embers of the jury, as to whether or not he may have talked to a lawyer about those matters is immaterial. You will disregard it." On defendant's direct examination she testified that she went to see a lawyer; however, she was forbidden to answer the question "[w]hat was the purpose of the appointment." A similar exchange occurred during the direct examination of Richard Helms. Finally, the court conducted a lengthy *voir dire* when defendant called Mr. Edwards to testify after which it concluded "as to the reason Mr. Helms was in his office and what he was doing, as to that I rule that that is not competent." During this *voir dire* Mr. Edwards testified that the Helmses consulted him about bringing an action to obtain custody of the Helms boys from Diane Rogers.

We hold the trial court erred in excluding evidence that the purpose for which defendant, her husband and stepson consulted a lawyer was to bring an action for the custody of the Helms boys

against Diane Rogers. Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1986). This evidence tends to support and make more plausible defendant's evidence that Diane Rogers suborned the boys' testimony. Whatever antipathy might naturally exist between a natural mother and a stepmother would be exacerbated when the stepmother threatens the natural mother with loss of her children's custody.

The state contends the evidence at issue is not relevant because there is no evidence that Diane Rogers knew the purpose of the consultation between Mr. Edwards and the Helmses.

It was not necessary for defendant to prove that Diane Rogers knew the purpose of the consultation with Mr. Edwards for her to introduce evidence of the consultation's purpose. Evidence of the consultation's purpose, coupled with the natural relationship between a mother and her children, could lead a jury reasonably to infer that the Helms boy told Diane Rogers about that purpose. It is reasonable to infer that a young boy would tell his mother that he and his father went to talk to a lawyer about whether he could live with his father instead of with his mother.

We also hold that under N.C.G.S. § 15A-1443(a) the trial court's error in precluding defendant from introducing evidence of the purpose underlying the consultation with Mr. Edwards unfairly prejudiced defendant. Under this statute, reversible 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) (1983). The defense in this case was premised largely on the theory that Diane Rogers caused her sons to make up false charges against defendant. Such a theory, divorced from evidence that defendant and Richard Helms were planning to institute a custody action against Diane Rogers, is not nearly so plausible as it would be in the presence of such evidence. This case boils down to which witnesses the jury chooses to believe. The state's case is strong, but so is the defendant's defense. Thus, we conclude that had this evidence not been erroneously excluded it is reasonably possible

there would have been a different result at trial.* The result, therefore, is a

New trial.

STATE OF NORTH CAROLINA v. DONALD EUGENE JAMES

No. 526A87

(Filed 5 May 1988)

Criminal Law § 102.9— closing argument—reference to affirmation—no plain error

There was no plain error in a prosecution for murder, hit and run driving with personal injury, and larceny where the prosecutor stated in his closing argument, in reference to defendant, "I normally say that he placed his hand on the same Bible as the other witnesses, but he didn't in this case." The entire thrust of the prosecutor's argument was that defendant was not credible because he had admitted to the jury that he steals and is not always truthful, and the prosecutor made no reference to defendant's affirmation as a witness to persuade the jury to disbelieve him. N.C.G.S. § 8C-1, Rule 603, Rule 610, N.C. Constitution, Art. I, § 13.

APPEAL by defendant from judgments of imprisonment for life for conviction of murder in the second degree, five years for conviction of hit and run driving with personal injury, and two years for conviction of larceny, said judgments imposed by *Lee, J.*, at the 4 May 1987 session of Superior Court, DURHAM County. Heard in the Supreme Court 13 April 1988.

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

Malcolm Ray Hunter, Jr., Appellate Defender, by Daniel R. Pollitt, Assistant Appellate Defender, for defendant.

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* Defendant raises other assignments of error which, she contends, necessitate that she receive a new trial. Because these errors are not likely to arise at the new trial we decline to address these arguments.

MARTIN, Justice.

We find no error in defendant's trial, convictions, and sentencing for murder in the second degree, hit and run driving resulting in personal injuries, and misdemeanor larceny.

An extensive review of the evidence is not necessary to dispose of the single issue raised upon this appeal. The evidence tends to show that on 25 March 1986 Rachel Basen and her fiance, William Michael Kountis, drove her 1977 Dodge van to Durham and parked the vehicle in a public parking lot. About twenty minutes later, 4:50 p.m., they returned to the van. Ms. Basen opened the driver's door, placed the key in the ignition switch, and then was pulled from the van by defendant. Kountis, who had not entered the van, began to yell at defendant and wrestle with him through the window. Kountis then ran to the passenger side and attempted to open the door but was "slung" to the ground when defendant drove the van backwards. When Kountis got up and ran to the front of the van, defendant suddenly floored the gas pedal and drove the van forward. It struck Kountis and dragged him to the parking lot exit where he was dropped from under the van. Kountis died from the injuries received by being struck by the van.

At trial defendant admitted that he stole the van and that Kountis tried to prevent him from leaving. After being duly affirmed, defendant testified that Kountis "flew from the van when I punched the gas to come off the parking lot."

Defendant presents a single issue for our review. He argues that the trial judge committed prejudicial error in failing to interrupt ex mero motu the prosecutor's argument at the underlined portion as follows:

> At this point, let me say a few things about the defendant's testimony. He did get up before you. He testified from the witness stand. I normally say that he placed his hand on the same Bible as the other witnesses, but he didn't in this case. What he did was he got on the witness stand and he told you some things about himself. He told you that he has a history of stealing. Why is that relevant? Because it proves that he stole the van in this case? No, although he admits to you that he did. But he's not guilty of anything in this case

because he had stolen in the past, just like he's not guilty of assaulting an officer in this case because he assaulted an officer in the past. What this tells us about the defendant is that the defendant is the kind of person that you just shouldn't trust. In your everyday lives, when you meet somebody and you have to make a decision about that person and you discover that that person has a history of taking other people's property, what is going to be your reasonable, logical conclusion about the trustworthiness of what that person tells you. I would submit that you wouldn't believe him. I would submit that you would have good reason not to believe him. In addition to the fact that the defendant admits to you that he has not always been truthful in the past, who in this case has the most motivation of all not to tell you the truth. Put yourself in the defendant's position for a second. What else can he say? What can he tell you? Everybody knows that he took the van; everybody knows that he ran over Mr. Kountis; there is nothing that he can do to change that; he can't say you got the wrong man, it wasn't me because he was still in the van when they caught him. He can't say that the van didn't run over him it was another vehicle because there were too many people there who saw that happen. So what can he say? All he can say is, "I never saw him." "I didn't know that it happened."

Defendant argues that the prosecutor's argument improperly impeached defendant's credibility by referring to his religious beliefs. Defendant relies upon article I, section 13 of the North Carolina Constitution:

Sec. 13. Religious liberty.

All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, control or interfere with the rights of conscience.

It is true that counsel may not attack the credibility of a witness because of the witness's religious beliefs or rights of conscience. N.C.R. Evid. 610. Here, however, defendant's credibility was not attacked by any reference to his religious beliefs or rights of conscience. Defendant misconstrues the prosecutor's argument. The prosecutor's argument was based upon the notion

that because defendant had admitted that he had a history of stealing, he is "the kind of person that you just shouldn't trust." The prosecutor further argued that the jury had a good reason not to believe defendant: not only had defendant admitted "that he has not always been truthful in the past," he had the most motivation not to tell the truth to the jury. The entire thrust of the prosecutor's argument was that defendant was not credible because he had admitted to the jury that he steals and is not always truthful. The prosecutor made no reference to defendant's affirmation as a witness to persuade the jury to disbelieve him. Defendant's argument to the contrary is unfounded.

The authorities relied upon by defendant are inapposite. In *People v. Hall*, 391 Mich. 175, 215 N.W. 2d 166 (1974), the prosecutor specifically cross-examined the defendant concerning his belief in God and how that belief could affect his ability to tell the truth. The prosecutor in *State v. Thomas*, 130 Ariz. 432, 636 P. 2d 1214 (1981), repeatedly referred to the *victim's* strict religious raising in his opening statement, in direct examination, and during closing argument, and tied that background into the victim's credibility. *People v. Wood*, 66 N.Y. 2d 374, 488 N.E. 2d 86, 497 N.Y.S. 2d 340 (1985), is a case where the prosecutor questioned a witness at length, over objection, about his affirming rather than swearing to God, and the trial judge's overruling the objection gave legitimacy to the questions. Last, in *State v. Kimbrell*, 320 N.C. 762, 360 S.E. 2d 691 (1987), there was extensive questioning of defendant about his practice of devil worshipping. None of these cases is concerned with a single, factual remark as is present in this appeal.

We decline to adopt defendant's strained reasoning, and conclude that defendant's rights under our state constitution were not violated.

Likewise, we find no violation of either Rule 603 or Rule 610 of the North Carolina Rules of Evidence. Rule 603 merely provides that a witness before testifying must either by oath or affirmation declare that he will testify truthfully. There is no contention by defendant that this rule was violated.

Rule 610 proscribes the admissibility of *evidence* of the religious beliefs or opinions of a witness for the purpose of attacking his credibility. Such evidence may be admitted to show in-

terest or bias of the witness. This is a rule of evidence and does not affect jury arguments, except in support of the rule that counsel ordinarily may not argue matters not supported by the evidence. There is no violation of Rule 610 in this case.

Finally, we note that defense counsel failed to object to the challenged argument and has waived his right to raise this issue. *State v. White*, 307 N.C. 42, 296 S.E. 2d 267 (1982); *State v. Brock*, 305 N.C. 532, 290 S.E. 2d 566 (1982). Ordinarily, objection to the prosecutor's jury argument must be made prior to verdict for the alleged impropriety to be reversible upon appeal. *State v. Smith*, 294 N.C. 365, 241 S.E. 2d 674 (1978). Failure to object waives the alleged error. *Id.* Not only did counsel fail to object when the argument was made, he did not raise the issue at the charge conference or upon the trial judge's invitation after the conclusion of the charge.

Defendant argues that this Court should review this issue under the "plain error" standard. This Court has only applied the plain error standard to alleged errors in the instructions to the jury, *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983), and to alleged evidentiary errors, *State v. Black*, 308 N.C. 736, 303 S.E. 2d 804 (1983). Where there is no objection to the jury argument of counsel, the standard for review is whether such argument was so prejudicial and grossly improper as to require corrective action by the trial judge ex mero motu. *State v. Hill*, 311 N.C. 465, 319 S.E. 2d 163 (1984). For the reasons previously stated, the prosecutor's argument was not so grossly improper as to require the trial judge to take corrective action on his own motion.

For the above reasons we find no error in defendant's trial.

No error.

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

ALLSUP v. ALLSUP

No. 102PA88.

Case below: 88 N.C. App. 533.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 5 May 1988.

BRYANT v. EAGAN

No. 123P88.

Case below: 88 N.C. App. 741.

Petition by plaintiff (George A. Bryant, Jr.) for a writ of certiorari to the North Carolina Court of Appeals denied 5 May 1988.

IN RE EDWARDS

No. 129P88.

Case below: 89 N.C. App. 356.

Petition by Clarence E. Edwards for discretionary review pursuant to G.S. 7A-31 denied 5 May 1988.

JERRETT v. CECIL KING TRUCKING

No. 39P88.

Case below: 88 N.C. App. 312.

Petition by defendant (Surety, Charles M. Dowd) for discretionary review pursuant to G.S. 7A-31 denied 5 May 1988.

KARP v. UNIVERSITY OF NORTH CAROLINA

No. 80PA88.

Case below: 88 N.C. App. 282.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals allowed 5 May 1988.

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

McCOY v. PURSER

No. 73P88.

Case below: 88 N.C. App. 482.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 May 1988.

McLEOD v. HUTCHINS

No. 97P88.

Case below: 88 N.C. App. 612.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 May 1988.

PASCHALL v. N.C. DEPT. OF CORRECTION

No. 99P88.

Case below: 88 N.C. App. 520.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 May 1988.

PATEL v. MID SOUTHWEST ELECTRIC

No. 74P88.

Case below: 88 N.C. App. 146.

Petition by Bhagu Patel for discretionary review pursuant to G.S. 7A-31 denied 5 May 1988.

STATE v. BREWER

No. 115P88.

Case below: 88 N.C. App. 152.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 5 May 1988.

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

STATE v. BROOKS

No. 132P88.

Case below: 86 N.C. App. 232.

Petition by defendant (Necholo Harvey) for writ of certiorari to the North Carolina Court of Appeals denied 5 May 1988.

STATE v. DANIELS

No. 87P88.

Case below: 77 N.C. App. 460.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 5 May 1988.

STATE v. DIAZ

No. 159P88.

Case below: 88 N.C. App. 699.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 5 May 1988.

STATE v. HAYES

No. 105PA88.

Case below: 88 N.C. App. 749.

Supersedeas and temporary stay dissolved 5 May 1988.

STATE v. NORMAN

No. 161P88.

Case below: 89 N.C. App. 384.

Petition by Attorney General for writ of supersedeas and temporary stay allowed 18 April 1988.

STATE v. ROWLAND

No. 162P88.

Case below: 89 N.C. App. 372.

Petition by Attorney General for writ of supersedeas and temporary stay denied 20 April 1988.

STATE v. SEALEY

No. 657P87.

Case below: 87 N.C. App. 679.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 May 1988.

STATE v. SMITH

No. 163A88.

Case below: 89 N.C. App. 19.

Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 5 May 1988. Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 5 May 1988. Only those issues which are the basis of the dissenting opinion in the Court of Appeals shall be presented to the Supreme Court in defendants' briefs.

STATE v. SOLOMAN

No. 49P88.

Case below: 88 N.C. App. 313.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 May 1988.

STATE v. TART

No. 56P88.

Case below: 88 N.C. App. 483.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 May 1988.

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

STATE v. WILDS

No. 14P88.

Case below: 88 N.C. App. 69.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 May 1988.

STATE ex rel. UTILITIES COMM. v. SOUTHERN BELL

No. 37P88.

Case below: 88 N.C. App. 153.

Motion by defendants (Public Staff and Southern Bell) to dismiss appeal by plaintiff (MCI) for lack of substantial constitutional question allowed 5 May 1988. Petition by plaintiff (MCI) for discretionary review pursuant to G.S. 7A-31 denied 5 May 1988.

Petition by plaintiff (U.S. Sprint) for discretionary review pursuant to G.S. 7A-31 denied 5 May 1988.

Motion by defendants (Public Staff and Southern Bell) to dismiss appeal by defendant (NCLDA) for lack of substantial constitutional question allowed 5 May 1988. Petition by defendant (NCLDA) for discretionary review pursuant to G.S. 7A-31 denied 5 May 1988.

U.S. LEASING CORP. v. EVERETT, CREECH, HANCOCK & HERZIG

No. 82P88.

Case below: 88 N.C. App. 418.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 5 May 1988.

U.S. LEASING CORP. v. EVERETT, CREECH, HANCOCK & HERZIG

No. 114P88.

Case below: 88 N.C. App. 418.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 5 May 1988.

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

WEAVER v. WEAVER

No. 124P88.

Case below: 88 N.C. App. 634.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 May 1988.

WILLIAMS v. MOORE

No. 72P88.

Case below: 88 N.C. App. 483.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 May 1988.

HERBERT DEAN BOUDREAU v. MILO BAUGHMAN AND MILO BAUGHMAN DESIGN, INC.

No. 409PA87

(Filed 2 June 1988)

1. **Courts § 21— conflict of laws—substantial rights governed by lex loci—procedural rights governed by lex fori**

Matters affecting the substantial rights of the parties are determined by lex loci, the law of the situs of the claim, and remedial or procedural rights are determined by lex fori, the law of the forum; thus, under North Carolina law when the injury giving rise to a negligence or strict liability claim occurs in another state, the law of that state governs resolution of the substantive issues in the controversy.

2. **Courts § 21.6; Uniform Commercial Code § 3— products liability action—transactions bearing "appropriate relation" to North Carolina—"appropriate relation" defined—injury occurring in Florida—Florida law applicable**

Plaintiff's breach of warranty claims in this products liability action are governed by the U.C.C. which provides that North Carolina law will be applied to "transactions bearing an appropriate relation to this State," and "appropriate relation" is interpreted to mean "most significant relationship"; therefore, Florida—the place of sale, distribution, delivery, and use of the chair in question, as well as the place of injury—was the state with the most significant relationship to the warranty claims and thus the state whose law applied. N.C.G.S. § 25-1-105(1) (1986).

3. **Limitation of Actions § 1— statutes of limitation and statutes of repose—distinction**

Statutes of limitation serve to limit the time within which an action may be commenced after the cause of action has accrued, while statutes of repose set a fixed time limit beyond which a plaintiff's claim will not be recognized, and the distinction between statutes of limitation and statutes of repose corresponds to the distinction between procedural and substantive laws.

4. **Courts § 21.5; Limitation of Actions § 4.1— statute of repose as substantive provision—Florida law applicable to tort claim—claim not time barred**

Statutes of repose will be treated as substantive provisions for choice of law purposes, and the applicable statute of repose thus will be determined by lex loci, the law of the situs of the claim; therefore, the 12-year Florida statute of repose applied to plaintiff's products liability claims where the sale, delivery and use of the product and the injury itself took place in Florida, and plaintiff's filing of the claims just over six years after the initial purchase of the product was timely.

5. **Negligence § 29.3— design of chair—injury on chrome edge—foreseeability—intervening negligence of manufacturer—summary judgment improper**

In plaintiff's action to recover for injuries sustained when he cut his foot on a chrome-plated tub-style chair designed by defendants, the record

presented genuine issues of material fact as to whether defendants breached the duty of reasonable care by specifying the use of chrome veneer, which is known to have a sharp edge, but failing to include some type of edge guard in the chair design and whether dangerously sharp edges were a reasonably foreseeable consequence of a design lacking an edge guard so that defendant's negligence in the design was not insulated by the manufacturer's negligence.

6. Sales § 22— design of chair—injury to user—strict liability—jury questions

In an action to recover for injuries sustained by plaintiff when he cut his foot on the base of a chrome-plated tub-style swivel chair designed by defendants, the forecast of evidence was sufficient to raise jury questions on the elements of strict liability where plaintiff was required to establish defendants' relationship to the chair, its defective condition, the existence of a causal connection between the chair's condition and plaintiff's injuries, and that the defect existed both at the time of the injury and at the time the product left the hands of the manufacturer or seller; the individual defendant admitted designing the chair but contended that the sharp edge on the chair was a manufacturing rather than a design defect; lapse of time between the purchase of the chair and the accident and the manufacturer's record of safety were simply circumstances to be considered in determining whether the product was defective when it left the control of the manufacturer or distributor; and it was reasonable to infer that the type of defect alleged, a uniform razor-sharpness around the entire circumference of the tub edge, would not have arisen from use of the chair.

7. Sales § 17.2— injury on allegedly defective chair—no privity between designer and user—summary judgment on breach of implied warranty claim proper

Under Florida law where plaintiff has been injured by an allegedly defective product but has no contractual relationship with defendants, he may pursue a strict liability cause of action if appropriate, but absent privity the vehicle of implied warranty is not available to him; therefore, summary judgment was properly granted for defendants on plaintiff's claims for breach of implied warranty of merchantability and breach of implied warranty of fitness for a particular purpose.

Justice WEBB dissenting.

ON plaintiff's petition for discretionary review of a decision of the Court of Appeals, 86 N.C. App. 165, 356 S.E. 2d 907 (1987), affirming summary judgment in favor of defendants entered by *DeRamus, J.*, at the 8 September 1986 session of Superior Court, FORSYTH County. Heard in the Supreme Court 10 February 1988.

Faison, Brown, Fletcher & Brough, by O. William Faison, Timothy C. Barber, and Gary R. Poole, for plaintiff-appellant.

Hutchins, Tyndall, Doughton & Moore, by Richard Tyndall and H. Lee Davis, Jr., for defendant-appellees.

MARTIN, Justice.

The sole issue for review on this appeal is whether the trial court properly granted defendants' motion for summary judgment. As a preliminary matter, however, this case poses a choice of law dilemma. We must determine which statute of repose applies to this products liability action: that of North Carolina, the forum state, or that of Florida, the state where the injury occurred. We hold that the Florida statute of repose applies and that summary judgment was inappropriately entered on plaintiff's negligence and strict liability claims.

Plaintiff brought this action on 5 March 1985, naming as defendant in both an individual and a corporate capacity the North Carolina designer of a chrome-plated, tub-style chair designated as model number 1183. The complaint alleged that plaintiff, a resident of Massachusetts, had injured his foot on the metal surface of the chair in question while visiting friends in Florida. Plaintiff claimed compensatory and punitive damages based on theories of negligent design, breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, and strict liability for injecting an inherently dangerous product into the stream of commerce.

Defendants' answer denied the material allegations of the complaint and asserted defenses of, inter alia, contributory negligence, independent negligence of the chair's manufacturer, accord and satisfaction, and lack of personal jurisdiction. On 24 June 1986, defendants moved for summary judgment. On 14 July 1986, defendants were permitted to amend their answer to include a further defense based on North Carolina statutes of repose. Thereafter the trial judge granted summary judgment in defendants' favor. The Court of Appeals affirmed.

Plaintiff contends that the applicable statute of repose is Florida Statutes § 95.031(2), which provides as follows:

> Actions for products liability and fraud under s. 95.11(3) must be begun within the period prescribed in this chapter, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in s. 95.11(3), but in any

> event within *12 years after the date of delivery of the completed product to its original purchaser* or within 12 years after the date of the commission of the alleged fraud, regardless of the date the defect in the product or the fraud was or should have been discovered.[1]

(Emphasis added.)

Defendants, on the other hand, maintain that N.C.G.S. § 1-50(6) controls. Section 1-50(6) provides:

> No action for the recovery of damages for personal injury, death or damage to property based upon or arising out of any alleged defect or any failure in relation to a product shall be brought more than *six years after the date of initial purchase* for use or consumption.

(Emphasis added.)

The record indicates that defendants sold the design for model number 1183 to Thayer-Coggin, Inc., a North Carolina furniture manufacturer, in 1967. Thayer-Coggin manufactured the chair and sold it to a furniture store in Florida, which in turn sold it to plaintiff's Floridian hosts on 26 January 1979. Plaintiff's injury occurred on 7 March 1982 and the complaint was filed on 5 March 1985. Applying these dates, plaintiff brought the action within the twelve-year period prescribed by the Florida statute but not within the six-year period prescribed by N.C.G.S. § 1-50(6). Defendants therefore contend that plaintiff's action is time-barred under North Carolina law.[2]

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1. In response to confusion about its constitutionality, *see Battilla v. Allis Chalmers Mfg. Co.*, 392 So. 2d 874 (Fla. 1980) (holding statute of repose unconstitutional); *Pullum v. Cincinnati, Inc.*, 476 So. 2d 657 (Fla. 1985), *appeal dismissed*, 475 U.S. 1114, 90 L.Ed. 2d 174 (1986) (overruling *Battilla* and reconstitutionalizing statute of repose), Florida Statutes § 95.031(2) was recently amended to delete the twelve-year period prescribed for products liability actions. *See* 1986 Fla. Sess. Law Serv. 86-271 (West). As there is no dispute that plaintiff filed his claim well within the twelve-year period, we need not concern ourselves with the implications of this change upon defendants' right to assert the statute as an affirmative defense.

2. Defendants also contend that the action would be time-barred by N.C.G.S. § 1-52(16), which provides that causes of action for personal injury or property damage "shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs. Provided that no cause of action shall accrue

Our choice of law analysis is somewhat complicated by the fact that plaintiff raises four distinct theories of recovery in four separate counts of the complaint. We first address plaintiff's claims of negligence and strict liability.

[1] Our traditional conflict of laws rule is that matters affecting the substantial rights of the parties are determined by lex loci, the law of the situs of the claim, and remedial or procedural rights are determined by lex fori, the law of the forum. *Charnock v. Taylor*, 223 N.C. 360, 26 S.E. 2d 911 (1943). For actions sounding in tort, the state where the injury occurred is considered the situs of the claim. Thus, under North Carolina law, when the injury giving rise to a negligence or strict liability claim occurs in another state, the law of that state governs resolution of the substantive issues in the controversy. *Leonard v. Johns-Manville Sales Corp.*, 309 N.C. 91, 305 S.E. 2d 528 (1983); *Bernick v. Jurden*, 306 N.C. 435, 293 S.E. 2d 405 (1982); *Howard v. Howard*, 200 N.C. 574, 158 S.E. 101 (1931); *Williams v. General Motors Corp.*, 19 N.C. App. 337, 198 S.E. 2d 766, *cert. denied*, 284 N.C. 258, 200 S.E. 2d 659 (1973).

This Court has consistently adhered to the lex loci rule in tort actions. Smith, *Choice of Law in the United States*, 38 Hastings L.J. 1041 (1987); Wurfel, *Choice of Law Rules in North Carolina*, 48 N.C.L. Rev. 243 (1970); *see, e.g., Henry v. Henry*, 291 N.C. 156, 229 S.E. 2d 158 (1976); *Young v. R.R.*, 266 N.C. 458, 146 S.E. 2d 441 (1966); *Petrea v. Tank Lines*, 264 N.C. 230, 141 S.E. 2d 278 (1965); *Frisbee v. West*, 260 N.C. 269, 132 S.E. 2d 609 (1963);

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more than 10 years from the last act or omission of the defendant giving rise to the cause of action."

We need not consider the effect of the ten-year period prescribed by section 1-52(16). This section replaced N.C.G.S. § 1-15(b) (repealed by 1979 N.C. Sess. Laws ch. 654, § 3, effective 1 October 1979) and its primary purpose appears to have been the adoption of the "discovery" rule. *Black v. Littlejohn*, 312 N.C. 626, 325 S.E. 2d 469 (1985); Note, *Repose for Manufacturers: Six Year Statutory Bar to Products Liability Actions Upheld—Tetterton v. Long Manufacturing Co.*, 64 N.C.L. Rev. 1157, n.7 (1986). That is, it was intended to apply to plaintiffs with latent injuries. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 329 S.E. 2d 350 (1985); *Raftery v. Construction Co.*, 291 N.C. 180, 230 S.E. 2d 405 (1976); *see also Barwick v. Celotex Corp.*, 736 F. 2d 946 (4th Cir. 1984). It is undisputed that plaintiff was aware of his injury as soon as it occurred. Thus the statute is inapplicable on the facts of this case. Our analysis will deal only with the statute of repose contained in section 1-50(6).

Shaw v. Lee, 258 N.C. 609, 129 S.E. 2d 288 (1963). We note that this continues to be the majority rule in the United States. Smith, *Choice of Law in the United States*, 38 Hastings L.J. 1041, app. at 1172-74; Kay, *Theory into Practice: Choice of Law in the Courts*, 34 Mercer L. Rev. 521, 582 & app. at 591-92 (1983). We see no reason to abandon this well-settled rule at this time. It is an objective and convenient approach which continues to afford certainty, uniformity, and predictability of outcome in choice of law decisions. We hold that the substantive law of Florida applies to plaintiff's negligence and strict liability claims.

[2] We next consider the choice of law question with respect to plaintiff's breach of warranty claims. A warranty, express or implied, is contractual in nature. *Wyatt v. Equipment Co.*, 253 N.C. 355, 117 S.E. 2d 21 (1960). Traditionally, under the lex loci rule, the substantive features of warranty claims were controlled by the law of the state where the contract was made or, in certain instances, by the law of the state of performance. *Bernick v. Jurden*, 306 N.C. 435, 293 S.E. 2d 405. However, actions for breach of implied warranty are now governed by the Uniform Commercial Code, adopted in North Carolina in 1965 as chapter 25 of the General Statutes. The Uniform Commercial Code applies to warranty claims in products liability actions. *See Morrison v. Sears, Roebuck & Co.*, 319 N.C. 298, 354 S.E. 2d 495 (1987); *Bernick v. Jurden*, 306 N.C. 435, 293 S.E. 2d 405; *Smith v. Cessna Aircraft Co.*, 571 F. Supp. 433 (M.D.N.C. 1983); Freedman, *Products Liability under the Uniform Commercial Code*, 10 Prac. Law 49, 50 (No. 4, 1964).

The Uniform Commercial Code is generally in accord with prior North Carolina law on the subject of warranties. *See* N.C.G.S., North Carolina Comment, introduction to art. 2, ch. 25 (1986). However, the Code provides its own choice of law rule, modifying the traditional place-of-contract-or-performance rule previously applied in this state. *Bernick v. Jurden*, 306 N.C. 435, 293 S.E. 2d 405. The Code provision states that, in the absence of an agreement between the parties, North Carolina law will be applied to "transactions bearing an appropriate relation to this State." N.C.G.S. § 25-1-105(1) (1986). The Code is silent on the meaning of the term "appropriate relation," leaving its interpretation to judicial decision. *See* N.C.G.S. § 25-1-105 Official Comment.

This Court has yet to define the term. We have therefore consulted decisions in other jurisdictions for guidance.

Our research reveals that some jurisdictions have interpreted the "appropriate relation" provision as requiring the application of forum law whenever the forum itself has significant contact with the case. *See* Siegel, *The U.C.C. and Choice of Law: Forum Choice or Forum Law?*, 21 Am. U.L. Rev. 494, 496 n.2 (1972); Note, *Conflicts of Laws and the "Appropriate Relation" Test of Section 1-105 of the Uniform Commercial Code*, 40 Geo. Wash. L. Rev. 797, 803 n.29 (1971-72).

This approach comports with a very literal-minded reading of the Code, but such an interpretation is at best outmoded. The language of the Code's choice of law provision was originally intended to encourage the application of forum law in those jurisdictions which had enacted the Code, thereby assuring that the Code would govern the transaction at issue when a non-Code jurisdiction was also involved. *See* Nordstrom & Ramerman, *The Uniform Commercial Code and the Choice of Law*, 1969 Duke L.J. 623; Weintraub, *Choice of Law for Products Liability: The Impact of the Uniform Commercial Code and Recent Developments in Conflicts Analysis*, 44 Tex. L. Rev. 1429 (1966). The drafters of the provision did not foresee the widespread enactment of the Code throughout the country. With all but one state having enacted the Code, a strictly forum-oriented choice of law rule is no longer necessary to ensure application of the Code in accordance with the intentions of the drafters. *Id.* Moreover, such an approach is likely to foster forum shopping. *United Overseas Bank v. Veneers, Inc.*, 375 F. Supp. 596 (D. Md. 1974). For these reasons we reject the forum-oriented approach.

Other jurisdictions interpret the appropriate relation test as an invitation for the forum state to use its standard choice of law rules. *See Barclays Discount Bank Ltd. v. Bogharian Bros.*, 568 F. Supp. 1116 (C.D. Cal. 1983), *rev'd on other grounds*, 743 F. 2d 722 (9th Cir. 1984); *Golden Plains Feedlot v. Great Western Sugar Co.*, 588 F. Supp. 985 (W.D.S.D. 1984); *Travenol Laboratories, Inc. v. Zotal, Ltd.*, 394 Mass. 95, 474 N.E. 2d 1070 (1985); Siegel, *The U.C.C. and Choice of Law: Forum Choice or Forum Law?*, 21 Am. U.L. Rev. 494, 496 n.3 (1972); Note, *Conflicts of Laws and the "Appropriate Relation" Test of Section 1-105 of the Uniform Commer-*

cial Code, 40 Geo. Wash. L. Rev. 797, 802-03 n.28 (1971-72). We reject this view. The North Carolina Comment to N.C.G.S. § 25-1-105 indicates that the enactment of the section was intended to *change* this state's rigid choice of law rules with respect to transactions under the Uniform Commercial Code. *Bernick v. Jurden*, 306 N.C. 435, 293 S.E. 2d 405.

Finally, many jurisdictions hold that the appropriate relation test is essentially the same as modern "interest analysis" or "grouping of contacts," which requires the forum to determine which state has the most significant relationship to the case. *See, e.g., Simmons v. American Mut. Liability Ins. Co.*, 433 F. Supp. 747 (S.D. Ala. 1976), *aff'd*, 560 F. 2d 1021 (5th Cir. 1977); *Landmark Land Co. v. Sprague*, 529 F. Supp. 971 (S.D.N.Y. 1981), *rev'd on other grounds*, 701 F. 2d 1065 (2d Cir. 1983); *General Electric Credit Corp. v. R.A. Heintz Const. Co.*, 302 F. Supp. 958 (D. Or. 1969); *Tucker v. Capitol Machine, Inc.*, 307 F. Supp. 291 (M.D. Pa. 1969); *P & E Elec., Inc. v. Utility Supply of America*, 655 F. Supp. 89 (M.D. Tenn. 1986); *Martin v. Julius Dierck Equipment Co.*, 52 A.D. 2d 463, 384 N.Y.S. 2d 479 (App. Div. 2d 1976), *aff'd*, 43 N.Y. 2d 583, 374 N.E. 2d 97, 403 N.Y.S. 2d 185 (1978); *Collins Radio Co. of Dallas v. Bell*, 623 P. 2d 1039 (Okla. App. 1980); *Baffin Land Corp. v. Monticello Motor Inn*, 70 Wash. 2d 893, 425 P. 2d 623 (1967); *Wilcox v. Wilcox*, 26 Wis. 2d 617, 133 N.W. 2d 408 (1965). This approach is most consistent with N.C.G.S. § 25-1-105 Official Comment 3, which seems to contemplate a comparison of "significant contacts" among jurisdictions connected to the case, and the North Carolina Comment, which contemplates a shift away from rigid rules toward a more flexible analysis. We therefore interpret "appropriate relation" to mean "most significant relationship."

Applying this analysis to the case at bar, we find Florida—the place of sale, distribution, delivery, and use of the product, as well as the place of injury—to be the state with the most significant relationship to the warranty claim.

Commentators have suggested that the law of the place of distribution should be supreme in products liability cases. Kozyris, *Interest Analysis Facing Its Critics—And, Incidentally, What Should Be Done About Choice of Law for Products Liability?*, 46 Ohio St. L.J. 569 (1985). This is particularly true with

respect to breach of warranty claims. *See Owens-Corning Fiberglas v. Sonic Dev. Corp.*, 546 F. Supp. 533 (D. Kan. 1982) (if any warranty existed, it was breached in state of delivery and use). A state's interest in enforcing warranties involves protection of its citizens from commercial movement of defective goods into that state. *Oresman v. G.D. Searle & Co.*, 321 F. Supp. 449 (D.R.I. 1971). The state in which a sales contract is consummated has a significant interest in applying the social and economic policies embodied in its own law of warranty. *Quadrini v. Sikorsky Aircraft Division, Etc.*, 425 F. Supp. 81 (D. Conn. 1977).

Cases holding that the state where the sale and/or injury took place had the most significant relationship to the products liability action include the following: *Wayne v. Tennessee Valley Authority*, 730 F. 2d 392 (5th Cir. 1984), *cert. denied*, 469 U.S. 1159, 83 L.Ed. 2d 922 (1985) (state of injury, sale, and delivery more interested than state of manufacture); *Bilancia v. General Motors Corp.*, 538 F. 2d 621 (4th Cir. 1976) (law of state where injury occurred has such an appropriate relation as to be controlling); *Gates Rubber Company v. USM Corporation*, 351 F. Supp. 329 (S.D. Ill. 1972), *rev'd on other grounds*, 508 F. 2d 603 (7th Cir. 1975) (state of injury, delivery, and use of product more interested than state of manufacture); *Jackson v. National Semi-Conducter Data Checker*, 660 F. Supp. 65 (S.D. Miss. 1986) (state of injury and sale had most significant contacts); *Armstrong Cork Co. v. Drott Mfg. Co.*, 433 F. Supp. 413 (E.D. Pa. 1977) (state of sale and delivery is where contacts most centered and is most appropriate as to breach of warranty); *Martin v. Julius Dierck Equipment Co.*, 52 A.D. 2d 463, 384 N.Y.S. 2d 479 (App. Div. 2d 1976) (state of injury and use of product more interested than state of manufacture).

[3] Having determined that the substantive law of Florida will apply to plaintiff's claims, we now consider whether the statutes of repose at issue are substantive or procedural in nature. The question of what is procedure and what is substance is determined by the law of the forum state. *Williams v. Riley*, 56 N.C. App. 427, 289 S.E. 2d 102 (1982); 16 Am. Jur. 2d *Conflict of Laws* § 3 (1979).

The term "statute of repose" is used to distinguish ordinary statutes of limitation from those that begin to run at a time

unrelated to the traditional accrual of the cause of action. *Bolick v. American Barmag Corp.*, 306 N.C. 364, 293 S.E. 2d 415 (1982). We discussed this distinction in *Trustees of Rowan Tech. v. Hammond Assoc.:*

> Statutes of limitation are generally seen as running from the time of injury, or discovery of the injury in cases where that is difficult to detect. They serve to limit the time within which an action may be commenced after the cause of action has accrued. Statutes of repose, on the other hand, create time limitations which are not measured from the date of injury. These time limitations often run from defendant's last act giving rise to the claim or from substantial completion of some service rendered by defendant.

313 N.C. 230, 234 n.3, 328 S.E. 2d 274, 276-77 n.3 (1985).

Statutes such as N.C.G.S. § 1-50(6) and Florida Statutes § 95.031(2) have been denominated statutes of repose because they set a fixed limit after the time of the product's manufacture, sale, or delivery beyond which a plaintiff's claim will not be recognized. *Bolick v. American Barmag Corp.*, 306 N.C. 364, 293 S.E. 2d 415; *Lamb v. Volkswagenwerk Aktiengesellschaft*, 631 F. Supp. 1144 (S.D. Fla. 1986), *aff'd*, 835 F. 2d 1369 (11th Cir. 1988). "[T]he repose serves as an unyielding and absolute barrier that prevents a plaintiff's right of action even before his cause of action may accrue." *Black v. Littlejohn*, 312 N.C. 626, 633, 325 S.E. 2d 469, 475 (1985).

The distinction between statutes of limitation and statutes of repose corresponds to the distinction between procedural and substantive laws. *Goad v. Celotex Corp.*, 831 F. 2d 508 (4th Cir. 1987).

Ordinary statutes of limitation are clearly procedural, affecting only the remedy directly and not the right to recover. *See Williams v. Thompson*, 227 N.C. 166, 41 S.E. 2d 359 (1947); *Sayer v. Henderson*, 225 N.C. 642, 35 S.E. 2d 875 (1945). The statute of repose, on the other hand, acts as a condition precedent to the action itself. *Bolick v. American Barmag Corp.*, 306 N.C. 364, 293 S.E. 2d 415. Unlike a limitation provision which merely makes a claim unenforceable, a condition precedent establishes a time period in which suit must be brought in order for the cause of ac-

tion to be recognized. If the action is not brought within the specified period, the plaintiff "literally has *no* cause of action. The harm that has been done is *damnum absque injuria*—a wrong for which the law affords no redress." *Rosenberg v. Town of North Bergen*, 61 N.J. 190, 199, 293 A. 2d 662, 667 (1972). For this reason we have previously characterized the statute of repose as a substantive definition of rights rather than a procedural limitation on the remedy used to enforce rights. *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 302 S.E. 2d 868 (1983); *Bolick v. American Barmag Corp.*, 306 N.C. 364, 293 S.E. 2d 415.

This characterization holds true in the context of choice of law. When commencement of an action within a specified period is a condition precedent to relief, "the limitation period is considered to be so tied up with the underlying right that for choice of law purposes, the limitation clause is treated as a 'substantive' rule of law." *Chartener v. Rice*, 270 F. Supp. 432, 436 (E.D.N.Y. 1967).

The overwhelming weight of authority in other jurisdictions accepts the characterization of statutes of repose as substantive provisions in a choice of law context. *See, e.g., Goad v. Celotex Corp.*, 831 F. 2d 508 (4th Cir. 1987); *Wayne v. Tennessee Valley Authority*, 730 F. 2d 392 (5th Cir. 1984), *cert. denied*, 469 U.S. 1159, 83 L.Ed. 2d 922 (1985); *President and Directors of Georgetown v. Madden*, 660 F. 2d 91 (4th Cir. 1981); *Pottratz v. Davis*, 588 F. Supp. 949 (D. Md. 1984); *Nieman v. Press & Equipment Sales Co.*, 588 F. Supp. 650 (S.D. Ohio 1984); *Harris v. Clinton Corn Processing Co.*, 360 N.W. 2d 812 (Iowa 1985). *But see Regents, Etc. v. Hartford Acc. and Idem. Co.*, 21 Cal. 3d 624, 581 P. 2d 197, 147 Cal. Rptr. 486 (1978).

[4] We hold that statutes of repose are treated as substantive provisions for choice of law purposes. This rule mandates the application of Florida's statute of repose to plaintiff's claims.[3] Upon so doing, we hold these claims are not time-barred.

In reaching the opposite conclusion, the Court of Appeals relied on a "public policy" exception. It is true we have held that

3. Because we rule in plaintiff's favor as to the applicability of the Florida statute of repose, we need not address plaintiff's assignments of error regarding the amendment of defendants' pleadings.

foreign law or rights based thereon will not be given effect or enforced if opposed to the settled public policy of the forum. *Davis v. Davis*, 269 N.C. 120, 152 S.E. 2d 306 (1967). However, the mere fact that the law of the forum differs from that of the other jurisdiction does not mean that the foreign statute is contrary to the public policy of the forum. *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145, 76 L.Ed. 1026 (1932). To render foreign law unenforceable as contrary to public policy, it must violate some prevalent conception of good morals or fundamental principle of natural justice or involve injustice to the people of the forum state. *Ellison v. Hunsinger*, 237 N.C. 619, 75 S.E. 2d 884 (1953); *Howard v. Howard*, 200 N.C. 574, 158 S.E. 101. This public policy exception has generally been applied in cases such as those involving prohibited marriages, wagers, lotteries, racing, gaming, and the sale of liquor. *Howard v. Howard*, 200 N.C. 574, 158 S.E. 101. Needless to say, this is not such a case. We discern no injustice to the people of North Carolina in the application of Florida's statute of repose.

Having determined that the substantive law of Florida applies to plaintiff's claims and that plaintiff's action is not time-barred by the Florida statute of repose, we now turn to the question of whether plaintiff's case would otherwise survive summary judgment.

The North Carolina Rules of Civil Procedure, which as lex fori govern the procedural aspects of the case, provide that summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c). By making a motion for summary judgment, a defendant may force a plaintiff to produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie case at trial. *Dickens v. Puryear*, 302 N.C. 437, 276 S.E. 2d 325 (1981). The party moving for summary judgment has the burden of establishing the lack of any triable issue. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379 (1975). The movant may meet this burden by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or can-

not surmount an affirmative defense which would bar the claim. *Bernick v. Jurden*, 306 N.C. 435, 293 S.E. 2d 405; *Dickens v. Puryear*, 302 N.C. 437, 276 S.E. 2d 325. All inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion. *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972).

The record reveals that model number 1183 is a bent plywood swivel-tilt tub-chair designed by defendants in 1967. The chair has a chrome veneer about one-sixteenth of an inch thick which is bonded to its plywood shell. The base of the chair upon which the "tub" portion tilts and swivels is somewhat recessed; the diameter of the base is about two inches less than the diameter of the tub. The bottom of the tub is about three inches off the floor.

Milo Baughman, the individual defendant, testified in his deposition that the chair was designed for residential use and that it is a natural assumption that people walk barefoot in their homes. Nonetheless, he never anticipated that someone might put his foot in the area between the back of the chair and the floor. He was familiar with the use of clear plastic welts known as "edge guards." These guards are used to protect the bottom edge of the metal on chrome-trimmed furniture. Model number 1183 was not designed with an edge guard because it did not seem necessary. Although it was technically feasible, it would have been alien to the visual concept of the chair to have placed a wood trim, molding, or cloth welt around the edge of the chrome veneer. If the chair were manufactured with the chrome veneer extending beyond the plywood, it would create a surface that would cut bare skin. This would be a dangerous condition. Number 1183 was specifically designed so that the plywood and chrome would be flush. This was not noted on the design drawing because it is so obvious. The drawings do not include all details: "I don't put in all the screws, I don't put in the dowels, I don't put in the mechanisms. . . . I don't specify things that are not my problems. These are done by the engineers in the plant."

A designer's role is to make a conceptual sketch, to provide a full-sized detail and working sketch, and to supervise the making of a model. The purpose of the supervision is to assure that the finished product looks right. The designer's responsibilities are

"aesthetic and not engineering." The manufacturer's inspectors occasionally "let something go through that isn't exactly right." In all factories some quality problems get through. Other than the present action, defendants have not received a single complaint of injury involving any of their furniture designs.

Julius Thayer Coggin, president of Thayer-Coggin, Inc., testified in his deposition that defendant Milo Baughman generally furnished Thayer-Coggin with a pencil sketch of the furniture design, as well as a working sketch which included the actual dimensions of the piece and specified the exterior material to be used. The chair in question was designed so that the veneer edge would be flush with the plywood and the edges of the veneer would be sanded down. Chrome veneer is sharp because it is thin. However, the chair was not designed to have sharp edges. A sharp edge is a manufacturing defect, not a design defect, and would be the responsibility of Thayer-Coggin. Nothing prevented the placement of a protective welt along the bottom of number 1183. Plastic edge guards have been added to similar tub-chairs in the last few years.

Luther Ray Cooper, plant supervisor at Thayer-Coggin, testified in his deposition that the purpose of an edge guard is to protect the metal on furniture rather than to prevent injury. Model number 1183 was designed to have the edges flush and sanded, not to have sharp edges. There will always be "a little sharp edge any time you're dealing with metal in this thickness." A sharp edge is a manufacturing defect.

Plaintiff testified in his deposition that he cut his bare foot on the "outside bottom edge of the chair where the base meets the sides," resulting in severe lacerations which required surgery and hospitalization. Plaintiff later examined the chair and determined that the edge was "razor sharp, sharp enough that if you were to rub your finger across the bottom outside edge of the chair, you would shave skin off your finger." The chrome was flush with the plywood but the edge was sharp all the way around the 360 degrees of the tub.

We now consider whether the forecast of evidence, viewed in the light most favorable to plaintiff, raised genuine issues of material fact with respect to the elements of each claim as defined by Florida law.

[5] Under Florida law, the elements of negligence are (1) the existence of a duty recognized by law requiring the defendant to conform to a certain standard of conduct for the protection of others, including the plaintiff; (2) a breach of that duty; and (3) injury sustained as a proximate cause of the breach. *Tieder v. Little*, 502 So. 2d 923 (Fla. Dist. Ct. App. 1987), *review denied*, 511 So. 2d 298 (Fla. 1987); *Clark v. Boeing Co.*, 395 So. 2d 1226 (Fla. Dist. Ct. App. 1981); *Welsh v. Metropolitan Dade Cty.*, 366 So. 2d 518 (Fla. Dist. Ct. App. 1979), *cert. denied*, 378 So. 2d 347 (Fla. 1979).

A designer is under a duty to use reasonable care to design a product that is reasonably safe for its intended use and for other uses which are reasonably foreseeable. *Husky Industries v. Black*, 434 So. 2d 988 (Fla. Dist. Ct. App. 1983). The design of a product includes the plan, structure, choice of materials, and specifications. *Id.* The availability of an alternative design does not translate into a legal duty in products liability. An action is not maintainable merely because the design used was not the safest possible. *Id.* Nevertheless, evidence of alternate designs bears upon the question of a defendant's reasonable care. *Id.*

Courts should be cautious in granting summary judgment in negligence cases. *McCabe v. Walt Disney World Co.*, 350 So. 2d 814 (Fla. Dist. Ct. App. 1977). Where questions of negligence are close, any doubt should always be resolved in favor of a jury trial. *Id.* If the circumstances established by the record are susceptible of a reasonable inference which would allow recovery and also capable of an equally reasonable inference to the contrary, a jury question is presented. *Voelker v. Combined Ins. Co. of America*, 73 So. 2d 403 (Fla. 1954).

In the light most favorable to plaintiff, the record presents a genuine issue of material fact as to whether defendants breached the duty of reasonable care by specifying the use of chrome veneer, which is known to have a sharp edge, but failing to include some type of edge guard in the chair design.

The record also presents a genuine issue of material fact as to proximate cause. Defendants make much of the distinction between design defects and manufacturing defects. A design defect is an injury-producing hazard accompanying normal use of a product that was intentionally manufactured according to design. *Cas-*

sisi v. Maytag Co., 396 So. 2d 1140 (Fla. Dist. Ct. App. 1981). A manufacturing defect, on the other hand, is caused by a miscarriage in the manufacturing process that produces an unintended result. *Id.* Defendants contend that a sharp edge on chrome veneer is solely a manufacturing defect and in this case constituted intervening negligence on the part of Thayer-Coggin.

Where both defendant and a third party are negligent but the third party's negligence is the sole proximate cause of injury, plaintiff cannot recover from defendant. *De la Concha v. Pinero*, 104 So. 2d 25 (Fla. 1958), *appeal dismissed*, 109 So. 2d 168 (Fla. 1959); *Pearce & Pearce v. Kroh Bros. Development Co.*, 474 So. 2d 369 (Fla. Dist. Ct. App. 1985).

However, if an intervening cause is reasonably foreseeable, it cannot insulate a defendant from all liability. *Rupp v. Bryant*, 417 So. 2d 658 (Fla. 1982); *see, e.g., Goode v. Walt Disney World Co.*, 425 So. 2d 1151 (Fla. Dist. Ct. App. 1982), *review denied*, 436 So. 2d 101 (Fla. 1983) (mother's negligent supervision of her child did not shield designer of theme park facilities from liability); *Leib v. City of Tampa*, 326 So. 2d 52 (Fla. Dist. Ct. App. 1976) (recklessness of speeding motorist did not shield designer of intersection from liability). *Cf. Detroit Marine Engineering, Inc. v. Maloy*, 419 So. 2d 687 (Fla. Dist. Ct. App. 1982) (boat manufacturer not insulated from liability simply because it relied on another company to manufacture the steering wheel at issue); *Caporale v. Raleigh Industries of America*, 382 So. 2d 849 (Fla. Dist. Ct. App. 1980) (bicycle manufacturer could not disclaim liability for injuries to ultimate purchaser simply because it relied on dealer to assemble product).

Proximate cause is generally an issue for jury determination unless it is so clear that reasonable men could not differ. *Helman v. Seaboard Coast Line R. Co.*, 349 So. 2d 1187 (Fla. 1977). We believe that evidence of the nature of the material used, coupled with the individual defendant's acknowledgment of the manufacturer's occasional lapses in quality, raised a jury question as to whether dangerously sharp edges were a reasonably foreseeable consequence of a design lacking an edge guard.

[6] Similarly we find that the forecast of evidence was sufficient to raise jury questions on the elements of strict liability. A plaintiff seeking to hold a defendant strictly liable in a products liabili-

ty case must establish: (1) the defendant's relationship to the product in question; (2) the defective condition of the product; and (3) the existence of a causal connection between the product's condition and plaintiff's injuries. *West v. Caterpillar Tractor Company*, 336 So. 2d 80 (Fla. 1976); *Clark v. Boeing Co.*, 395 So. 2d 1226 (Fla. Dist. Ct. App. 1981); *Sansing v. Firestone Tire & Rubber Co.*, 354 So. 2d 895 (Fla. Dist. Ct. App. 1978), *cert. denied*, 360 So. 2d 1250 (Fla. 1978). In addition to the above elements, the plaintiff must also establish that the defect existed both at the time of the injury and at the time the product left the hands of the manufacturer or seller. *Diversified Products Corp. v. Faxon*, 514 So. 2d 1161 (Fla. Dist. Ct. App. 1987); *Cassisi v. Maytag Co.*, 396 So. 2d 1140 (Fla. Dist. Ct. App. 1981).

Defendants reiterate many of the contentions previously considered and rejected with respect to the negligence claim. They also contend that plaintiff presented no evidence raising a reasonable inference that the chair was defective when it left the manufacturer. Defendants note their spotless record with respect to complaints of injury and theorize that any defect in the chair arose after many years of wear and tear.

We nonetheless find that the forecast of evidence was sufficient to support an inference in plaintiff's favor. Mere lapse of time between the purchase and the accident does not foreclose liability as a matter of law. *Marrillia v. Lyn Craft Boat Company*, 271 So. 2d 204 (Fla. Dist. Ct. App. 1973). Nor does evidence of safe use for a period of time. *Advance Chemical Co. v. Harter*, 478 So. 2d 444 (Fla. Dist. Ct. App. 1985), *review denied*, 488 So. 2d 829 (Fla. 1986). Defendants in products liability cases may not rely on their history of good fortune to exempt themselves from liability. *Id.* Lapse of time and a record of safety are simply circumstances to be considered in determining whether the product was defective when it left the control of the manufacturer or distributor. The weight of such evidence is for the trier of fact. *Cassisi v. Maytag Co.*, 396 So. 2d 1140 (Fla. Dist. Ct. App. 1981). Moreover, it is reasonable to infer that the type of defect alleged, a uniform razor-sharpness around the entire circumference of the tub edge, would not have arisen from use of the chair.

With respect to defendants' affirmative defenses, we note that contributory negligence does not constitute a bar to strict

liability or negligence actions in Florida, a comparative negligence state. *Cassisi v. Maytag Co.*, 396 So. 2d 1140, 1152 n.26; *Martinez v. Clark Equipment Co.*, 382 So. 2d 878 (Fla. Dist. Ct. App. 1980). We have already addressed intervening negligence of the manufacturer and statutes of repose. The record does not present adequate information upon which we may judge the other defenses. Therefore we find for the purpose of this opinion that defendants have not demonstrated plaintiff's inability to surmount the affirmative defenses.

[7] Lastly we consider the breach of warranty claims. By creating the strict liability cause of action, the Florida Supreme Court in *West v. Caterpillar Tractor Company*, 336 So. 2d 80, abolished the implied warranty cause of action in products liability cases where no privity exists. *Kramer v. Piper Aircraft Corp.*, 520 So. 2d 37 (Fla. 1988). Where, as here, plaintiff has been injured by an allegedly defective product but has no contractual relationship with defendants, he may pursue a strict liability cause of action if appropriate but, absent privity, the vehicle of implied warranty is no longer available to him. *Id.; Affiliates for Evaluation v. Viasyn Corp.*, 500 So. 2d 688 (Fla. Dist. Ct. App. 1987).

Thus, we hold that summary judgment was properly granted for defendants as to plaintiff's claims for breach of implied warranty of merchantability and breach of implied warranty of fitness for a particular purpose but was inappropriate on plaintiff's claims for negligence and strict liability.

The result is: The decision of the Court of Appeals is affirmed for different reasons as to the claims for breach of implied warranty. As to the claims for negligence and strict liability, the decision of the Court of Appeals is reversed and the cause remanded to that court for remand to the Superior Court, Forsyth County, for further proceedings not inconsistent with this opinion.

Reversed and remanded in part, modified and affirmed in part.

Justice WEBB dissenting.

I dissent from the majority. In determining the choice of law for the application of the statute of repose, the majority relies on

previous statements of this Court that statutes of repose are substantive definitions of rights. *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 302 S.E. 2d 868 (1983); *Bolick v. American Barmag Corp.*, 306 N.C. 364, 293 S.E. 2d 415 (1982). It is not necessary to question the validity of these statements to see we should not have a different treatment for statutes of limitation and statutes of repose in choice of law determinations.

Whatever differences we may find in statutes of limitation and statutes of repose, the purpose of both of them is to bar claims which are not filed within certain times. The majority has not said why there should be a different treatment of them because we call one statute substantive and the other procedural. I do not see why we should. The law of the forum applies when a statute of limitations is pled. *Sayer v. Henderson*, 225 N.C. 642, 35 S.E. 2d 875 (1945). By using a different choice of law for a statute of repose, I believe we are giving different treatment to statutes which were adopted for the same purpose. I do not believe we should do so.

I agree with the opinion written by Judge Parker for the Court of Appeals. The majority says that the Court of Appeals in reaching its decision "relied on a 'public policy' exception." The only time the Court of Appeals mentioned public policy was in quoting from an opinion of this Court, *Tieffenbrun v. Flannery*, 198 N.C. 397, 151 S.E. 857, 68 A.L.R. 210 (1930), which held that although the time limitation on the wrongful death action had been held to be a condition precedent to the action, the limitation also applied to an action brought in this state when the action was based on a death that occurred in Florida. *Tieffenbrun* comes close to governing this case.

STATE OF NORTH CAROLINA v. BRANTLEY LOCKLEAR

No. 492A87

(Filed 2 June 1988)

1. Constitutional Law § 31— murder—private investigator—denied—no error

The trial court did not err in a prosecution for first degree murder by denying defendant's motion for the appointment of an investigator where defend-

ant did not make the requisite threshold showing of specific necessity in that defendant's motion contained only general allegations that defendant's attorney did not have the time or expertise to conduct the investigation, that a trained criminal investigator was needed because witnesses might be reluctant to speak, and that defendant could not obtain an adequate defense and a fair trial without an expert criminal investigator.

2. Jury § 6— individual voir dire and sequestration denied—no error

The trial judge in a murder prosecution did not err by denying defendant's motion for individual *voir dire* and sequestration of jurors during *voir dire* where neither the record nor defendant's argument revealed any basis for holding that the denial of the motion could not have been the result of a reasoned decision by the trial judge; moreover, defendant's argument relates primarily to the views of prospective jurors on the death penalty, which defendant did not receive.

3. Criminal Law § 91.1— pretrial motions—continuance denied—no error

The trial court did not err in a murder prosecution by not acting *ex mero motu* to continue a hearing on certain pretrial motions in order to provide defendant's court-appointed counsel adequate time to confer with retained counsel in preparation for the hearing where retained counsel had been in the case for at least three and a half months when the motions were heard and the record does not establish or even suggest that either counsel was not fully prepared to argue defendant's motions.

4. Homicide § 21.5— first degree murder—motion to dismiss properly denied

The trial court did not err in a murder prosecution by denying defendant's motion to dismiss where the evidence, viewed in the light most favorable to the State, clearly constituted substantial evidence that defendant committed the offense charged. The credibility of an accomplice who testified for the State, and his interest in the outcome, were matters for the jury to consider.

5. Homicide § 8.1— murder—intoxication—motion to dismiss properly denied

The trial court did not err by denying defendant's motions to dismiss a charge of murder on the ground that defendant was so impaired by intoxication that he was incapable of forming a deliberate and premeditated purpose to kill where, although there was evidence that defendant was highly intoxicated, there was also evidence from which the jury could have found that defendant nevertheless retained the capacity to premeditate and deliberate.

6. Criminal Law § 98.1— murder—emotional display by victim's widow—jury not instructed ex mero motu

The trial court did not err in a murder prosecution by failing to instruct the jury *ex mero motu* to disregard a display of emotion by the victim's widow where defendant did not request a curative instruction or move for a mistrial; furthermore, the trial judge witnessed the incident and was in a position to gauge its effect on the jury. N.C.G.S. § 15A-1061.

7. Criminal Law § 73.2— murder—admission of newspaper story and photograph of crime scene—no error

The trial court did not err in a murder prosecution by admitting a copy of a newspaper containing a story about the death of the victim and a photograph of investigative officers making casts of tire prints at the crime scene where the article and photograph were not offered to prove the truth of the matter asserted or depicted, but to corroborate testimony, and there was no prejudice in that the article and photograph related entirely to routine crime scene investigation, they did not in any way implicate defendant, and the testimony of the State's witnesses exposed the jury to the same information in considerably greater detail.

8. Criminal Law § 90— murder—defense counsel not allowed to impeach defendant with prior convictions—no prejudice

There was no prejudice in a murder prosecution from the trial judge's refusal to allow defendant to be impeached by defense counsel with evidence of his prior convictions where, although the credibility of a witness may be attacked by any party, including the party calling him, there was no offer of proof as to the matter excluded, the question was not one to which the answer was apparent from the context and the brief exchange was incidental in the context of a lengthy trial. N.C.G.S. § 8C-1, Rule 607. N.C.G.S. § 8C-1, Rule 103(a)(2).

9. Criminal Law § 102.6— argument of prosecutor—misstatement of fact—no intervention ex mero motu

The trial court did not err in a murder prosecution by not intervening *ex mero motu* to instruct the jury as to a misstatement of the evidence by the district attorney in his closing argument where the argument was inaccurate in detail but not so grossly improper or prejudicial that the court should have been expected to intervene *ex mero motu.*

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 *Preston, J.*, at the 9 March 1987 session of Superior Court, ROBESON County. Heard in the Supreme Court 10 May 1988.

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

E. C. Bodenheimer, Jr., Freda J. Bowman, and Hubert N. Rogers, III, for defendant-appellant.

WHICHARD, Justice.

Defendant was convicted of first degree murder and sentenced to life imprisonment. We find no error.

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

On 18 March 1986 at approximately 8:00 p.m., people in the vicinity of Albert Gibbs' small grocery store heard several shots. Shortly thereafter Gibbs was found lying in the road nearby. Dorothy Blue opened Gibbs' shirt, found blood on the right side, and checked for a pulse. Gibbs then took two deep breaths, following which Ms. Blue could detect no pulse.

An autopsy revealed a penetrating wound under Gibbs' right arm, which a pathologist determined to be a bullet wound. In the pathologist's opinion, Gibbs died from a gunshot wound.

The same evening Gaston Hoover Jones, who operated a grocery store three to four miles from Gibbs' store, observed a head "rise up" from behind an icebox and a "Kelvinator" beside his store. A person, whom Jones identified at trial as defendant, then walked out. Jones observed that defendant's left back pocket was "breached out." Jones asked defendant where he was going, and defendant said: "I'm going around here." Jones thereafter thought he could hear defendant walking in the edge of the woods. He saw a car door open and the car lights come on. He followed the car to Gibbs' store and observed the store briefly. By then the car had gone.

Jones returned home and told his wife to call Gibbs. He and his brother then returned to Gibbs' store. When they arrived, they saw Gibbs lying in the road.

Charles Wilbert Smith gave a statement to law enforcement officers and testified for the State at trial. Smith had purchased marijuana from defendant over a period of several months prior to Gibbs' death. While together taking various illegal drugs, Smith and defendant had talked. Defendant told Smith that he was heavily in debt for drugs. In February 1986, defendant asked Smith to assist him in robbing a convenience store. Defendant showed Smith a .22 caliber pistol and told him it had hollow points. Over a period of several days defendant and Smith started to commit several robberies, but each time one of them got scared and failed to follow through.

Ultimately, Gibbs' store came to their attention. They went first to Jones' store, where defendant took a .22 pistol and a ski

mask and hid behind the store between an icebox and a refrigerator. Smith observed defendant go behind Jones' store toward a trailer, with Jones following him. After running through the woods, defendant had rejoined Smith in the car. The two drove to Smith's mother's former home, where they sat in the car and shared "a joint." They talked of robbing Gibbs. They then went to Gibbs' store, where they bought gas and left. As Smith prepared to pull off, defendant said, "I'll kill that son-of-a-bitch and rob him."

When Smith and defendant were three to four hundred yards from Gibbs' store, defendant said, "Let's go back and I'll go in there and rob him." When Smith warned that Gibbs would shoot defendant, defendant replied, pointing the gun in Smith's direction: "What the hell you think I got this for? If he shoots at me, I'll kill the son-of-a-bitch."

A few minutes later Smith and defendant went back toward Gibbs' store. About halfway there, defendant said: "Well, I'm going to rob the store." Defendant stopped at a trailer house directly behind the store, took the gun, and walked toward the store. He told Smith he was going to "rob the son-of-a-bitch," and if he (Gibbs) shot at him he was going to kill him. He also told Smith to pick him up where he got out, "to come back right there . . . and he would be there."

Smith drove a short distance, made a U-turn, and drove back slowly. When he arrived back at the intersection where Gibbs' store was located, he saw a man lying on the ground and three other people nearby "crying and hollering." He looked to his right and saw defendant "squatted down in the ditch" about twenty or thirty yards behind the trailer house in the area where he had dropped him off.

When Smith picked up defendant, defendant said: "I shot that man. I shot that son-of-a-bitch. I don't know whether he's dead or not, but don't anybody know what happened here except me and you, and if you tell, I'll kill you, too." Defendant told Smith that he had told Gibbs to stop and drop his money. Gibbs then shot first, and defendant shot Gibbs three times.

Pursuant to a search warrant obtained after an investigation and receipt of the statement from Smith, officers searched de-

fendant's house. They seized a .22 caliber R.G. Model 23 Revolver and a box of .22 caliber hollow point bullets. An S.B.I. agent, who qualified as an expert in firearms and tool marking identification, testified that the .22 bullet that killed Gibbs had the same rifling characteristics as—and microscopic similarities to—the bullets he test fired from the pistol seized at defendant's house. He also testified that the bullet that killed Gibbs and the six live rounds removed from defendant's pistol were "the same manufacture."

Defendant presented evidence showing the following:

He consumed alcoholic beverages virtually all the time and used a variety of drugs. On the day Gibbs was killed, he had consumed six or seven Tylenol IV tablets, some prescribed pills, and a pint and a half of vodka. He had passed out and was awakened around 6:00 p.m. by Smith pulling on him and asking for drugs.

Smith asked defendant to take him to his home in Pembroke. Defendant took a sleeping pill and two Tylenol IVs, then left with Smith. Defendant's gun was in the car because he had "had it out shooting . . . in the canal . . . behind [his] house."

Smith drove, and defendant consumed four or five beers. Defendant then went to sleep and did not regain consciousness for some time. When he regained consciousness, he called his wife and asked that she come for him. This occurred at approximately 9:00 p.m.

Defendant did not know Gibbs and had never been to Gibbs' store. He learned of Gibbs' death when he "[h]eard [his] wife reading it in the newspaper."

Smith had told defendant that he was getting so far behind on his alimony that he was expecting his probation officer to have him "picked up." Smith spoke of needing money every time defendant saw him.

A licensed clinical psychologist testified that a man of defendant's age and weight, with his history of alcohol abuse, who had consumed the amount of alcohol and drugs that defendant testified to having consumed on the date Gibbs was killed, would have been "significantly intoxicated." He considered it "very likely" that such a person would have been in a "passed out and/or blacked out" state.

[1] Defendant first contends that the trial court erred in denying his motion for the appointment of an investigator to aid in the preparation of his defense. N.C.G.S. § 7A-450(b) provides that "[w]henever a person . . . is determined to be an indigent person entitled to counsel, it is the responsibility of the State to provide him with counsel and the other necessary expenses of representation." N.C.G.S. § 7A-450(b) (1986). However, it is well established that in this jurisdiction "the defendant must show a particularized need for the requested expert." *State v. Hickey*, 317 N.C. 457, 468, 346 S.E. 2d 646, 654 (1986). *See also State v. Penley*, 318 N.C. 30, 51, 347 S.E. 2d 783, 795-96 (1986); *State v. Artis*, 316 N.C. 507, 512-13, 342 S.E. 2d 847, 850-51 (1986). This requirement accords with decisions of the United States Supreme Court. *See Caldwell v. Mississippi*, 472 U.S. 320, 86 L.Ed. 2d 231 (1985); *Ake v. Oklahoma*, 470 U.S. 68, 84 L.Ed. 2d 53 (1985).

The motion here for an investigator contained only general allegations that defendant's attorney did not have the time or expertise to conduct the investigation, that because witnesses might be reluctant to speak it would "take a trained criminal investigator to conduct the investigation," and that without an expert criminal investigator defendant could not "obtain an adequate defense and a fair trial." These allegations amount to "little more than undeveloped assertions that the requested assistance would be beneficial." *Caldwell v. Mississippi*, 472 U.S. at 323-24 n. 1, 86 L.Ed. 2d at 236 n. 1. We thus hold that defendant has failed to make the requisite threshold showing of specific necessity, and the trial court did not abuse its discretion in denying the appointment of an investigator. *State v. Artis*, 316 N.C. 507, 513, 342 S.E. 2d 847, 851.

[2] Defendant next contends that the trial court erred in denying his motion for individual voir dire of jurors and sequestration of jurors during voir dire. The gravamen of his motion was that the voir dire would include sensitive and potentially embarrassing questions exploring the prospective jurors' bias or prejudice in a capital case, and that prospective jurors who were not being questioned would be "highly susceptible" to being influenced by those who were. The gravamen of his argument on appeal is that some jurors were tainted by the responses given by others to questions regarding their feelings about the death penalty.

"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." N.C.G.S. § 15A-1214(j) (1983). However, this provision does not grant either party an absolute right. *State v. Barts*, 316 N.C. 666, 678, 343 S.E. 2d 828, 837 (1986). The decision rests in the sound discretion of the trial court, and its ruling will not be disturbed 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. *Id.* at 678-79, 343 S.E. 2d at 837. *See also State v. Reese*, 319 N.C. 110, 119-20, 353 S.E. 2d 352, 357 (1987); *State v. Jackson*, 309 N.C. 26, 34, 305 S.E. 2d 703, 710 (1983).

Neither the record nor defendant's argument reveals any basis for holding that the denial of this motion could not have been the result of a reasoned decision. Further, the argument relates primarily to alleged prejudice from questions regarding the views of prospective jurors on the death penalty, and defendant did not receive the death penalty. We find no abuse of discretion in the denial of the motion.

[3] Defendant next contends that the trial court erred by not acting *ex mero motu* to continue a hearing on certain pretrial motions in order to provide his court-appointed counsel adequate time to confer with retained counsel in preparation for the hearing. The background of the argument is as follows:

On 26 August 1986, upon defendant's affidavit of indigency, attorneys Cabel Regan and Kenneth E. Ransom were appointed to represent defendant. On 31 October 1986 attorney Freda J. Bowman filed a Notice of Limited Representation, which stated that she represented defendant in "[a]ll further Superior Court Proceedings." On 31 October 1986 Bowman also filed two motions on defendant's behalf. On 6 November 1986 Regan and Ransom moved for permission to withdraw as counsel on the ground that defendant had requested that they do so to enable Bowman to represent him. On 21 January 1987 Bowman filed several other motions on behalf of defendant. On 30 January 1987 the trial court allowed Regan and Ransom to withdraw. On 16 February 1987 Bowman filed a motion seeking appointment of co-counsel to

represent defendant, and the trial court appointed E.C. Bodenheimer as co-counsel. On 17 February 1987 the trial court heard numerous motions filed on defendant's behalf. On 19 February 1988 it entered an order denying most of these motions. The order recites that Bodenheimer was present for the hearing on the motions.

Defendant concedes that he did not move for a continuance of the hearing. He further concedes that even when such a motion is made, its grant or denial is normally within the sound discretion of the trial court and is reviewable only for abuse of that discretion. *State v. Billups*, 301 N.C. 607, 609-10, 272 S.E. 2d 842, 845 (1981). He nevertheless argues that he had a constitutional right to effective assistance of counsel, and that a reasonable opportunity for counsel to prepare is inherent in that right. When a constitutional right is involved, a motion to continue is deemed on appeal to present a question of law, and is therefore reviewable. *Id.* at 610, 272 S.E. 2d at 845. Defendant thus argues that we should find "plain error" in the trial court's failure to continue the hearing *ex mero motu* to allow his newly appointed counsel time "to adequately acquaint himself with the motions at hand."

An indigent defendant's right to the appointment of *additional* counsel in capital cases is statutory, not constitutional. *See* N.C.G.S. § 7A-450(b1) (1986). Defendant thus had no *constitutional* right to the assistance of such counsel, in the hearing of his motions or otherwise. The record establishes that retained counsel had been in the case for at least three and one-half months when the motions were heard. It does not establish, or even suggest, that either appointed or retained counsel was not fully prepared to argue defendant's motions on 17 February 1987. We thus find this argument without merit.

[4] Defendant next contends that the trial court erred in denying his motions to dismiss. He argues that State's witness Smith "is simply not telling the truth about the killing," that Smith had the greater motive to kill Gibbs because he was more in need of money than defendant was, and that Smith's testimony "was not substantially sufficient to convince a reasonable trier of fact that [defendant] was the perpetrator of the offense, most especially when considering his interest in the outcome of this case."

On a motion to dismiss, the trial court must view the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from it. *State v. Williams*, 319 N.C. 73, 79, 352 S.E. 2d 428, 432 (1987) (quoting *State v. Young*, 312 N.C. 669, 680, 325 S.E. 2d 181, 188 (1985)). If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied. *Id.*

The evidence set forth above, viewed—as required—in the light most favorable to the State, clearly constituted substantial evidence that defendant committed the offense charged. Smith's credibility, and his interest in the outcome, were matters for the jury to consider. If believed, however, Smith's testimony, together with the other evidence presented by the State, clearly permitted a reasonable inference that defendant was the perpetrator of the Gibbs murder.

[5] Defendant also argues that the trial court should have granted his motions to dismiss because the evidence established that he was so impaired by intoxication that he was "incapable of forming a deliberate and premeditated purpose to kill." We disagree.

> If at the time of the killing, the defendant was so intoxicated as to be utterly incapable of forming a deliberate and premeditated intent to kill, he could not be found guilty of first degree murder, because an essential element of the crime would be missing. *See State v. Propst*, 274 N.C. 62, 71-72, 161 S.E. 2d 560, 567 (1968). However, "no inference of the absence of deliberation and premeditation arises from intoxication as a matter of law," *State v. Murphy*, 157 N.C. 614, 619, 72 S.E. 1075, 1077 (1911), because intoxication does not necessarily render a person incapable of engaging in the thought process of premeditation and deliberation.

State v. Lowery, 309 N.C. 763, 766-67, 309 S.E. 2d 232, 236 (1983). While there was considerable evidence here that defendant was highly intoxicated, there was also evidence from which the jury could have found that he nevertheless retained the capacity to premeditate and deliberate. One witness, who had observed defendant on the evening in question, testified that defendant had

walked and talked normally, that defendant had not staggered "a bit," and that he did not smell anything on defendant. The witness Smith testified to extended conversations with defendant which contained numerous avowals by defendant of a preformed intent to kill Gibbs. "If any evidence reasonably tended to show that defendant formed the specific intent to kill [Gibbs] and that this intention to kill was preceded by premeditation and deliberation, then the denial of defendant's motion[s] was proper." *Id.* at 767, 309 S.E. 2d at 236. The foregoing constituted such evidence. The evidence thus "did not warrant a finding, as a matter of law, that defendant was incapable of forming the specific intent to kill." *Id.* at 769, 309 S.E. 2d at 238. Therefore, the motions to dismiss were properly denied. For the same reasons, the motions to set aside the verdict and for a new trial were also properly denied.

[6] Defendant next contends that the trial court erred by failing to instruct the jury *ex mero motu* to disregard a display of emotion by the victim's widow. When the district attorney called the widow as a witness, a spectator informed the court that the widow had "gone outside." There was a brief delay while the bailiff checked on the witness, following which the bailiff informed the court: "She said she's unable to come in." The reason given was: "She's crying." The court thereupon took a brief recess. It sent the jury to the jury room with instructions not to speak about the case and to "keep an open mind."

Defendant did not request a curative instruction or move for a mistrial. *See* N.C.G.S. § 15A-1061 (1983) (upon motion, trial court must declare mistrial if prejudicial conduct occurs inside or outside courtroom). He now argues that he was denied a fair and impartial trial by the court's failure to instruct the jury to disregard this display of emotion. The record, however, provides no basis for such a conclusion. The trial court witnessed the incident and was in a position to gauge its effect on the jury. As we stated in finding no error in the failure to instruct regarding a similar incident: "Aside from defendant's failure to request a curative instruction, such an instruction may well have highlighted the witness's emotional state; indeed it is possible that the defense attorney declined to request a curative instruction because of the likelihood that it would emphasize the witness's outburst." *State v. Blackstock*, 314 N.C. 232, 245, 333 S.E. 2d 245, 253 (1985). As in

Blackstock, "we find no error in the court's failure to give a curative instruction with regard to this matter." *Id.*

[7] Defendant next contends that the trial court erred in admitting into evidence a copy of a newspaper containing a story about the death of the victim and a photograph of investigative officers making casts of tire prints at the crime scene. He argues that this was hearsay which put before the jury a portion of the pretrial publicity in the case.

" '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) (1986). The article and photograph were not offered to prove the truth of the matters asserted or depicted therein, but to corroborate certain testimony of the witness Smith. They thus were not hearsay.

Moreover, even if they were hearsay, "the erroneous admission of hearsay is not always so prejudicial as to require a new trial." *State v. Hickey*, 317 N.C. 457, 473, 346 S.E. 2d 646, 657 (1986). "The defendant must still show that there was a reasonable possibility that a different result would have been reached at trial if the error had not been committed." *Id.*

We have reviewed the article and photograph, and we conclude that they relate entirely to routine crime scene investigation. The article and photograph were published on the day following the killing. The investigation was then in its early stages, and neither the article nor the photograph in any way implicates defendant. The jury was exposed to the same information contained in the article and the photograph, in considerably greater detail, by the testimony of the State's witnesses at trial. We thus find no merit in this argument.

[8] Defendant next contends that the trial court erred by not allowing defense counsel to impeach him with evidence of his prior criminal convictions. The argument is based on the following exchange at the outset of direct examination of defendant:

Q. What have you been tried and convicted of?

A. Speeding and—

MR. BRITT: Object to her impeaching her own witness.

THE COURT: Sustained.

MR. BRITT: Move to strike.

THE COURT: Motion to strike allowed. Members of the jury [you are] not to consider the question.

The credibility of a witness may now be attacked by any party, including the party calling him. N.C.G.S. § 8C-1, Rule 607 (1986). However, "[e]rror may not be predicated upon a ruling which . . . excludes evidence unless a substantial right of the party is affected, and . . . the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." N.C.G.S. § 8C-1, Rule 103(a)(2) (1986).

Here, defendant made no offer of proof as to the matter excluded, and the question was not one as to which the answer was apparent from the context in which the question was asked. We thus have no basis for concluding that a substantial right was affected, and the ruling in question cannot be the predicate for an assertion of error on appeal. Further, in the context of a lengthy trial this brief exchange was altogether incidental, and defendant has failed to carry his burden of showing prejudice from the ruling. N.C.G.S. § 15A-1443(a) (1983).

[9] Defendant finally contends that the trial court erred in failing to intervene *ex mero motu* to instruct the jury as to a misstatement of the evidence by the district attorney in his closing argument. The contention is based on the following sequence at trial:

Defendant's wife, a defense witness, testified that on one occasion she had taken out a warrant against defendant for aggravated assault. The trial court subsequently struck this testimony, on the ground that it was irrelevant, and instructed the jury not to consider it.

Thereafter, a clinical psychologist, who had treated defendant for alcohol dependency, testified as an expert witness for defendant. The witness had reviewed all of defendant's medical records, and in his testimony he related material from the records concerning defendant's physical and mental health.

On cross-examination the district attorney questioned this witness concerning a warrant in the records which charged defendant with communicating a threat to kill his wife and two children. In his jury argument, the district attorney used this incident as the basis for arguing that defendant had attempted to hide information from the jury. He argued that the State had "been completely open and fair and direct . . . in giving [the jury] every scintilla of evidence in the case." He then argued that defendant had not reciprocated, stating:

> Has the defense done the same, Ladies and Gentlemen of the Jury? When brother Jordan was on the stand, and on cross examination, he was asked, "Did you deliver, now, during the break, all of the hospital records that you were supposed to deliver to the State for cross examination? Yes, I did. Well, open up that file there and look at the piece of paper that is on the top. Did you deliver that to the State? No, sir, I didn't. What was it? It was a warrant for the indictment of this defendant for aggravated assault involving three persons by the use of a rifle."
>
> Now, is that laying all the cards on the table, Ladies and Gentlemen of the Jury?

Defendant contends that this argument related to the nonexistent crime of aggravated assault, and that the court "committed plain and prejudicial error by failing to instruct the jury as to [this] misstatement of the evidence." Because defendant failed to object to the argument, the standard for review is as follows:

> In capital cases . . . an appellate court may review the prosecution's argument, even though defendant raised no objection at trial, but the impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it.

State v. Brown, 320 N.C. 179, 194-95, 358 S.E. 2d 1, 13 (1987) (quoting *State v. Johnson*, 298 N.C. 355, 369, 259 S.E. 2d 752, 761 (1979)). Viewing the argument here in light of this standard, we conclude that defendant has not shown prejudicial error. Evidence of the warrant was properly before the jury through the

testimony on cross-examination of defendant's psychological expert. The only misstatement of the evidence in the argument was the reference to the warrant as one for aggravated assault rather than for communicating threats. The point of the argument was the witness' lack of candor, not the warrant itself. While inaccurate in detail, the argument was not so grossly improper or prejudicial that the trial court should have been expected to intervene *ex mero motu*.

An able, dedicated veteran of this State's superior court bench presided over defendant's trial. We have carefully examined the record in light of the arguments presented, and we conclude that defendant received a fair trial, free from prejudicial error.

No error.

CARNATION S. PICKRELL, WIDOW OF CLYDE R. PICKRELL, DECEASED, EMPLOYEE, PLAINTIFF v. MOTOR CONVOY, INC., EMPLOYER, TRANSPORT INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 562PA86

(Filed 2 June 1988)

Master and Servant § 56— workers' compensation—death at work—no evidence of death other than by accident—presumption that death work-related—compensability

Where the undisputed evidence indicated that decedent died while acting within the course and scope of his employment when he fell while inspecting vehicles before transporting them from railroad cars via a tractor-trailer truck to their ultimate destination, and no evidence indicated decedent died other than by accident, plaintiff could rely on a presumption that decedent's death occurred by a work-related cause, thereby making the death compensable, whether the medical reason for death was known or unknown.

Justice MEYER dissenting.

Justices WEBB and WHICHARD join in this dissenting opinion.

ON plaintiff's petition for discretionary review of a decision of the Court of Appeals, 82 N.C. App. 238, 346 S.E. 2d 164 (1986), affirming an order of the Industrial Commission entered 25 Sep-

tember 1985 denying plaintiff's claim for compensation. Heard in the Supreme Court 9 June 1987.

Smith, Patterson, Follin, Curtis, James & Harkavy, by J. David James, Henry N. Patterson, Jr., and Jonathan R. Harkavy, for plaintiff appellant.

Bell, Davis & Pitt, P.A., by Walter W. Pitt, Jr., and Joseph T. Carruthers, for defendant appellees.

EXUM, Chief Justice.

This is a workers' compensation case in which the question presented is whether the Court of Appeals erred in holding that a presumption of compensability does not apply when an employee dies within the course and scope of employment and the cause of death is unknown. We hold the Court of Appeals erred and remand this case to the Industrial Commission for further proceedings consistent with our decision.

I.

The material facts shown by the evidence and found by the Commission are undisputed.

Defendant's business, located in Walkertown, involves unloading cars and vans from railroad cars and then reloading them onto tractor-trailer trucks for transportation to their ultimate destinations. Decedent Clyde Pickrell was employed by defendant as a tractor-trailer driver. His duties entailed loading cars and vans onto his tractor-trailer for transport. Before loading the new vehicles, decedent was required to check them carefully for any damage they might have sustained during their railroad transport. When checking for possible damage to the roof of a new van, decedent had to stand on the van's rear bumper and hold onto the door handles or top railing. Other drivers observed decedent practice this method of inspection.

At approximately 5:45 p.m. on 17 January 1983 decedent's fellow drivers found him lying dead behind a van which he had been assigned to load and transport. He lay on his back with his left leg extended under the van's rear bumper and his right leg bent toward the left. A small amount of blood came from his left

nostril. Blood was also discovered in front of his left ear. The van's bumper, which was rounded and about eighteen inches above the ground, showed a scuff mark resembling a shoe print. An outside temperature of eighteen degrees under windy conditions made outside work uncomfortable. Decedent had reported to work at approximately 2:30 p.m. that day and was dispatched on a trip to Lowell and Charlotte. He returned from this trip at around 4 p.m. and spoke with his terminal manager. It was the last time he was seen alive. No evidence was adduced before the Commission with respect to the medical reasons for his death.

The Deputy Commissioner denied the claim brought by decedent's widow for death benefits. While the Deputy Commissioner found that the decedent sustained an accident arising out of and in the course of his employment, she denied plaintiff's claim on the grounds that "his death was not proven to be the proximate result of the accident."[1] On appeal the Full Industrial Commission,

1. The Deputy Commissioner found:

> 4. The evidence is sufficient to raise the inference that plaintiff slipped while standing on the bumper of the van to inspect it for any damage, and, in the absence of medical evidence as to the cause of decedent's death, the undersigned so finds. He thereby sustained an accident arising out of and in the course of his employment with defendant-employer. However, there is no evidence as to the cause of his death. Plaintiff did not prove that decedent died as a result of injuries sustained in a fall, and that fact may not be reasonably inferred from the evidence. He could have died from a number of causes unrelated to his employment or to a fall even though he was apparently in good health before this occurred.
>
> 5. Decedent's death on January 17, 1983 was not proven to be the result of an injury by accident arising out of and in the course of his employment with defendant-employer.
>
> . . . .
>
> The Deputy Commissioner then commented:
>
> There is no evidence of causation in this case. Decedent fell from a height of approximately 18 inches. The cause of his death was not apparent from his appearance and cannot be inferred from the nature of the fall in that he fell a short distance. Consequently, plaintiff has not met the necessary burden of proof.
>
> . . . .

On the basis of the foregoing the Deputy Commissioner concluded:

> Although decedent sustained an accident arising out of and in the course of his employment with defendant-employer on January 17, 1983, his death was

with Commissioner Clay dissenting, concluded that the Deputy Commissioner's "ultimate decision" was correct; however, it found the evidence insufficient to raise the inference that plaintiff suffered an accident arising out of and in the course of his employment.

The Court of Appeals affirmed the Commission's decision to deny plaintiff's claim; however, it concluded the Commission erred in deciding the evidence was insufficient to raise an inference of accident arising out of decedent's employment. The court held that because plaintiff offered no evidence of the medical reason for decedent's death she "failed to sustain her burden of proving that decedent died as a proximate result of an injury by accident arising out of his employment." 82 N.C. App. at 243, 346 S.E. 2d at 167-68. The court concluded that, under these circumstances, plaintiff could not rely on a presumption that decedent's death was compensable, but was required to prove that he died as a result of a work-related accident. *Id.*

II.

Plaintiff contends, and we agree, that the Court of Appeals erred in holding that she could not rely on a presumption of compensability when she introduced evidence that decedent died while acting within the course and scope of his employment and no evidence was adduced indicating that decedent died other than by a compensable cause.

In order for a claimant to recover workers' compensation benefits for death, he must prove that death resulted from an injury (1) by accident; (2) arising out of his employment; and (3) in the course of the employment. N.C.G.S. § 97-2(6), (10) (1985). The claimant has the burden of proving each of these elements. *Henry v. Leather Co.*, 231 N.C. 477, 479, 57 S.E. 2d 760, 761 (1950). The question this case presents is what mode of proof claimant may use to meet her burden where the evidence shows decedent died in the course and scope of his employment, but there is no evidence as to whether the cause of death was work-related, *i.e.*, from an injury by accident arising out of employment.

not proven to be the proximate result of the accident. G.S. 97-2(6); G.S. 97-38; *Taylor v. Twin City Club*, 260 N.C. 435 (1963); *Gilmore v. Hoke County Board of Education*, 222 N.C. 358 (1942).

The general rule is that a claimant under such circumstances may rely upon a presumption that the death resulted proximately from a work-related injury:

> When an employee is found dead under circumstances indicating that death took place within the time and space limits of the employment, in the absence of any evidence of what caused the death, most courts will indulge a presumption or inference that the death arose out of the employment.

1 Larson, *The Law of Workmen's Compensation* § 10.32 (1985). Stated another way the rule is that:

> In the absence of evidence to the contrary, the presumption or inference will be indulged in that injury or death arose out of the employment where the employee is found injured at the place where his duty may have required him to be, or where the employee is found dead under circumstances indicating that death took place within the time and space limits of the employment. . . . Such presumptions are rebuttable and they disappear on the introduction of evidence to the contrary.

100 C.J.S. *Workmen's Compensation* § 513 (1958).

Previously we have allowed claimants to rely on presumptions in meeting their burden of proof in workers' compensation cases where the evidence indicated the death occurred in the course and scope of the decedent's employment and the only question was whether it was work-related. In *McGill v. Town of Lumberton*, 215 N.C. 752, 3 S.E. 2d 324 (1939), a town's police chief was found shot to death by his own gun in a small room with its door and windows locked. We held that plaintiff was entitled to a presumption that the police chief's death was accidental, rather than suicidal, and therefore compensable under the workers' compensation statute. In *Harris v. Henry's Auto Parts, Inc.*, 57 N.C. App. 90, 290 S.E. 2d 716, *disc. rev. denied*, 306 N.C. 384, 294 S.E. 2d 208 (1982), the decedent was a service station attendant who was found dead on the employer's premises while he was on duty. He had been shot, and no motive for the killing was introduced. The Court of Appeals, relying on *McGill*, held that claimant was entitled to rely on a presumption that death arose out of decedent's employment.

It is important to note that the presumption enabled the claimants in *McGill* and *Harris*, respectively, to prove different elements of their compensation claims. Common to both cases was that death occurred during the course and scope of employment. In *McGill* the Court held that the presumption applied to the "accident" element of the claim, and in *Harris* the Court of Appeals concluded it applied to the "arising out of" element. The *McGill* Court permitted the claimant to use the presumption to carry her burden of proving the death occurred by accident. In *Harris*, the Court of Appeals permitted the claimant to use the presumption to carry his burden of proving that death "arose out of" decedent's employment.

McGill and *Harris*, read together, support the proposition that the presumption is really one of compensability. It may be used to help a claimant carry his burden of proving that death was caused by accident, or that it arose out of the decedent's employment, or both. In *McGill*, we chose to address the question of compensability by determining whether death was accidental, bypassing any inquiry as to whether it "arose out of" decedent's employment. The *Harris* court analyzed the question of compensability by focusing on whether death "arose out of" decedent's employment, ignoring whether it was an accident. Both cases, in effect, merged the elements of "arising out of" and "accident," and permitted the claimant to meet her burden of proof by relying on a presumption that the event causing decedent's death was work-related.[2]

2. In his treatise on workers' compensation, Professor Larson demonstrates that the inquiries as to "accident" and "arising out of" are often merged when the essential question is whether the event causing death was work-related. This often occurs when the medical cause of death is a heart attack or excessive exposure:

> [A] special rule on "accident" is applied in heart cases because of the difficulty of proving that heart deaths "arise out of the employment" . . . . [There is] a fear that heart cases and related types of injury and death will get out of control . . . and will become compensable whenever they take place within the time and space limits of employment. Most states have chosen to press the "accident" concept into service as one kind of arbitrary boundary, but, with a few exceptions, one gets the impression that what is behind it all is not so much an insistence on accidental quality for its own sake as the provision of an added assurance that compensation will not be awarded for deaths not really caused in any substantial degree by the employment.

1 Larson, *The Law of Workmen's Compensation* § 38.81 (1985).

In *McGill*, *Harris*, and the instant case, the decedent died while within the course and scope of his employment, and no evidence was introduced that death was due to a non-compensable cause. The critical question here, as in *McGill* and *Harris*, is whether death was work-related. In all three cases, those in the best position to speak to this question are the employee, whom death has silenced, and the employer. Under such circumstances, a presumption of compensability is theoretically and practically justified.

> The theoretical justification is similar to that for unexplained falls and other neutral harms: The occurrence of the death within the course of employment at least indicates that employment brought deceased within range of the harm, and the cause of harm being unknown, is neutral and not personal. The practical justification lies in the realization that, when the death itself has removed the only possible witness who could prove causal connection, fairness to the dependents suggests some softening of the rule requiring claimant to provide affirmative proof of each requisite element of compensability.

1 Larson, *The Law of Workmen's Compensation* § 10.32 (1985).

The Court of Appeals distinguished *McGill* and *Harris* from the instant case on the ground that in those cases "the cause of death . . . was known." 82 N.C. App. at 242, 346 S.E. 2d at 167. The court held "[t]he inference does not extend . . . to causation, and the claimant is not relieved of the requirement of proving that the event proximately resulted in the employee's death." *Id.* at 243, 346 S.E. 2d at 167. Although the court does not define "causation," it seems to suggest that a claimant must prove the medical reason for death before becoming entitled to any presumption of compensability.

We see no reason not to apply a presumption of compensability where the evidence shows that death occurred while the decedent was within the course and scope of employment, but the medical reason for death is not adduced. In unexplained death

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> It has been shown, for example, that in the sunstroke and freezing cases the test of "accident" has imperceptively become the same as that for "arising out of employment."

1 Larson, *The Law of Workmen's Compensation* § 38.82 (1985).

cases where the medical reason for death is known, such as *McGill* and *Harris*, the circumstances bearing on work-relatedness remain unknown. It is these circumstances, not the medical reasons for death, which are critical in determining whether a claimant is entitled to workers' compensation benefits. A blow to the head, gunshot wound or heart attack may, or may not, be compensable, depending on the manner in which the event occurred. It is this aspect of causation which the presumption of compensability, properly understood, addresses. In cases, therefore, where the circumstances bearing on work-relatedness are unknown and the death occurs within the course of employment, claimants should be able to rely on a presumption that death was work-related, and therefore compensable, whether the medical reason for death is known or unknown.

Applying such a presumption of compensability is fair because the Workers' Compensation Act should be liberally construed in order to accomplish its purpose. Employers may be in a better position than the family of the decedent to offer evidence on the circumstances of the death. Their employees ordinarily are the last to see the decedent alive, and the first to discover the body. They know the decedent's duties and work assignments. Additionally, if employers deem it necessary to determine the medical reason for death, they may notify the medical examiner of the county where the body is found, N.C.G.S. § 130A-383 (1986), and utilize the certificate of death which the medical examiner thereafter prepares. N.C.G.S. § 130A-385(a)(b) (1986). Such reports may be received as evidence, and certified copies thereof have the same evidentiary value as the originals. N.C.G.S. § 130A-392 (1986).

There is some confusion in our cases regarding the nature of the presumption of compensability in a workers' compensation case. In *McGill* the Court declared the presumption "is sufficient to raise a *prima facie* case as to accident only. Then, if employer claims death of employee is by suicide, the statute places the burden on him to go forward with proof negativing the factual inference of death by accident." *McGill v. Town of Lumberton*, 215 N.C. at 754, 3 S.E. 2d at 326. While the presumption in *McGill* is called a "*prima facie* case," the effect which *McGill* gave to the presumption is that of a true presumption.

> [A] prima facie case and a presumption differ sharply in their effect upon the burden of producing evidence. A prima facie case discharges the burden of the proponent, but does not shift the burden to his adversary. A presumption, however, not only discharges the proponent's burden but also throws upon the other party the burden of producing evidence that the presumed fact does not exist. If no such evidence is produced, or if the evidence proffered is insufficient for that purpose, the party against whom the presumption operates will be subject to an adverse ruling by the judge, directing the jury to find in favor of the presumed fact if the basic fact is found to have been established.

Moore v. Insurance Co., 297 N.C. 375, 381-2, 255 S.E. 2d 160, 163-64 (1979) (quoting 2 Stansbury's North Carolina Evidence § 218 (Brandis rev. 1973)).

On the basis of our decision in *McGill*, we conclude the presumption of compensability in a workers' compensation case is a true presumption. Thus, in those cases where the claimant is entitled to rely on the presumption, the defendant must come forward with some evidence that death occurred as a result of a non-compensable cause; otherwise, the claimant prevails. In the presence of evidence that death was not compensable, the presumption disappears. In that event, the Industrial Commission should find the facts based on all the evidence adduced, taking into account its credibility, and drawing such reasonable inferences from the credible evidence as may be permissible, the burden of persuasion remaining with the claimant.

We conclude plaintiff was entitled to rely on a presumption of compensability. The undisputed evidence indicated decedent died while acting within the course and scope of his employment. No evidence indicated decedent died other than by accident. Under these circumstances plaintiff may rely on a presumption that decedent's death occurred by a work-related cause, thereby making the death compensable. The decision by the Court of Appeals to the contrary is reversed and the case is remanded to the Court of Appeals for remand to the Industrial Commission for further proceedings consistent with this opinion.[3]

3. Plaintiff also contends the Court of Appeals erred in failing to remand this case to the Industrial Commission for its consideration of plaintiff's motion, filed

Reversed and remanded.

Justice MEYER dissenting.

I cannot agree with the rule laid down by the majority today that *McGill v. Town of Lumberton*, 215 N.C. 752, 3 S.E. 2d 324 (1939), and *Harris v. Henry's Auto Parts, Inc.*, 57 N.C. App. 90, 290 S.E. 2d 716, *disc. rev. denied*, 306 N.C. 384, 294 S.E. 2d 208 (1982), have merged two of the three N.C.G.S. § 97-2 elements in a workers' compensation claim, so that the claimant may meet her burden of proof by relying on a "presumption of compensability" that the event causing decedent's death was "work-related." The majority defines "work-related" to mean "from an injury by accident arising out of employment." In effect, this definition is itself a merger of the "by accident" and "arising out of his employment" elements in N.C.G.S. § 97-2. I do not read these two cases to mean that a workers' compensation claimant may escape having to prove separately either one or the other, and certainly not both, of these elements. In short, the majority has broadened the effect of the presumptions indulged by the cases beyond any scenario envisioned when they were decided.

In *McGill*, we expressly limited the scope of the presumption to allow an "inference . . . sufficient to raise a prima facie case as to accident *only*." 215 N.C. at 754, 3 S.E. 2d at 326 (emphasis added). In *Harris*, the Court of Appeals held the presumption applicable to the "arising out of" element *only*. By defining "work-related" as a combination of these two *separate* elements, the majority ignores the intent of N.C.G.S. § 97-2 that each element must be separately proved and allows a workers' compensation claimant to rely on a presumption to furnish the proof. While previously we indulged a *presumption* that the death "arose out of" an accident and an *inference sufficient to raise a prima facie case* as to "accident" only, the majority has now created a new animal called a "presumption of compensability."

While the majority fails to disclose it, I note that the unexplained death provisions upon which Larson relies in his treatise to justify the use of a presumption in a claimant's favor apply

with the Commission, to take additional testimony concerning the cause of death. We decline to address this issue in light of our decision to remand for further proceedings.

only when *the cause of death is known* but the circumstances are not. 1 Larson, *The Law of Workmen's Compensation* § 10.32 (1985). In both *McGill* and *Harris*, the medical causation of death was known. Use of a presumption was necessary to prove that the circumstances surrounding each of the deaths met the requirements of the statutory elements defining a compensable injury. In the present case, however, we know nothing of either the cause of death or the circumstances surrounding it. The purpose of the presumption is to ease the claimant's burden of proof in situations where there is an unexplained death and no reasonable way for the claimant to provide affirmative proof of each element of compensability. That is not the case here, at least with regard to determination of the cause of death, since the claimant could have had an autopsy performed in order to ascertain that the cause of death either was or was not likely to have been accidental.

Finally, the majority's statement that "[e]mployers may be in a better position than the family of the decedent to offer evidence on the circumstances of the death" is simply not true and is in fact illogical. Reading this statement in context, the Court apparently refers to the medical circumstances of the death. An autopsy is the accepted method of determining the cause of a person's death. There is, indeed, a statutory limitation on persons who have the right to have an autopsy performed. N.C.G.S. § 130A-398 (1986). This statute lists six categories to which the right to have an autopsy performed is limited. These categories include medical examiners, district attorneys, family members, etc. An employer is within none of these categories. In contrast, the claimant of a decedent's benefits *is* authorized to cause an autopsy to be performed, provided he is the spouse, adult child or stepchild, parent, stepparent, adult sibling, guardian, relative, or person who accepts responsibility for the final disposition of the decedent's body. N.C.G.S. § 130A-398(6) (1986). The claimant, therefore, is the only person who bears the responsibility of having the cause of death medically determined and who concomitantly should bear the burden of offering such evidence.

The majority compounds the error of its reasoning by citing N.C.G.S. § 130A-383 for the proposition that employers may request the assistance of the Chief Medical Examiner's Office in determining the medical reason for the employee's death "in any

case of death resulting from accident when the deceased had been in apparent good health." N.C.G.S. § 130A-383 grants the medical examiner jurisdiction over sudden deaths "occurring in a jail, prison, correctional institution or in police custody; or occurring under any suspicious, unusual or unnatural circumstance." Even in those circumstances, the medical examiner must find an autopsy "advisable and in the public interest." N.C.G.S. § 130A-389(a) (1986). Where, as here, there is merely a private civil claim for monetary benefits, it is unlikely that an autopsy is required "in the public interest." *Id.* This statute is obviously designed to give the medical examiner jurisdiction in situations where a death may have occurred in *criminal* circumstances. N.C.G.S. § 130A-383(a) (1986). Further, N.C.G.S. § 130A-385, also cited by the majority, specifically states that "[a] copy of the report of the medical examiner investigation may be forwarded to the appropriate district attorney." N.C.G.S. § 130A-385(d) (1986). In my view, N.C.G.S. §§ 130A-383, *et seq.*, cover only those questionable deaths in which an autopsy is required in the *public* interest. An employer does not come within the parameters of these statutes in a case such as the one *sub judice.*

The situation in the case at bar is particularly egregious because the claimant did not introduce the death certificate, which would presumably have shown the medical cause of death or that such cause could not be determined. Nor do we know whether an autopsy was performed and, if so, what it revealed or even whether the claimant requested an autopsy. All the claimant did here was to assert that the death was work-related. This should not entitle the claimant to such a "presumption of compensability." The majority decision allows the potential of the perpetration of a fraud by withholding evidence.

I dissent.

Justices WEBB and WHICHARD join in this dissenting opinion.

STATE OF NORTH CAROLINA v. MELVIN LEON LOFTIN

No. 495A87

(Filed 2 June 1988)

1. **Homicide § 28; Criminal Law § 168.2— instruction on self-defense—no plain error**

If the trial court in a first degree murder case erred in instructing on self-defense, such error was favorable to defendant, and there was no merit to his contention that the instruction amounted to plain error.

2. **Homicide § 28.8; Criminal Law § 168— failure to instruct on defense of accident—no plain error**

Though the trial court in a first degree murder case erred in failing to instruct the jury on the defense of accident, such error was not plain error because the instruction would not have affected the outcome where defendant's evidence consisted principally of his own uncorroborated testimony as to what occurred on the afternoon in question; his testimony was not only contradicted by the State's witnesses, but defendant himself was impeached by both his past record of criminal activity and by his prior inconsistent statements; the testimony and the physical evidence did not lend credibility to defendant's description of the shooting as the result of a struggle over the victim's gun; only the State presented testimony of persons other than defendant who had witnessed the events surrounding the shooting; and one of the eyewitnesses testified in complete contradiction to defendant's story.

3. **Criminal Law §§ 117.1, 168— instruction on impeachment by prior inconsistent statements—no plain error**

Even if the trial court erred in instructing the jury prior to its deliberation on impeachment by prior inconsistent statements, such error was not plain error where the statements in question were made to a police officer concerning defendant's address and the date of his purchase of a handgun, and the jury probably would not have reached a different verdict had the allegedly erroneous instruction not been given.

APPEAL as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by *Smith, J.*, at the 8 June 1987 Criminal Session of Superior Court, CRAVEN County, upon defendant's conviction by a jury of murder in the first degree. Heard in the Supreme Court on 12 April 1988.

Lacy H. Thornburg, Attorney General, by Doris J. Holton, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Staples Hughes, Assistant Appellate Defender, for defendant-appellant.

MEYER, Justice.

Defendant Melvin Leon Loftin was convicted of one count of first-degree murder arising out of the January 1987 shooting death of Curtis Bryant. 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 the mandatory term of life imprisonment.

In his appeal to this Court, defendant brings forward for our consideration two assignments of error relative to the guilt-innocence phase of his trial. We have carefully reviewed the entire record on appeal and both of defendant's assignments of error in turn, and we find no reversible error in defendant's trial. Accordingly, we leave undisturbed defendant's conviction and the accompanying life sentence.

The crime in question occurred in a garage at the home of one Frank Roberts[1] in the Dover Community of Craven County, North Carolina. This garage was apparently a familiar gathering place for certain members of the Dover Community who would meet there to, among other things, talk, consume alcoholic beverages, play cards, and watch television. The shooting incident occurred on the afternoon of Saturday, 24 January 1987. At trial, the State and defendant presented vastly different versions of what in fact transpired on that occasion.

Evidence presented by the State at trial tended to show the following relevant facts and circumstances. Defendant came to the garage meeting place between 3:45 p.m. and 4:30 p.m. on the day in question. Upon arrival, defendant spoke to several of the persons at the garage, including Wesley Roberts, the son of the proprietor, and Ray Hart, a longtime Dover resident. Defendant, who did not appear intoxicated, inquired of Ray Hart as to whether he had seen Curtis Bryant. He explained to Ray Hart that he needed to talk with Bryant about something.

Curtis Bryant arrived at the garage meeting place some thirty minutes later. Defendant apparently observed the victim as he

1. The record reveals that Frank Roberts was but one of the several names by which the proprietor was known. He was also known by some members of the community as Frank Rouse and Frank Robinson.

got out of a car in the parking lot. As Curtis Bryant came through the door of the garage, and as he was removing one of his gloves, defendant met him. Without any conversation, defendant pulled a handgun from his back pocket, shot the victim once in the face, and returned the gun to his back pocket. Wesley Roberts then took the handgun from defendant's back pocket and, covering it with a napkin or paper towel, placed it on a table or bench inside the garage.

Some two hours later, at approximately 6:50 p.m., Deputy Sheriff Terry Register, a crime lab evidence technician with the Craven County Sheriff's Department, arrived at the scene. Deputy Sheriff Register found the victim immediately behind the door to the garage, lying in a pool of blood. She observed, among other things, that a bullet appeared to have entered the victim's right eyelid and exited at the back of his head. She noted also that in the victim's left hand was clutched a glove. Deputy Sheriff Register located a .32-calibre automatic handgun covered by a paper towel, but she did not find any other weapon either inside or outside the area of the garage.

An autopsy revealed that a .32-calibre bullet had indeed entered the victim's right upper eyelid and had exited the back of his head on the right side, doing massive damage to the brain. The path of the bullet was straight, with a slightly upward trajectory. Massive hemorrhaging and obliteration of the brain mass directly resulted in the victim's immediate death. The autopsy failed to reveal any alcohol content in the victim's blood at the time of his death.

John Woolard, an investigative officer with the Craven County Sheriff's Department, talked with defendant on the evening of the shooting. Defendant told Officer Woolard on that occasion where he lived and worked. Subsequently, however, Officer Woolard determined that the address that defendant had given as his residence did not in fact exist. On Monday, 26 January, defendant admitted that he had lied about his address and that he had also lied about his place of employment. Defendant also told Officer Woolard that he did in fact own a weapon—specifically, a handgun which he had purchased from "some dudes in Greenville" several months prior to the victim's death.

Further evidence for the State tended to show that the victim was not a person prone to violence. Wesley Roberts testified that Curtis Bryant, who had dated his sister for the four or five years just prior to the time when defendant started dating her, had never to his knowledge possessed a knife or a gun. In addition, Marlena Bryant, the victim's sister, and Ray Hart, the longtime Dover resident who had witnessed the shooting, also indicated that the victim, in their experience, had never possessed a gun or a knife.

Defendant's evidence, primarily in the form of his own testimony, portrayed an entirely different event at the garage meeting place on the afternoon in question. According to defendant, he had been dating Cathy Roberts, the daughter of the owner of the garage and the former girlfriend of the victim, for some eight months. Defendant testified that he was preparing to leave the establishment at the time that Curtis Bryant arrived there on the afternoon of 24 January. The victim came through the door of the garage on that occasion and told defendant that he was tired of defendant's messing with the victim's girlfriend.

Defendant testified further that the victim then stepped back and pulled a gun from his pocket. Defendant then attempted to get the gun away from the victim, and a struggle ensued which lasted for several minutes. During that struggle, maintains defendant, he grabbed the gun and it discharged, striking Curtis Bryant in the face and killing him. Defendant, in an attempt to support this struggle theory of the case, also presented evidence that the victim had once pointed a shotgun at him on the occasion of one of defendant's visits to see Cathy Roberts.

Following the presentation of all of the evidence, the trial judge instructed the jury on first-degree murder, second-degree murder, and self-defense. He did not charge the jury on death by accident. Following the instructions to the jury, neither counsel indicated any complaint concerning the instructions, and neither suggested corrections, additions, or substitutions. The case then went to the jury.

Having been instructed as stated above, and on the basis of the above-mentioned and other evidence, the jury found defendant guilty of the first-degree murder of Curtis Bryant. Pursuant to the jury's verdict, the trial judge sentenced defendant to a

mandatory life term. In his appeal to this Court, defendant brings forward for our review two specific assignments of error: first, that the trial judge committed reversible error in instructing on self-defense and in failing to instruct on accident; and second, that the trial judge committed reversible error in instructing on impeachment by prior inconsistent statements. We deal with both of these assignments in turn, and we find merit in neither.

I.

In his first assignment of error, defendant asserts that the trial judge committed reversible error, first, in instructing the jury on self-defense and, second, in failing to instruct the jury concerning death by accident. Defendant concedes here that his attorney did not object to the trial judge's instruction at trial as required by Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure. Notwithstanding this admitted failure to properly preserve the issue for appellate review, defendant argues that the trial judge's error was such as to constitute plain error entitling defendant to a new trial per this Court's decision in *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983). We do not agree with defendant as to either of the instructions in question, and we therefore overrule this first of his assignments of error.

At the close of the presentation of all of the evidence at trial, Judge Smith instructed the jury on first-degree murder, second-degree murder, and in addition, on self-defense. He did not, however, instruct the jury on death by accident. After the jurors had retired to deliberate, Judge Smith solicited the lawyers' comments on the instructions he had just delivered. The following exchange occurred:

> MR. HEATH: We don't have any complaints with the charge as delivered.
>
> THE COURT: Any corrections, additions, substitutions or anything?
>
> MR. MCFADYEN: No, sir.
>
> THE COURT: Go ahead. Let the record so indicate. Give them the sheet.

Consistent with this excerpt from the trial transcript, defendant concedes on appeal that he failed to enter a timely objection to the jury instructions of which he now complains.

Defendant is quite correct to concede that, having thus failed to enter a timely objection to the instructions in question, he has failed to properly preserve the question of the instructions' propriety for our review. In pertinent part, Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure provides that "[n]o party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict." As defendant also correctly points out, however, this Court, in *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983), mitigated the harshness of Rule 10(b)(2) via the adoption of the plain error rule. This rule had been used and is used today in the federal courts pursuant to Rule 52(b) of the Federal Rules of Criminal Procedure. That rule provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Fed. R. Crim. P. 52(b).

Since this Court's adoption of the plain error rule in *Odom*, we have had several opportunities to interpret the rule for the purposes of North Carolina courts. It is clear that the burden upon defendant to demonstrate plain error in cases such as that before us today is severe. In *State v. Walker*, 316 N.C. 33, 340 S.E. 2d 80 (1986), for example, we stated as follows:

> The plain error rule applies only in truly exceptional cases. Before deciding that an error by the trial court amounts to "plain error," the appellate court must be convinced that absent the error the jury probably would have reached a different verdict. In other words, the appellate court must determine that the error in question "tilted the scales" and caused the jury to reach its verdict convicting the defendant. Therefore, the test for "plain error" places a much heavier burden upon the defendant than that imposed by N.C.G.S. § 15A-1443 upon defendants who have preserved their rights by timely objection. This is so in part at least because the defendant could have prevented any error by making a timely objection.

Id. at 39, 340 S.E. 2d at 83-84 (citations omitted). With this as background, we turn now to a review of the instructions before us for plain error. We find none.

[1] First, assuming, without deciding, that defendant is correct in his assertion that Judge Smith committed error in instructing

the jury on self-defense, such error could not be said to rise to the level of plain error. Even if, as defendant apparently argues, a self-defense instruction was not supported by the evidence presented at trial, this alleged error was favorable to defendant. *State v. Bush*, 307 N.C. 152, 297 S.E. 2d 563 (1982). As a result of the trial judge's jury instruction concerning self-defense, the jury was given a vehicle by which to acquit defendant that it would not otherwise have had. *Id. See also State v. Boone*, 299 N.C. 681, 263 S.E. 2d 758 (1980). It is therefore without merit to suggest that Judge Smith's action in this regard, if indeed it was error at all, rises to the level of plain error. Accordingly, we reject defendant's argument relative to the self-defense instruction.

[2] Second, with regard to the instruction on accident, we note as an initial matter that Judge Smith's failure to give the instruction constitutes *error*. This Court has held on numerous occasions that it is the duty of the trial court to instruct the jury on all of the substantive features of a case. *State v. Brock*, 305 N.C. 532, 290 S.E. 2d 566 (1982); *State v. Ferrell*, 300 N.C. 157, 265 S.E. 2d 210 (1980). This is a duty which arises notwithstanding the absence of a request by one of the parties for a particular instruction. *State v. Dooley*, 285 N.C. 158, 203 S.E. 2d 815 (1974); *State v. Todd*, 264 N.C. 524, 142 S.E. 2d 154 (1965). All defenses arising from the evidence presented during the trial constitute substantive features of a case and therefore warrant the trial court's instruction thereon. *State v. Brock*, 305 N.C. 532, 290 S.E. 2d 566 (1982); *State v. Jones*, 300 N.C. 363, 266 S.E. 2d 586 (1980).

We agree with defendant's contention that accident was a substantive feature of the case before us. Defendant's evidence, primarily in the form of his own testimony, revealed that defendant and the victim struggled over the victim's handgun for some three to four minutes. It was during this struggle, says defendant, that the gun discharged, striking the victim in the face and killing him. Defendant's "struggle" theory of the case was such as to clearly make the defense of accident a substantive feature arising upon the evidence presented below. Accordingly, even in the absence of a specific request therefor, the trial judge was duty bound under our case law to instruct the jury on accident. His failure to so instruct was therefore error.

Having held that the trial judge erred in his failure to instruct in this regard, we hasten to add that we do not find the

trial judge's omission to constitute *plain error.* As we noted above, the burden carried by defendant in a case such as this one is heavy indeed, and we do not find that he has successfully borne it. As in our decision in *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375, the evidence of defendant's guilt of the crime of which he stands convicted is such that the trial judge's mistake could hardly be considered plain error.

As we stated above, in order for this Court to hold that plain error occurred at trial, we must be convinced that, but for the error, the jury probably would have reached a different verdict. *State v. Walker*, 316 N.C. 33, 340 S.E. 2d 80. In other words, we must determine that Judge Smith's omission of the instruction on accident "tilted the scales" and caused the jury to convict this defendant of first-degree murder. *Id.* at 39, 340 S.E. 2d at 83-84. We are convinced to a certainty that, even had Judge Smith given the admittedly called-for instruction, it would not have affected the outcome.

The parallels between the evidence in the case before us and that in *Odom*, wherein we adopted the plain error rule but found no plain error on the facts, are significant. Here, only the State presented the testimony of persons other than defendant who had witnessed the events in the garage on the day in question. One of these persons, Ray Hart, witnessed the shooting, and he testified, in complete contradiction to defendant's story, that defendant, who had been asking about the victim's whereabouts, shot the victim in the face as the latter entered the garage.

Defendant's evidence, on the other hand, consisted principally of his own uncorroborated testimony as to what occurred on the afternoon in question. His testimony was not only contradicted by the State's witnesses, defendant himself was impeached by both his past record of criminal activity[2] and by his prior inconsistent statements. Moreover, the record of the case as a whole, including all of the testimony and the physical evidence, does not lend credibility to defendant's description of the shooting as the result of a struggle over the victim's gun. That defendant's story com-

2. The prosecutor's cross-examination of defendant revealed that defendant had previously been convicted on one occasion of grand larceny, on one occasion of possession of marijuana, and on three occasions of driving while impaired.

pletely lacked the ring of truth obviously did not escape the jury, which convicted defendant of premeditated and deliberate murder following a mere twenty-seven minutes of deliberation.

We find no plain error in the trial judge's instructions to the jury in the case at bar. Accordingly, this assignment of error is hereby overruled.

II.

[3] In his second and final assignment of error on appeal, defendant asserts that the trial judge committed reversible error in instructing the jury prior to its deliberation on impeachment by prior inconsistent statements. Once again, defendant concedes that his attorney failed to enter a timely objection under Rule 10(b)(2) of our Rules of Appellate Procedure. Again, however, defendant argues that the trial judge's error was sufficiently serious as to constitute plain error entitling him to a new trial consistent with our decision in *Odom*. Assuming, without deciding, that Judge Smith erred in instructing the jury on impeachment by prior inconsistent statements, we do not agree that such an error would constitute plain error on the facts of this case.

Defendant, as the basis for his assignment of error concerning the instruction on prior inconsistent statements, alleges that at least two instances of improper impeachment occurred at trial. Defendant concedes that he did not enter an objection on either occasion. First, defendant contends that error occurred when Officer Woolard, a rebuttal witness for the State, testified that defendant had given him false information regarding his home address and place of employment during the investigation of the case. This impeachment was improper, according to defendant, because defendant, during the course of cross-examination, had already admitted lying to Officer Woolard. This rebuttal evidence, maintains defendant, rebutted nothing and was not inconsistent with defendant's actual trial testimony.

Second, defendant contends that error occurred when the prosecutor was permitted, during Officer Woolard's rebuttal testimony, to question him about defendant's out-of-court statements concerning the purchase of a .32-calibre handgun. Transcript excerpts perhaps best reveal the nature of this argu-

ment. To wit, during the prosecutor's cross-examination of defendant, the following exchange occurred:

Q. Now, then, he asked you about a gun, didn't he?

A. Yes, he did.

Q. And you told him, "I owned a gun. I purchased it from some dudes from Greenville at a service station leaving work one night several months ago," didn't you?

A. I didn't tell him what gun.

THE COURT: You didn't tell him what?

A. Ask the question again.

Q. [Mr. McFadyen] You told this man that you bought the gun, the .32 pistol, from some dudes at a service station leaving work at Greenville several nights ago, didn't you?

A. No.

Q. You said, "I bought a watch and a gold chain, all for $125, and the gun," didn't you?

A. No.

Q. What did you tell him?

A. I told him I owned a gun. I said I bought it from some dudes in '76. He asked me what kind it was. I told him I had a .32.

Subsequently, as indicated above, the State presented Officer Woolard as a rebuttal witness. Upon direct examination by the prosecutor, the following exchange occurred:

Q. Now, did there come a time later that day after you had been to the residence of Bernice Meyers on Shine Street, did you ask him about the gun?

A. Yes, sir. . . .

. . . He said, quote, I owned a gun. I purchased it from some dudes in Greenville, North Carolina, at a service station, leaving work one night several months ago. I bought a gold watch and chain all for a hundred and twenty-five dollars.

Defendant contends that this impeachment was improper because Officer Woolard's statements tended to impeach defendant on merely collateral matters. The date of purchase of the handgun and the fact that the gun was purchased as a part of a larger transaction, claims defendant, were of no consequence.

Nonetheless, as a part of his instructions to the jury at the close of all of the evidence, Judge Smith did in fact charge the jury on impeachment by prior inconsistent statements. Specifically, he stated as follows:

> Now, as I remember, there was also some evidence offered that tended to show at some earlier time the defendant in this case made certain statements which you might find are inconsistent with some of the testimony he gave here in the courtroom. But, ladies and gentlemen, you must not consider any earlier statement as evidence of what happened on the date and time in question, because it wasn't made under oath and it wasn't made here in the courtroom.
>
> But if you should find that the defendant made an earlier statement and if you should further find that it is inconsistent with the testimony he gave here in the courtroom, you may consider that fact, together with all other facts and circumstances which you determine might bear upon his truthfulness in deciding whether or not to believe the testimony that he gave here in this courtroom under oath.

Assuming, without deciding, that defendant is correct in his assertion here that the trial judge erred in his instruction to the jury concerning impeachment, we are satisfied that such an error could not fairly be considered plain error. As we stated in Part I above, the burden borne by a defendant in a plain error case such as that before us today is severe. Before deciding that the supposed error in Judge Smith's instructions to the jury constitutes plain error, we must be convinced that but for the error, the trial jury probably would have reached a different verdict. *State v. Walker*, 316 N.C. 33, 340 S.E. 2d 80 (1986). The plain error rule, we have held, applies in only the truly exceptional case. *State v. Joplin*, 318 N.C. 126, 347 S.E. 2d 421 (1986). We are convinced, in great part by the similarities between *Odom* and the case at bar discussed in Part I above, that this is simply not such a case. Accordingly, this second assignment of error is hereby overruled.

In conclusion, having carefully reviewed the record and each of defendant's assignments of error, we find that defendant received a fair trial, free of reversible error. Accordingly, we leave undisturbed defendant's conviction of first-degree murder and the accompanying sentence of life imprisonment.

No error.

STATE OF NORTH CAROLINA v. JOSEPH MARIO TARANTINO

No. 30PA87

(Filed 2 June 1988)

Searches and Seizures § 25— marijuana growing in building—deputy peering through cracks in wall—no probable cause for search warrant

The decision of the U. S. Supreme Court in *U. S. v. Dunn*, 480 U.S. ---, does not require a reversal of the trial court's decision to grant defendant's motion to suppress evidence taken from his building where a deputy received a tip from an unreliable confidential informant that marijuana was growing in an old store building which was built into a hillside, the deputy went to the store at approximately 11:00 p.m. without a warrant, knocked on the front door, then climbed a hill to the back of the building and, using a flashlight, entered an open porch and knocked on one of the inside doors, searched the back wall until he found small cracks in the wall, illuminated a small part of the interior by maneuvering his body and his flashlight and observed marijuana plants, and then obtained a search warrant. The building's padlocked front door, nailed back doors, and boarded windows indicate that defendant had a subjective expectation of privacy in his building's interior, and this expectation was not unreasonable even though there were small cracks between the boards in the building's back wall.

Justice MITCHELL dissenting.

Justices MEYER and WEBB join in this dissenting opinion.

ON discretionary review of a decision of the Court of Appeals, 86 N.C. App. 441, 358 S.E. 2d 131 (1987), affirming an order entered by *Gray, J.*, presiding at the 7 April 1986 Mixed Session of Superior Court, AVERY County, granting defendant's motion to suppress evidence seized by a law enforcement officer from a building defendant owned. Heard in the Supreme Court 11 February 1988.

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

Beskind and Rudolf, P.A., by Thomas K. Maher, for defendant appellee.

EXUM, Chief Justice.

The sole issue this case presents is whether, in light of the United States Supreme Court's decision in *Dunn v. United States*, 480 U.S. ---, 94 L.Ed. 2d 326 (1987), the Court of Appeals correctly upheld the trial court's decision to grant defendant's motion to suppress evidence seized from his building because the information furnishing probable cause for the search warrant was obtained in violation of the Fourth Amendment of the United States Constitution. We answer yes, and affirm the Court of Appeals.

I.

On 10 April 1986 Judge Gray conducted a hearing on defendant's motion to suppress evidence seized from a building he owned. After the hearing, he made findings of fact to which neither the state nor defendant except. He found that on 30 August 1985 B. R. Baker, Jr., a detective in the Avery County Sheriff's Department, received a telephone call from a confidential informant who said he had seen marijuana plants growing on the second floor of the old "Aldridge Store Building." The caller informed Detective Baker that the plants could be observed by looking through cracks in the building's back wall. Detective Baker concluded he lacked probable cause to obtain a search warrant because he knew the caller to be unreliable. At approximately 11 p.m. he went to the building, without a warrant, to investigate the caller's claims.

The building which Detective Baker investigated was a two-story frame structure built into a hillside. It was in poor repair when he made his inspection. The windows were boarded from the inside, the solid-wood front door was padlocked, and the back doors—one solid and the other with a paneless window covered by wood—were nailed shut. The back doors opened directly to the building's second floor from a porch which had a large open entrance. At the bottom of the wall between the porch doors were several cracks where the wooden boards did not join com-

pletely. These cracks were no more than one-quarter of an inch wide.

Detective Baker began his investigation by knocking on the front door. He then climbed the hill to the second-story porch, using a flashlight to guide his way along a little-used path. He entered the porch and knocked on one of the doors inside. Receiving no answer, he searched the back wall until he found cracks in the wall between the doors. By maneuvering his body and shining his flashlight through the cracks, Detective Baker illuminated a small part of the building's interior and saw marijuana plants. He returned to the Avery County Sheriff's Department, executed an affidavit, obtained a search warrant from a magistrate, returned to the premises and seized the marijuana.

After making these findings, Judge Gray concluded, as a matter of law, that Detective Baker's first inspection of the building constituted a warrantless search in violation of the Fourth Amendment. He determined defendant had a reasonable expectation of privacy in the premises searched. He further adjudged that the search fell within no exception to the Fourth Amendment's requirement of a valid warrant. On the basis of his factual findings and legal conclusions, Judge Gray granted defendant's motion to suppress.

The Court of Appeals affirmed Judge Gray's decision. *State v. Tarantino*, 83 N.C. App. 473, 350 S.E. 2d 864 (1986). Subsequently, the United States Supreme Court decided *United States v. Dunn*, 480 U.S. ---, 94 L.Ed. 2d 326. The state petitioned for discretionary review in light of the *Dunn* decision. We granted the state's petition and remanded the case to the Court of Appeals for further consideration in light of *Dunn*. The Court of Appeals reaffirmed its previous decision, holding that the facts in the present case and those in *Dunn* are sufficiently distinguishable such that *Dunn*'s holding does not require a different result. *State v. Tarantino*, 86 N.C. App. at 442, 358 S.E. 2d at 132.

II.

In *Dunn* the United States Supreme Court held that Drug Administration Enforcement agents did not violate the Fourth Amendment when they peered into the "essentially open front" of the defendant's barn and saw what they thought to be a drug lab-

oratory. *United States v. Dunn*, 480 U.S. at ---, 94 L.Ed. 2d at 334. The agents made their observations at night after crossing several fences encircling the barn, which was located about 60 yards from the defendant's ranch house residence. A locked wooden fence with a waist-high gate barred the agents from entering the barn. The barn's front section was open, covered only by netting material stretching from the barn's ceiling to the gate's top. By standing next to the netting and shining flashlights inside the barn, the agents acquired sufficient information to obtain a search warrant. Pursuant to the warrant, the agents seized chemicals and equipment and arrested the defendant. *Id.* at ---, 94 L.Ed. 2d at 332-34.

The primary issue confronting the Court in *Dunn*, as the Court of Appeals noted in its opinion below, was whether the agents' search violated the defendant's Fourth Amendment rights because the barn lay within the curtilage of his home. The Court held the barn did not lie within the house's curtilage, applying a four-part test drawn from prior cases. *Id.* at ---, 94 L.Ed. 2d at 334. However one might view the Court's determination of the curtilage question in *Dunn*, it has no bearing in the instant case, for no curtilage question is here presented.

The second issue addressed in *Dunn* was whether the defendant possessed a reasonable expectation of privacy, independent from his home's curtilage, in the barn and its contents. The Court assumed, for argument's sake, that the barn itself could not be entered or its contents seized without a warrant, but went on to hold that the officers properly peered into its interior over the front gate. It reasoned, on the basis of its resolution of the curtilage question, that the officers lawfully approached and stood next to the barn because the land surrounding it was a constitutionally unprotected "open field." From this vantage point the officers rightfully used flashlights to peer through the netting material covering the barn's opening. The Court held "the officers' use of the beam of a flashlight, directed through the essentially open front of [the defendant's] barn, did not transform their observations into an unreasonable search within the meaning of the Fourth Amendment." *United States v. Dunn*, 480 U.S. at ---, 94 L.Ed. 2d at 337. In so holding the Court drew support from its recent decision in *California v. Ciraolo* in which it stated "the Fourth Amendment 'has never been extended to require law en-

forcement officers to shield their eyes when passing by a home on a public thoroughfare'." *Id.* at ---, 94 L.Ed. 2d at 337 (quoting *California v. Ciraolo*, 476 U.S. 207, 213, 90 L.Ed. 2d 210, 216 (1986)).

The *Dunn* decision, as the Court of Appeals correctly noted, does not alter the rule that the Fourth Amendment applies if a person exhibits a subjective expectation of privacy in the object of the challenged search, and that expectation is one which society is prepared to recognize as reasonable. *O'Conner v. Ortega*, 480 U.S. ---, ---, 90 L.Ed. 2d 714, 722 (1987); *California v. Ciraolo*, 476 U.S. at 211, 90 L.Ed. 2d at 215; *Smith v. Maryland*, 442 U.S. 735, 740, 61 L.Ed. 2d 220, 226-27 (1979). The Fourth Amendment applies to non-residential buildings to the extent they are not exposed to the public. *Marshall v. Barlow's Inc.*, 436 U.S. 307, 311, 56 L.Ed. 2d 305, 310 (1978); *United States v. Katz*, 389 U.S. 347, 351-52, 19 L.Ed. 2d 576, 582 (1967).

Consistent with this traditional approach, the Court in *Dunn* did not end its analysis by concluding the officers were in an open field when they made their observations; rather, it proceeded to examine the nature of the opening through which they made their observations to determine if this negated any reasonable expectation of privacy in the building's interior. Because the barn's interior was exposed to the public from an unprotected vantage point, the Court held that the officers' inspection was not a Fourth Amendment violation. *United States v. Dunn*, 480 U.S. at ---, 94 L.Ed. 2d at 337.

Applying traditional Fourth Amendment analysis to the instant case, we agree with the Court of Appeals that the trial court correctly concluded defendant had a reasonable expectation of privacy in the building which Detective Baker inspected. The building's padlocked front door, nailed back doors, and boarded windows indicate that defendant had a subjective expectation of privacy in his building's interior. This expectation was not unreasonable even though there were small cracks between the boards in the building's back wall. The presence of tiny cracks near the floor on the interior wall of a second-floor porch is not the kind of exposure which serves to eliminate a reasonable expectation of privacy. To hold otherwise would result in an unfairly exacting standard. It would require owners of non-residential

buildings who want to enjoy their Fourth Amendment rights to maintain their structures almost as airtight containers. The Supreme Court has never imposed such a standard, and we decline to do so in this case.

Nothing in the Supreme Court's *Dunn* decision suggests that an expectation of privacy is eliminated by quarter-inch cracks in the back wall of an otherwise sealed building. The inquiry in *Dunn* centered on the Fourth Amendment's requirements when law enforcement officials are faced with an open barn front obstructed only with see-through netting. The barn's interior was fully exposed to anyone standing next to the netting. *United States v. Dunn*, 480 U.S. at ---, 94 L.Ed. 2d at 338 (Brennan, J., dissenting). Under these circumstances the Court declared it would not require the officers to "shield their eyes" from that which was exposed to public view. *Id.* at ---, 94 L.Ed. 2d at 337.

By contrast, in the instant case, Detective Baker confronted a nearly solid wall when he entered defendant's porch. Boarded windows and nailed doors prohibited observation of the inside from all but the most rigorous scrutiny. To make his observations, Detective Baker had to bend and peer with a flashlight through quarter-inch cracks near the floor. Nothing indicates, as in *Dunn*, that had Detective Baker conducted his investigation during the day he could have viewed the building's interior without making the same searching inquiry. These facts distinguish this case from *Dunn* in a constitutionally significant way. Far from demanding Detective Baker to avert his eyes to avoid viewing the building's interior, the cracks near the porch floor required him to make a probing examination in order to see inside. Under these circumstances defendant's reasonable expectation of privacy remained intact.*

The reasonableness of defendant's expectation of privacy was not eliminated because the building's exterior evidenced a degree of neglect when Detective Baker made his observations. The Fourth Amendment's application to a non-residential building's interior is not diminished because its exterior reflects poor main-

* Defendant argues that it was unlawful for Detective Baker to enter the porch without a warrant. We decline to assess this contention's merit. Assuming, *arguendo*, that Detective Baker rightfully entered the porch, his subsequent action of peering into the building's interior was an impermissible warrantless search.

tenance. *See United States v. Burnette*, 648 F. 2d 1038, 1047 (9th Cir. 1983). On the contrary, the Fourth Amendment applies fully so long as the interior is not exposed to the public. *Marshall v. Barlow's Inc.*, 436 U.S. at 311, 56 L.Ed. 2d at 310; *United States v. Katz*, 389 U.S. at 351-52, 19 L.Ed. 2d at 582. Because defendant did not expose the interior of his building to the public, the Fourth Amendment applied with full force.

Our decision is consistent with those of other jurisdictions. In *Bradshaw v. United States*, the Fourth Circuit held that the defendant's reasonable expectation of privacy in his truck's interior was not eliminated by the presence of a crack where the back doors did not fit snugly. 490 F. 2d 1097, 1101 (4th Cir.), *cert. denied*, 419 U.S. 895, 42 L.Ed. 2d 139 (1974). The court concluded that police officers violated the Fourth Amendment when they looked through the crack without a warrant, saw moonshine whiskey jugs, and seized them. The court acknowledged that the officers had a right to approach and stand next to the truck, but it concluded they went beyond lawful investigation when peering through the small space. *Id.* In *State v. Kaaheena*, the Hawaii Supreme Court concluded the defendant's Fourth Amendment rights were violated when the police stood on a crate and looked through a one-inch hole in the drapes and blinds of a building which housed a "commercial establishment and some rental apartments." 575 P. 2d 462, 466 (1978). Although the police made their observations from a public vantage point, the court held that the search was impermissible because the defendant maintained his reasonable expectation of privacy in the building's interior. *Id.* at 467; *see also Kroehler v. Scott*, 391 F. Supp. 1114 (E.D. Pa. 1975) (violation of Fourth Amendment for officers to peer through small ceiling vents); *Lorenzana v. Superior Court of Los Angeles County*, 9 Cal. 3d 626, 511 P. 2d 33, 108 Cal. Rptr. 585 (1973) (officers violated Fourth Amendment by peering through drawn curtains); *People v. Triggs*, 8 Cal. 3d 884, 506 P. 2d 232, 106 Cal. Rptr. 408 (1973) (illegal search where officers in maintenance access area peered through vents); *People v. Lovelace*, 172 Cal. Rptr. 65, 116 Cal. App. 3d 541 (1981) (reasonable expectation of privacy not eliminated by knotholes and cracks in six foot high wooden fence); *State v. Biggar*, 716 P. 2d 493 (1986) (reasonable expectation of privacy not eliminated by crack one-half to one inch wide where toilet stall door did not close properly).

In conclusion, we agree with the Court of Appeals that the decision by the Supreme Court in *United States v. Dunn* does not require a reversal of the trial court's decision to grant defendant's motion to suppress evidence taken from his building. Both the trial court and the Court of Appeals reached the right result on the search issue for the right reasons. The decision below, therefore, is

Affirmed.

Justice MITCHELL dissenting.

The defendant has at no time contended in the present case that any step in either the search for or the seizure of his marijuana violated any provision of the Constitution of North Carolina or any statute. Instead, the defendant raises only the federal question of whether the trial court was required to suppress the evidence concerning the marijuana seized from his building, because probable cause for the search warrant was obtained in violation of the Fourth Amendment to the Constitution of the United States.

The majority relies upon the decision of the Supreme Court of the United States in *Dunn v. United States*, 480 U.S. ---, 94 L.Ed. 2d 326 (1987) in resolving the Fourth Amendment question presented here. I am convinced that the principles stated and applied in *Dunn* do not require exclusion of evidence concerning the marijuana seized in the present case. Therefore, I dissent.

I begin by assuming in the present case, as the Supreme Court assumed in *Dunn*, that the building in which the contraband was located was protected by the Fourth Amendment. 480 U.S. at ---, 94 L.Ed. 2d at 337. However, I believe that any expectation of privacy the defendant may have had in the present case was much less "reasonable" than that of the defendant in *Dunn*.

It is true that in *Dunn*, the Supreme Court held *for purposes of Fourth Amendment search and seizure analysis* that the barn lay outside the curtilage of the defendant's home. *But cf. State v. Frizzelle*, 243 N.C. 49, 51, 80 S.E. 2d 725, 726 (1955) (applying State common law); *State v. Browning*, 28 N.C. App. 376, 379, 221 S.E. 2d 375, 377 (1976) (same). However, the evidence in *Dunn* revealed that the barn was a part of the same small Texas ranch

on which the defendant's residence was located and was only sixty yards from the residence. The residence and barn

> are located in a clearing surrounded by woods, one-half mile from a road, down a chained, locked driveway. Neither the farmhouse nor its outbuildings are visible from the public road or from the fence that encircles the entire property. Once inside this perimeter fence, it is necessary to cross at least one more "substantial" fence before approaching Dunn's farmhouse or either of his two barns . . . .

United States v. Dunn, 480 U.S. at ---, 94 L.Ed. 2d at 338 (Brennan, J., dissenting). The front of the barn involved in *Dunn* was enclosed by a wooden fence. The back and sides of the barn

> "were composed of brick, metal siding, and large metal sliding doors and were completely enclosed. The front of the barn was partially composed of a wooden wall with windows. The remainder was enclosed by waist-high wood slatting and wooden gates. At the time of [the] agent['s] visits . . ., the top half of the front of the barn was covered by a fishnet type material from the ceiling down to the top of the locked wooden gates. To see inside the barn it was necessary to stand immediately next to the netting [under the barn's overhang]. From as little as a few feet distant, visibility into the barn was obscured by the netting and slatting." 766 F. 2d 880, 883 (CA5 1985).

Id.

Since the barn and adjacent barnyard in *Dunn* were held to be outside the curtilage, the Supreme Court concluded that the officers had observed the interior of the barn from an open field not protected by the Fourth Amendment. Although the officers in *Dunn* could not see inside the barn—assumed to be protected by the Fourth Amendment—until they went under the eaves and stood immediately next to the netting used to cover the only open portion, the Supreme Court concluded that no unreasonable search was involved.

The Supreme Court has held that:

> [T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own

> home or office, is not a subject of Fourth Amendment protection . . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

Katz v. United States, 389 U.S. 347, 351-52, 19 L.Ed. 2d 576, 582 (1967). On the facts of *Dunn*, the Supreme Court indicated that the defendant had not sufficiently sought to preserve his privacy interest in his barn and the immediately adjacent area because he "did little to protect the barn area from observation by those standing in the open fields." *United States v. Dunn*, 480 U.S. at ---, 94 L.Ed. 2d at 336.

Any expectation of privacy the defendant in the present case may have had in the closed country-store building was, by any objective test, much less "reasonable" than the defendant's expectation of privacy in *Dunn*. In *Dunn* the barn was only sixty yards from the defendant's residence. The closed country-store in the present case was not near any dwelling house and was the only structure on the property. In *Dunn* the defendant took extensive steps to ensure his privacy by blocking his driveway with a chain and lock located approximately one-half mile from the barn, fencing the perimeter of his property, fencing the barn itself, and shielding the only open part of the barn with a locked gate and netting material. The defendant in the present case erected no barriers on his property, but simply placed a large quantity of marijuana in the old empty store and closed the door. In *Dunn* the officers were required to walk a great distance from the road and climb perimeter and interior fences before they could position themselves under the eaves of the barn and close enough to see through the netting material into the interior. Here, the investigating officer merely had to walk a relatively short distance up an unobstructed path and step onto the essentially open back porch of the old store building. In order to see into the building, he had merely to stoop or bend at the waist and look through one of the open spots in the rear of the building.

I am convinced that Dunn did more to protect his barn from observation than was done by the defendant here, and Dunn's expectation of privacy was far more reasonable than any expectation of privacy this defendant may have had. I certainly am convinced that any distinction between this case and *Dunn* on the

ground that the officer here had to bend at the waist to see through an open slit in the wall, while in *Dunn* the officers had to go under the eaves of the barn and position themselves close enough to peek through Dunn's netting material, could not be reasonably viewed as a distinction favorable to this defendant. If we are to follow *Dunn* in resolving the purely federal question presented, I believe we must hold that the information obtained by looking through the back of the building was not obtained in violation of the Fourth Amendment, and it properly provided probable cause for the issuance of the search warrant. Accordingly, I dissent.

Justices MEYER and WEBB join in this dissenting opinion.

MARTHA G. ARMSTRONG v. IVAN O. ARMSTRONG

No. 235PA87

(Filed 2 June 1988)

1. **Divorce and Alimony § 30— equitable distribution—military pension—no constitutional violation**

Defendant in an equitable distribution action lacked standing to argue that Art. X, § 4 of the North Carolina Constitution violates the federally protected rights of married men to equal protection and due process in that property acquired by married men can be subject to equitable distribution while property acquired by women cannot. There was no indication in this case that any property acquired by the plaintiff-wife during the marriage was excluded from equitable distribution. N.C.G.S. § 50-20, N.C.G.S. § 50-21.

2. **Divorce and Alimony § 30— equitable distribution—military pension—not retroactive taking or taking without compensation**

A defendant in an equitable distribution action was not denied due process and equal protection in that subjecting his military pension to equitable distribution amounted to a retroactive taking or a taking without compensation. Defendant's acquisition of property during marriage but prior to the effective date of the Equitable Distribution Act does not mean that he also acquired a vested right in the law governing the disposition of property upon divorce. N.C.G.S. § 50-20, N.C.G.S. § 50-21, Art. I, § 19 of the North Carolina Constitution, Amendment XIV of the United States Constitution.

3. **Divorce and Alimony § 30— equitable distribution—written findings of fact required in every case**

The trial court erred in an equitable distribution action by not making findings of fact to support its equal division of the marital portion of defend-

ant's military retirement pay because written findings of fact are required in every case in which a distribution of marital properties is ordered under the Equitable Distribution Act. N.C.G.S. § 50-20.

4. Divorce and Alimony § 30— equitable distribution—military pension—findings insufficient

The trial court did not make sufficient findings of fact in an equitable distribution action involving a military pension where evidence was presented concerning the relative incomes of the parties, their health, and other matters tending to show that an equal division would be inequitable. Once such evidence was introduced, it became necessary for the trial court to consider the factors set out in N.C.G.S. § 50-20(c) in determining an equitable property division and to make findings sufficient to address the statutory factors and support the division ordered.

ON discretionary review of a decision of the Court of Appeals, 85 N.C. App. 93, 354 S.E. 2d 350 (1987), which affirmed judgment entered by *Martin (James), J.*, on 23 July 1985 in the District Court, ONSLOW County. Heard in the Supreme Court on 10 February 1988.

Merritt & Stroud, by Timothy E. Merritt, for the plaintiff-appellee.

Charles William Kafer, for the defendant-appellant.

MITCHELL, Justice.

The defendant has brought forward several assignments of error and contends that, on the facts of this case, any application of the Equitable Distribution Act affecting his military retirement pension violates his rights to equal protection of the laws and due process, that the trial court failed to make adequate findings of fact when ordering an equal division of part of his pension as marital property, and that such equal division was not supported by the trial court's findings. We will address the defendant's arguments *seriatim*.

The evidence before the trial court tended to show that the plaintiff and defendant were married on 1 February 1951. Four children were born to the marriage. During the marriage, the defendant-husband served in the United States Marine Corps for seventeen years and eleven months. He retired from the Marine Corps on 31 January 1969. As a result of his military service, he receives military pension payments in the net amount of $750.87 per month.

The evidence tended to show that, after the defendant's retirement from the military, the plaintiff and defendant operated a service station for ten years. During that time, neither of them was paid a salary. Money earned from the operation of the service station was reinvested in the business. The evidence also tended to show that the parties later invested in and operated a Hertz Rent-A-Car franchise.

The parties separated on 1 April 1983, and the plaintiff's complaint seeking an absolute divorce and equitable distribution of marital property was filed on 14 May 1984. The defendant filed an answer and counterclaim.

The plaintiff testified that she was employed by the rental car agency and had a net monthly income of approximately $1,100. She had a total of $1,635 in her checking and savings accounts. The plaintiff testified that she also had certain debts on which she made monthly payments.

The defendant testified that he was unemployed. He also testified that his only source of income was his military retirement pay.

Evidence tended to show that both of the parties suffered from medical disorders. They stipulated that the defendant suffered from paranoid schizophrenia at the time of the trial. He had been hospitalized for his psychological disorders in 1978. A psychologist testified that it was questionable whether the defendant would be able to maintain full-time employment. The defendant also has a hearing disability necessitating the use of hearing aids in both ears, and his hand was injured at the time of trial.

The evidence also tended to show that the plaintiff suffered from medical problems. She had undergone bladder surgery three times, the last time being in 1979 or 1980. She had been advised that she might need additional surgery which would result in her wearing an external bladder device. The plaintiff testified that she suffered from a rare eye disorder which had caused her to lose her peripheral vision. She is required to have her eyes examined every three months.

On 14 November 1985, the trial court entered judgment granting an absolute divorce and ordering an equal division of all marital property. The trial court valued the parties' marital prop-

erty at $54,511.07 and concluded that it should be divided equally. The defendant's military retirement benefits were not included in this valuation. By separate findings and conclusions, the trial court determined that the defendant's military pension was marital property subject to equitable distribution. Pursuant to the parties' stipulation that the defendant's rights in eighty-seven percent of the military pension accrued during the marriage, the trial court awarded the plaintiff one-half of that amount, or forty-three and one-half percent of the monthly retirement benefits.

The defendant's motion for a new trial, or in the alternative for amendment of the judgment, was denied by the trial court in an order dated 27 February 1986. The defendant appealed to the Court of Appeals, which affirmed the trial court.

[1] The defendant first contends that Article X, section 4 of the Constitution of North Carolina violates the federally protected rights of married men to equal protection and due process. U. S. Const. amend. XIV. He argues that Article X, section 4 prevents property acquired by married women from becoming marital property subject to equitable distribution but does not contain similar protections as to property acquired by married men. The defendant contends that since Article X, section 4 lacks any such reciprocal protection, property acquired by married men can be subject to equitable distribution under the Equitable Distribution Act, N.C.G.S. §§ 50-20 and 50-21, while property acquired by married women cannot.

Article X, section 4 provides in pertinent part:

> The real and personal property of any female in this State acquired before the marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations, or engagements of her husband, and may be devised and bequeathed and conveyed by her, subject to such regulations and limitations as the General Assembly may prescribe. . . .

We find it unnecessary to consider or decide any question relating to either the construction of this section proposed by the defendant or his argument that, so construed, it violates the Four-

teenth Amendment. Instead, we conclude that the defendant does not have standing to raise such issues in the present case.

The essence of the concept of standing is that no person is entitled to assail the constitutionality of a law or act unless it affects that person adversely. *See Grace Baptist Church v. City of Oxford*, 320 N.C. 439, 358 S.E. 2d 372 (1987). Nothing in the record on appeal indicates that Article X, section 4 was applied in the present case. There is no indication that any property acquired by the plaintiff-wife during the marriage was excluded from equitable distribution pursuant to this section or for any other reason. To the contrary, the record clearly shows that Article X, section 4 did not adversely affect the defendant, since all property acquired by both parties during the marriage was determined to be marital property and was subjected to equitable distribution. Since the defendant has failed to show that his property was treated differently than the plaintiff's, he has failed to show that he has been or will be adversely affected by Article X, section 4. Therefore, he lacks standing to raise the issue of whether the section violates the Fourteenth Amendment. This assignment of error is overruled.

[2] The defendant next argues that the Equitable Distribution Act [hereinafter the Act], N.C.G.S. §§ 50-20 and 50-21, as applied by the trial court in the present case, denies him equal protection and due process in violation of the Fourteenth Amendment to the Constitution of the United States and Article I, section 19 of the Constitution of North Carolina. The defendant contends that subjecting his military pension to equitable distribution amounted to a retroactive application of the Act and a taking without compensation. His argument is premised on the facts that the Act did not exist at the time the parties married or at the time his military pension rights accrued. Additionally, the parties were separated before the Act was amended to make military pensions subject to equitable distribution. We conclude that the defendant was not denied any constitutional right by the trial court's application of the Act to all property acquired by the defendant during the marriage but before the separation.

In 1981, our legislature provided a framework for the equitable division of marital property upon divorce by enacting the Equitable Distribution Act, now codified as N.C.G.S. §§ 50-20 and

50-21. *See White v. White*, 312 N.C. 770, 324 S.E. 2d 829 (1985). In the Uniform Services Former Spouses' Protection Act [hereinafter USFSPA], Congress authorized the states, after 25 June 1981, to classify military retirement pay as either marital or separate property and to provide for direct payments to a former spouse who was married to the member for at least ten years while the member performed military service. 10 U.S.C. § 1408(c)(1) (1983). In response to this federal enactment, our legislature amended the Equitable Distribution Act to include within its definition of marital property "all vested pension and retirement rights, including military pensions eligible under the federal . . . [USFSPA]." N.C.G.S. § 50-20(b)(1) (1987). The amendment became effective 1 August 1983. 1985 N.C. Sess. Laws ch. 758, § 5.

By its terms, the Equitable Distribution Act becomes operative only after a husband and wife have separated and a claim for equitable distribution has been filed. N.C.G.S. § 50-21(a) (1987). The Act does not affect ownership of the spouses' property in any way during marriage. Nor does it prevent married persons from owning or disposing of property separately during the marriage, assuming no action seeking equitable distribution is pending. *See id.* With these principles in mind, we find meritless the defendant's claim that his rights to due process and equal protection were violated because the Act was applied retroactively and in a way which took his property without compensation.

Contrary to the defendant's arguments, the fact that he acquired property during marriage but prior to the effective date of the Act does not mean that he also acquired a vested right in the law governing the disposition of property upon divorce which was in effect either at the time the property was acquired or at the time of his marriage. There is no such thing as a vested right in the continuation of an existing law. *See Spencer v. McDowell Motor Co.*, 236 N.C. 239, 246, 72 S.E. 2d 598, 604 (1952); *see also Wood v. J. P. Stevens & Co.*, 297 N.C. 636, 256 S.E. 2d 692 (1979); *Byrd v. Johnson*, 220 N.C. 184, 16 S.E. 2d 843 (1941); 16 Am. Jur. 2d *Constitutional Law* § 675 (1979). Statutes providing for the division of property upon divorce are remedial in nature. The legislature may amend them, at least to the extent they apply to claims brought after the effective date of such amendments, without infringing constitutional principles. *See, e.g., Fournier v. Fournier*, 376 A. 2d 100 (Me. 1977); *In re Marriage of MacDonald*,

104 Wash. 2d 749, 709 P. 2d 1196 (1985). *See generally*, Lawrence J. Golden, *Equitable Distribution of Property*, § 3.03 (1983) [hereinafter Golden].

Based on the laws in effect at the time when the parties married, at the time when the defendant's pension rights accrued, and at the time the parties separated, the defendant may have expected that upon their divorce he would receive his full pension payments. His expectation of a continuance of existing law, however, did not amount to a vested property right. *MacDonald*, 104 Wash. 2d at 750, 709 P. 2d at 1199.

> A vested right, entitled to protection from legislation, must be something more than a *mere expectation* based upon an anticipated continuance of the existing law; it *must have become a title*, legal or equitable, *to the present or future enjoyment of property, a demand, or legal exemption from a demand by another.*

Godfrey v. State, 84 Wash. 2d 959, 963, 530 P. 2d 630, 632 (1975), *quoted in MacDonald*, 104 Wash. 2d at 750, 709 P. 2d at 1199. Therefore, the adoption of the Act and the amendment in question did not affect a vested right entitled to protection from legislation. *See generally Gardner v. Gardner*, 300 N.C. 715, 268 S.E. 2d 468 (1980).

Further, the Act and the amendment were not applied retroactively in the present case. Although the defendant's right to his pension benefits had accrued fully in 1969, prior to the adoption of both the Act and the 1 August 1983 amendment to N.C.G.S. § 50-20 subjecting his pension to equitable distribution, the Act and amendment did not affect his property interests until the plaintiff's claim for equitable distribution was filed on 14 May 1984. N.C.G.S. § 50-21(a) (1987). This claim was filed well after both the Act and the amendment became effective. We do not view this as a retroactive application of the Act or of the amendment. As this action for divorce and equitable distribution was filed after the effective date of both the Act and the amendment thereto, the trial court only applied them prospectively. *See Addison v. Addison*, 62 Cal. 2d 558, 399 P. 2d 897, 43 Cal. Rptr. 97 (1965); *Rothman v. Rothman*, 65 N.J. 219, 320 A. 2d 496 (1974) (in dictum). *See generally* Golden, § 3.03.

Further, we do not believe that the legislature intended the Act to apply solely to property acquired on or after the effective date of the Act or its amendments. Were this construction adopted, the full effect of the Act would not be felt for at least a generation. *See generally* Golden, § 3.03. We conclude that there is no merit to the defendant's claim that he was denied due process and equal protection by the trial court's application of the Act and the amendment.

[3] By his last assignment of error, the defendant contends that the trial court's findings of fact in the present case did not support its equal division of the marital portion of his military retirement pay. We agree.

Our Court of Appeals has taken the position that under the Act, findings of fact are necessary only when the trial court concludes that an equal division of marital property is inequitable. *E.g., Loeb v. Loeb*, 72 N.C. App. 205, 324 S.E. 2d 33, *cert. denied*, 313 N.C. 508, 329 S.E. 2d 393 (1985). However, N.C.G.S. § 50-20(j), which controls, provides the following:

> In *any* order for the distribution of property made pursuant to this section, the court *shall* make written findings of fact that support the determination that marital property has been equitably divided.

(Emphasis added.) The plain language of the statute mandates that written findings of fact be made in *any* order for the equitable distribution of marital property made pursuant to N.C.G.S. § 50-20.

Where, as here, the terms of a statute are clear and unambiguous, there is no room for construction and courts must apply the terms according to their literal meaning. Therefore, we conclude that written findings of fact are required in every case in which a distribution of marital property is ordered under the Equitable Distribution Act. We expressly disapprove cases which have held that a trial court need not make findings of fact when marital property is equally divided. *E.g., Morris v. Morris*, 90 N.C. App. 94, 367 S.E. 2d 408 (1988); *Beroth v. Beroth*, 87 N.C. App. 93, 359 S.E. 2d 512, *disc. rev. denied*, 321 N.C. 296, 362 S.E. 2d 778 (1987); *Spence v. Jones*, 83 N.C. App. 8, 348 S.E. 2d 819 (1986); *Andrews v. Andrews*, 79 N.C. App. 409, 338 S.E. 2d

809 (1986); *Weaver v. Weaver*, 72 N.C. App. 228, 324 S.E. 2d 915 (1985); *Loeb v. Loeb*, 72 N.C. App. 205, 324 S.E. 2d 33 (1985).

[4] We turn now to the defendant's challenge to the sufficiency of the findings in the present case to support the equal division of the marital portion of the defendant's military retirement pay. In *White v. White*, 312 N.C. 770, 324 S.E. 2d 829 (1985), this Court concluded that an equal division of marital property is mandatory unless the trial court determines that an equal division would be inequitable. *Id.* at 776, 324 S.E. 2d at 832-33. The party seeking an unequal division bears the burden of showing, by a preponderance of evidence, that an equal division would not be equitable. *Id.* at 776, 324 S.E. 2d at 832. "Therefore, if no evidence is admitted tending to show that an equal division would be inequitable, the trial court *must* divide the marital property equally." *Id.* at 776, 324 S.E. 2d at 832-33. When, however, evidence is presented from which a reasonable finder of fact could determine that an equal division would be inequitable, the trial court is required to consider the factors set forth in N.C.G.S. § 50-20(c), "but guided always by the public policy expressed . . . [in the Act] favoring an equal division." *Id.* at 777, 324 S.E. 2d at 833. The trial court then must make findings and conclusions which support its division of marital property.

In the case at bar, the trial court made the following findings of fact and conclusions of law relevant to the division of the defendant's military pension:

> 8. That in addition to the above items of marital property, the parties also owned other items of marital property which are subject to distribution, to wit: a United States Marine Corps pension, checking and savings accounts, and a silver collection.
>
> 9. That the parties were married while the defendant served in the United States Marine Corps such as to entitle the plaintiff to receive 43.5% of the defendant's retirement pay, that is, $326.63 per month.
>
> . . . .

CONCLUSIONS OF LAW

. . . .

4. That after consideration of the evidence presented and the factors enumerated in North Carolina General Statute 50-20, the Court concludes that an equal division of marital property is equitable.

. . . .

NOW, THEREFORE, IT IS ORDERED, ADJUDGED and DECREED as follows:

. . . .

6. That the defendant shall pay or cause to be paid to the plaintiff the sum of $326.63 per month as her distributive share of the United States Marine Corps pension . . . .

After reviewing the findings of fact, we are unable to determine whether the trial court properly exercised its discretion by equally dividing the marital property portion of the defendant's military pension. Evidence presented concerning the relative incomes of the parties, their health and other matters tended to show that an equal division would be inequitable. Once such evidence was introduced, it became necessary for the trial court to consider factors set out in N.C.G.S. § 50-20(c) in determining an equitable property division. Although the trial court was not required to recite in detail the evidence considered in determining what division of the property would be equitable, it was required to make findings sufficient to address the statutory factors and support the division ordered.

"The purpose for the requirement of specific findings of fact that support the court's conclusion of law is to permit the appellate court on review 'to determine from the record whether the judgment—and the legal conclusions that underlie it—represent a correct application of the law.' " *Patton v. Patton*, 318 N.C. 404, 406, 348 S.E. 2d 593, 595 (1986) (quoting *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E. 2d 185, 189 (1980)). When the findings and conclusions are inadequate, appellate review is effectively precluded. We do not imply that a trial court must make exhaustive findings regarding the evidence presented at the hearing; rather "the trial court should be guided by the same rules applicable to

actions for alimony *pendente lite*, *Peoples v. Peoples*, 10 N.C. App. 402, 179 S.E. 2d 138 (1971), and to actions for child support, *Plott v. Plott*, 313 N.C. 63, 326 S.E. 2d 863 (1985), thus limiting the findings of fact to ultimate, rather than evidentiary facts." *Patton v. Patton*, 318 N.C. at 406-07, 348 S.E. 2d at 595.

In the case at bar, the trial court made sufficient findings as to the value of all of the marital property, including the military pension. However, it did not make findings as to the parties' incomes, liabilities or health. Findings as to these and other factors must be made and considered, when evidence concerning them is introduced, in determining whether marital property has been equitably divided. N.C.G.S. § 50-20(c)(1) (1987). Although the trial court specifically stated in its conclusions that it had considered "evidence presented and the factors enumerated in North Carolina General Statute 50-20" in ordering an equal division, this conclusion, even taken in conjunction with the trial court's findings of fact, does not provide this Court with the information necessary for appellate review. Since the judgment appealed from is not supported by sufficient findings of fact to permit appellate review, the decision of the Court of Appeals affirming the judgment is reversed. This case is remanded to the Court of Appeals for further remand to the District Court, Onslow County, for proceedings consistent with this decision.

Reversed and remanded.

STATE OF NORTH CAROLINA v. FREDERICK JONES

No. 361A87

(Filed 2 June 1988)

Criminal Law § 60.3— fingerprint evidence—opinion of nontestifying expert admissible

The trial court properly admitted a fingerprint identification opinion rendered by an expert who did not testify at trial for the purpose of revealing one basis underlying a testifying expert's opinion given under N.C.G.S. § 8C-1, Rule 703.

Justice WEBB dissenting.

State v. Jones

APPEAL of right by defendant pursuant to N.C.G.S. § 7A-27(a) (1986) from a judgment imposing a sentence of life imprisonment entered by *Allen (J. B., Jr.), J.*, upon defendant's conviction of first degree burglary at the 6 March 1987 Criminal Session of Superior Court, JOHNSTON County. On 7 December 1987 we allowed defendant's petition to bypass the Court of Appeals on his appeal from a conviction of second degree rape for which he received a sentence of twelve years to run consecutively to the life sentence. Heard in the Supreme Court 11 April 1988.

Lacy H. Thornburg, Attorney General, by G. Patrick Murphy, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Daniel R. Pollitt, Assistant Appellate Defender, for defendant-appellant.

WHICHARD, Justice.

Defendant was convicted of the second degree rape of an eighty-six-year-old woman and the first degree burglary of her home. Upon finding factors in aggravation of punishment, the trial court imposed a life sentence for the burglary. As punishment for the rape, it sentenced defendant to a term of twelve years to run consecutively to his life sentence.

This appeal concerns the admissibility of a fingerprint identification opinion rendered by an expert who did not testify at trial. We hold that the trial court properly admitted the out-of-court expert's opinion for the purpose of revealing one basis underlying a testifying expert's opinion given under N.C.G.S. § 8C-1, Rule 703.

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

The victim, an eighty-six-year-old widow, lived alone. Around 4:00 a.m. on 9 September 1986, she awoke to find a man standing beside her bed. Proclaiming "I'm going to get what I came for," the intruder crawled onto the victim's bed and began to beat and to choke her. He also smothered her with her bed pillows. When she turned her head toward him, he would twist her head back and threaten to kill her. The intruder forced the victim to have non-consensual sexual intercourse. He then left. After washing herself, the victim called her daughter and the police.

The daughter and her husband transported the victim to the hospital. A nurse, who participated in the examination of the victim, described her as "severely beaten." She observed that the victim had bruises on her wrist, her left eye was swollen shut and blackened, her buttocks were bruised and scratched, and her vagina was torn and bleeding.

Smithfield policeman Steve Knox arrived at approximately 4:25 a.m. Knox discovered that the bottom right pane was missing from the victim's bathroom window. While examining the exterior of the house, he observed a cinder block lying under the bathroom window. About twenty feet from the house, he found an eight-by-ten glass pane that had been broken and taped back together. Although dew had fallen that night, the side of the pane facing up was dry, while the bottom was damp.

The victim could not positively identify the intruder. At trial, she described him as a black male, wearing shorts, who had an odor of alcohol about his person.

S.B.I. Special Agent Ricky Navarro testified as an expert in fingerprint identification. He had identified one latent print found on the windowpane as belonging to defendant. He based his opinion on ten points of identification and on the verification of another fingerprint expert.

S.B.I. Special Agent Troy Hamlin, an expert in forensic hair examination, testified that he had examined a hair found on the bath cloth used by the victim to clean herself after the assault. Hamlin determined that the hair did not belong to the victim. He found this hair to be similar to defendant's hair. However, due to the limited nature of the sample, he could not conclude that the hair was defendant's.

S.B.I. Special Agent David Spittle, an expert in forensic serology, testified that he tested defendant's blood and that defendant is a Type-B secretor. Spittle testified that semen found on the victim's nightgown and vagina was produced by a Type-B secretor.

Defendant presented the following pertinent evidence:

Defendant denied committing the assault. He had lived across from the victim for several years and had frequently used a path

running through the victim's yard to walk to the store. Walt Sanders owns property adjoining the victim's home. A stack of building materials lies beside a storage shack on Sanders' property. A couple of months prior to the incident, defendant helped Sanders move a disabled truck from the area near the storage shack. In clearing a path for the truck, defendant handled several window frames that lay in the stack of building materials.

Sanders testified that defendant helped him move the truck and that there were window frames stacked beside the storage shed. Sanders did not know whether defendant had handled the frames.

Defendant contends solely that the trial court erred by admitting hearsay evidence that an unidentified S.B.I. expert independently examined, compared, and positively identified his fingerprint, and verified Agent Navarro's identification. After qualifying as a fingerprint expert, Navarro testified that he compared defendant's fingerprints to twelve latent fingerprint "lifts" found at the victim's home. He concluded that defendant's right little finger matched one of the lifts taken from the windowpane found in the victim's yard. He testified that he found ten "points of identification" on the latent lift that corresponded with the defendant's fingerprint.

The district attorney and Navarro then engaged in the following exchange:

> Q. Now do you have quality control at your laboratory in the fingerprint identification section?
>
> A. Yes, sir, we do.
>
> Q. Would you explain to the jury what your quality control consists of?
>
> A. Once you receive a case into the latent evidence section and you have examined or conducted the type of examination requested by the department, if an identification is effected, this identification, the report is written, a handwritten report is made. This will be taken to another latent examiner in that section who has qualified in court as an expert and your examination and your comparison and identification has to be verified and initialed on the report before the report can be typed and mailed out.

MR. SHAW: Object and move to strike.

COURT: Overruled.

A. In this particular case my identification was verified by another latent examiner in my section.

MR. SHAW: Objection and move to strike.

COURT: Overruled, motion denied.

Defendant challenges the admissibility of Navarro's statements that his identification was verified by another latent examiner in his section of the lab. He asserts that this testimony was hearsay offered as substantive evidence to prove the truth of the out-of-court expert's opinion. The State responds that this testimony was properly admitted under N.C.G.S. § 8C-1, Rule 703 to reveal a basis of Navarro's expert opinion. We agree.

The admissibility of an expert opinion based on an out-of-court communication is now governed by Rule 703. This rule provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

N.C.G.S. § 8C-1, Rule 703 (1986).

Our Court of Appeals has interpreted this rule to permit an expert witness to rely on an out-of-court communication as a basis for an opinion and to relate the content of that communication to the jury. *See In re Wheeler*, 87 N.C. App. 189, 360 S.E. 2d 458 (1987) (in giving opinion on whether child would be good candidate for adoption, expert could rely on information supplied by adoption preparation home where child had resided); *Haponski v. Constructor's Inc.*, 87 N.C. App. 95, 360 S.E. 2d 109 (1987) (in answering hypothetical question, expert medical witness could properly base opinion on notes made by another physician during treatment of plaintiff).

This Court also has held that Rule 703 permits an expert witness to base an opinion on the out-of-court opinion of an expert

who does not testify. *See State v. Allen*, 322 N.C. 176, 184, 367 S.E. 2d 626, 630 (1988); *State v. Smith*, 315 N.C. 76, 337 S.E. 2d 833 (1985).

In *Allen*, a physician testified concerning the defendant's capacity voluntarily to waive her constitutional rights. As part of the basis for his opinion, he consulted a psychiatric evaluation prepared by a physician at Dorothea Dix Hospital. We held that the Dix report was properly admitted to show part of the underlying basis of the testifying physician's opinion. *State v. Allen*, 322 N.C. at 184-85, 367 S.E. 2d at 629-30.

In *Smith*, the State's medical expert in part based his opinion that the victims had been subjected to sexual intercourse on his review of another physician's medical reports and conversations with two other physicians. We held that these bases met the reasonable reliance standard of Rule 703 and found no error in the admission of the opinion. *State v. Smith*, 315 N.C. at 100-01, 337 S.E. 2d at 849.

Thus, under Rule 703, as interpreted in *Allen* and *Smith*, a testifying expert can reasonably rely on the opinion of an out-of-court expert and can testify to the content of that opinion.

This interpretation of Rule 703 accords with our pre-Rules case law. Prior to adoption of the Rules of Evidence, we set out a two-part framework for considering expert opinions based on out-of-court communications. *See State v. Wade*, 296 N.C. 454, 251 S.E. 2d 407 (1979). We explained that the trial court must: (1) consider the admissibility of the expert opinion based on out-of-court communication; and (2) if the opinion is admissible, address the extent to which the testifying expert "may repeat what was told him out of court in order to show its basis." *Id.* at 459, 251 S.E. 2d at 410. We stated, per Justice (now Chief Justice) Exum:

> Although none of [the] cases articulates any sort of universally applicable rule, the pattern of their holdings supports the following propositions: (1) a physician, as an expert witness, may give his opinion, including a diagnosis, based either on personal knowledge or observation *or on information supplied him by others*, including the patient, if such information is inherently reliable, even though it is not independently admissible into evidence. The opinion, of course, may be based

> on information gained in both ways. (2) *If the opinion is admissible the expert may testify to the information he relied on in forming it for the purpose of showing the basis of the opinion.*

Id. at 462, 251 S.E. 2d at 412. We explained, quoting *State v. Griffin*, 99 Ariz. 43, 49, 406 P. 2d 397, 401 (1965), that the statement of an opinion without its basis "would impart a meaningless conclusion to the jury." *State v. Wade*, 296 N.C. at 463, 251 S.E. 2d at 413. Disclosure of the basis of the opinion is essential to the fact-finder's assessment of the credibility and weight to be given to it. *Id.; see* S. Saltzburg and K. Redden, *Federal Rules of Evidence Manual* 671 (4th ed. 1986). *See also Booker v. Medical Center*, 297 N.C. 458, 479, 256 S.E. 2d 189, 202 (1979) (not error to allow medical expert to base opinion in part on history obtained from other treating physician). We stated in *State v. Allen*: "The official Commentary notes that although Rule 703 requires that the facts or data 'be of a type reasonably relied upon by experts in the particular field' rather than that they be 'inherently reliable,' [as stated in *Wade*], the thrust of *Wade* is consistent with the rule." 322 N.C. at 184, 369 S.E. 2d at 630.

In another pre-Rules case, we explained:

> Testimony as to matters offered to show the basis for a physician's opinion and not for the truth of the matters testified to is not hearsay. "We emphasize again that such testimony is not substantive evidence." *State v. Wade*, . . . 296 N.C. at 464, 251 S.E. 2d at 412. Its admissibility does not depend on an exception to the hearsay rule, but on the limited purpose for which it is offered.

State v. Wood, 306 N.C. 510, 516-17, 294 S.E. 2d 310, 313 (1982), *quoted in State v. Allen*, 322 N.C. at 184, 367 S.E. 2d at 630. Our Court of Appeals, in an opinion by Judge (now Justice) Webb, followed *Wade* and *Wood* in holding that a physician's opinion based on tests performed by someone else, and his testimony as to the information upon which he relied, were admissible. *State v. Edwards*, 63 N.C. App. 737, 306 S.E. 2d 160 (1983).

While *Wade*, *Booker*, *Wood* and *Edwards* all dealt with expert medical testimony, the principles set forth therein apply to

expert testimony generally. *See State v. Huffstetler*, 312 N.C. 92, 107, 312 S.E. 2d 110, 120 (1984), *cert. denied*, 471 U.S. 1009, 85 L.Ed. 2d 169 (1985) ("It is . . . clear that the new rule [703] is not confined in its application to medical and psychiatric experts."). These cases demonstrate that our well established practice has been to admit evidence otherwise inadmissible as hearsay for the purpose of revealing the basis for expert opinion testimony.

Federal courts likewise have uniformly interpreted the federal rule, which is identical to our Rule 703, to allow a testifying expert to employ another expert's opinion as the basis for his or her opinion, and to relate that opinion to the jury. *E.g., United States v. Posey*, 647 F. 2d 1048 (10th Cir. 1981) (chemist's review of another chemist's analysis); *American Universal Ins. Co. v. Falzone*, 644 F. 2d 65, 66 (1st Cir. 1981) (fire marshal's opinion as to cause of fire based in part upon reports of other investigators; "reasonable for one . . . marshal to rely on the contemporaneous and on-the-scene opinions of other investigators"); *United States v. Genser*, 582 F. 2d 292 (3rd Cir. 1978), *cert. denied*, 444 U.S. 928, 62 L.Ed. 2d 185 (1979) (I.R.S. agent's opinion based on audit done by others); *United States v. Golden*, 532 F. 2d 1244 (9th Cir. 1976) (drug enforcement agent's opinion on market value of heroin based in part on information obtained from other agents).

Applying these well established principles to the question presented, we hold that Agent Navarro's testimony regarding the other examiner's opinion was properly admitted as a part of the basis for Navarro's opinion. While the question to Navarro asked for an explanation of "quality control" rather than for the basis of his opinion, in context it is clear that the testimony related to a part of the basis for Navarro's opinion. The question was posed while the District Attorney was eliciting the basis for Navarro's opinion. In response to the inquiry about "quality control," Navarro described the procedure followed in the laboratory "before the report can be typed and mailed out." He testified that he observes the following practice: first, he conducts an examination; second, he prepares a handwritten report; and third, he submits this report to another expert examiner for verification. He specifically stated that his identification "has to be verified and initialed before it can be typed and mailed out." It is thus clear that, under standard S.B.I. operating procedures, without verification of his own opinion by another examiner, the witness could

not have arrived at, and testified to, a final conclusion regarding the fingerprint. The opinion of the other examiner thus necessarily forms a part of the basis for the opinion to which the witness testified, and it clearly was reasonable for an expert in the field of fingerprint identification to rely upon such a procedure.

Because the evidence was admissible as a basis for Navarro's opinion, but not as substantive evidence, defendant was entitled upon request to an instruction limiting its consideration to its proper scope. N.C.G.S. § 8C-1, Rule 105 (1986). He made a general objection, however, and did not request a limiting instruction. The admission of evidence which is competent for a restricted purpose will not be held error in the absence of a request by the defendant for limiting instructions. *See State v. Maccia*, 311 N.C. 222, 228-29, 316 S.E. 2d 241, 245 (1984).

Defendant's argument that the admission of Navarro's testimony violates the confrontation clause of Article I, sec. 23 of the North Carolina Constitution, and the Sixth Amendment to the United States Constitution, is without merit. "The admission into evidence of expert opinion based upon information not itself admissible into evidence does not violate the Sixth Amendment guarantee of the right of an accused to confront his accusers where the expert is available for cross-examination." *State v. Huffstetler*, 312 N.C. at 108, 322 S.E. 2d at 120-21. Defendant had ample opportunity to cross-examine Navarro. Further, because Navarro's challenged testimony was not offered for the truth of the matter asserted, but as a part of the basis for Navarro's opinion, it was not hearsay. *State v. Allen*, 322 N.C. at 184, 367 S.E. 2d at 630; *State v. Wood*, 306 N.C. at 516-17, 294 S.E. 2d at 313. *See* N.C.G.S. § 8C-1, Rule 801(c) (1986). "[A]dmission of nonhearsay 'raises no Confrontation Clause concerns.'" *United States v. Inadi*, 475 U.S. 387, 398 n. 11, 89 L.Ed. 2d 390, 400 n. 11 (1986) (quoting *Tennessee v. Street*, 471 U.S. 409, 414, 85 L.Ed. 2d 425, 431 (1985)).

For the reasons set forth, the assignment of error brought forward is overruled. We conclude that defendant received a fair trial, free from prejudicial error.

No error.

Justice WEBB dissenting.

I dissent from the majority. I do not believe the testimony by Mr. Navarro that his fingerprint identification was verified by another latent examiner was a fact or datum upon which he relied in forming his opinion. As I read the testimony, Mr. Navarro formed his opinion and then gave the materials to another examiner who formed his opinion. The witness' testimony as to the opinion of the second examiner should have been excluded as hearsay testimony.

In the cases cited by the majority, the experts were allowed to testify to matters upon which they based their opinions. Not one of them testified that after he had formed an opinion, the opinion was verified by another expert. The majority says that it is clear that "without verification of his own opinion by another examiner the witness could not have arrived at, and testified to, a final conclusion regarding the fingerprint." This may be true. I do not believe it follows that the opinion of the other examiner forms a part of the basis for the witness' opinion. The witness had formed his opinion at the time the verification was made. The verification may have made him more confident that he was right but he did not form his opinion based on the verification.

I vote for a new trial.

STATE OF NORTH CAROLINA v. JERRY WAYNE FLETCHER

No. 352A87

(Filed 2 June 1988)

1. **Constitutional Law § 34; Criminal Law § 26.5— rape, incest, taking indecent liberties—convictions not double jeopardy**

It was not double jeopardy for a defendant to be punished for convictions of rape, incest, and taking indecent liberties with a minor when all the convictions were based on one incident.

2. **Constitutional Law § 30— sexual abuse of child—motion for psychological examination of child—denied—no error**

The trial court did not err in a prosecution for first degree rape, incest, and taking indecent liberties with a child by denying defendant's motion to continue and to allow an examination of the child by a clinical psychologist.

3. Witnesses § 1.2— sexual abuse of child—four-year-old victim—competent to testify

The trial court did not err in a prosecution for first degree rape, incest, and taking indecent liberties with a child by allowing testimony from the victim where the child had testified at the *voir dire* hearing that she had told a lie in the past and was uncertain about some times and dates. The fact that the child may not have told the truth in the past and was uncertain about some times and dates does not prevent her from being a competent witness. N.C.G.S. § 8C-1, Rule 601.

4. Witnesses § 1.2— child rape victim—voir dire hearing—cross-examination question—objection sustained

The trial court did not err during a *voir dire* to determine competency of a child rape victim to testify by sustaining an objection to a question asked of the child as to why she wasn't telling the truth. The sustaining of the objection could not have affected the determination of the court as to whether the child was capable of expressing herself and whether she was capable of understanding the duty of a witness to tell the truth.

5. Rape and Allied Offenses §§ 4, 19— rape, incest, taking indecent liberties with a child—use of anatomically correct dolls—no error

The trial court did not err in a prosecution for rape, incest, and taking indecent liberties with a child by allowing the child to use anatomical dolls to illustrate her testimony because there was no hearsay involved in the child's testimony; the use of anatomical dolls is not inherently open to suggestiveness if the examiner is other than an expert; there is nothing technically complex about the use of anatomical dolls and there is no need to have an expert evaluate the use of such dolls or explain it to a jury; and the practice is wholly consistent with existing rules governing the use of photographs and other items to illustrate testimony.

6. Criminal Law § 73.2— sexual abuse of child—the use of residual hearsay exception—no error

The trial court did not err in a prosecution for first degree rape, incest, and taking indecent liberties with a child by admitting numerous hearsay statements under the residual hearsay exception of N.C.G.S. § 8C-1, Rule 803(24) without required findings because none of defendant's exceptions relates to any evidence admitted under Rule 803(24).

7. Criminal Law § 50— sexual abuse of child—testimony of psychologist who had not examined child excluded—no error

The trial court did not err in a prosecution for first degree rape, incest, and taking indecent liberties with a child by excluding the testimony of a psychologist who had not examined the victim as to the sexual awareness and habits of young children, the ability of children to remember, and typical and atypical reactions of sexually abused young children because there was no evidence of the reaction of the child to the incident in this case and the doctor's testimony would not be helpful to the jury in reaching a decision. N.C.G.S. § 8C-1, Rule 702.

8. Rape and Allied Offenses §§ 5, 19— rape, incest, taking indecent liberties with a child—evidence sufficient

The trial court did not err by denying defendant's motions to dismiss charges of first degree rape, incest, and taking indecent liberties with a child where the child testified that defendant "stuck his ding dong up my po po."

9. Rape and Allied Offenses § 6; Criminal Law § 120— rape—instruction on mandatory sentence—no prejudice

There was no prejudice in a prosecution for first degree rape, incest, and taking indecent liberties with a child where the court instructed the jury that at least one of the sentences carried a mandatory sentence of life imprisonment but that the jury's concern was not that of punishment because, assuming error, the jury would be more reluctant to return a verdict of guilty if they thought the defendant would be sentenced to life imprisonment instead of a lesser term.

10. Rape and Allied Offenses § 6— rape, incest, taking indecent liberties with a child—instruction on vaginal intercourse—no error

The trial court did not err in a prosecution for first degree rape by instructing the jury that it is not necessary that the vagina be entered or that the hymen be ruptured and that the entering of the vulva or labia is sufficient. The instruction was taken verbatim from *State v. Murray*, 277 N.C. 197, and it is not an expression of opinion for the court to make a correct statement of the law however weak the evidence may be.

11. Criminal Law § 138— incest and taking indecent liberties—aggravating and mitigating factors—no error

The trial court did not err when sentencing defendant for incest and taking indecent liberties with a minor by using only one form to find the factors in aggravation and mitigation where it was clear that the court intended to make the findings listed on the form applicable to both convictions.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a life sentence entered by *Kirby, J.*, at the 2 April 1987 Session of Superior Court, YADKIN County. The defendant's motion to bypass the Court of Appeals as to the lesser sentences was allowed pursuant to N.C.G.S. § 7A-31(b). Heard in the Supreme Court 15 March 1988.

Defendant was tried for first degree rape, incest, and taking indecent liberties with a child. Evidence presented at trial tended to show the four-year-old victim lived with her aunt and uncle. During the week of 12 October 1986 she had been visiting defendant, her father. On Saturday, 18 October 1986, defendant brought her back to her aunt and uncle's house. That evening as her aunt was giving her a bath, the child did not want her aunt to wash

her "po po" because it hurt. When her aunt asked why it hurt, she told her that her father had put his "ding dong" in it.

Her aunt took her to the emergency room, where Dr. Jolly, a resident in family medicine, examined her. When he began examining her genitals, she became combative and screamed. When he asked her why she was upset, she replied that her father had messed with her there. He found her genital area to be red and swollen. There was bruising and redness up to the hymen, but the hymen itself had not been penetrated.

When Dr. Michelle Massey Bruier, a resident in gynecology, told the child she was going to examine her in the genital area, she again started crying. She told Dr. Bruier that her father had put his thing down there. Dr. Bruier found her genitals red and swollen, with lacerations at the entrance to her vagina.

The child later gave similar statements to Officer Brinsfield of the Winston-Salem Police Department and Lottie Piscopo, a social worker. She also told Ms. Piscopo that her father had "peed" on her vaginal area.

The child testified to the same events at trial, stating "[h]e stuck his 'ding dong' up my 'po po' " and "[h]e stuck his finger in there too." She demonstrated the positions of the "ding dong" and "po po" on anatomically correct dolls. She testified that she had felt it inside, and had cried because it hurt.

Defendant denied having committed the offenses. He admitted prior convictions of driving under the influence and assault on a female. The defendant was convicted of all the charges. He was sentenced to life in prison for the conviction of rape, fifteen years for the conviction of incest, and ten years for the conviction of taking indecent liberties with a minor. The defendant appealed.

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

Mary K. Nicholson and Bruce C. Fraser for defendant appellant.

WEBB, Justice.

[1] In his first assignment of error the defendant, relying on *State v. Freeland*, 316 N.C. 13, 340 S.E. 2d 35 (1986), argues that

he was placed in double jeopardy because he was convicted of three separate offenses based on the same act. In *Freeland* we held that a defendant could not be sentenced for first degree kidnapping and a sexual assault if it was necessary to prove the sexual assault in order to convict the defendant of first degree kidnapping. We held that the intent of the General Assembly in that case was that the defendant not be punished for both offenses. In *State v. Etheridge*, 319 N.C. 34, 352 S.E. 2d 673 (1987), a case which is virtually on all fours with this case, we held that it was not double jeopardy for a defendant to be punished for convictions of rape, incest, and taking indecent liberties with a minor when all the convictions were based on one incident. We are bound by *Etheridge* to overrule this assignment of error.

[2] Defendant next assigns error to the court's denying his motion to continue and to allow an examination of the child by Dr. Lewis Bradbard, a clinical psychologist. The record shows that on 30 April 1987 the defendant filed a motion which recited that a district court judge in Forsyth County had signed an order requiring the minor child to submit herself for examination by Dr. Bradbard of Salem Psychiatric Associates on 26 April 1987 and the district court judge had rescinded this order. The defendant prayed the court that the case be continued and an examination be allowed of the child. The court denied this motion.

The defendant has cited no authority for the proposition that a witness for the State may be ordered to submit to an examination by a psychologist or a psychiatrist. No right of discovery by the defendant in a criminal case existed at common law. *State v. Davis*, 282 N.C. 107, 191 S.E. 2d 664 (1972). If the defendant had the right to have the prosecuting witness examined by a psychologist such a right must be pursuant to a statute. We can find no such right given by statute. In *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203 (1982), we held that the State did not have to make its witnesses available for interviews with a medical expert who had been appointed to aid the defendant. We hold it was not error to deny the defendant's motion for a continuance and for the examination of the child by a psychologist.

[3] The defendant next assigns error to the court's holding that the four year old was competent to testify. The court conducted a voir dire hearing before allowing testimony by the child. The

child testified at the voir dire hearing that she knew what it meant to tell the truth and she knew it was bad to tell a lie. She promised to tell "just what had happened and nothing else." She also testified she had told a lie in the past. She was uncertain about some times and dates. The defendant contends that in light of the child's testimony that she had told a lie in the past and her uncertainty as to times and dates, the child should not have been qualified as a witness. N.C.G.S. § 8C-1, Rule 601 provides in part:

> (a) General Rule.—Every person is competent to be a witness except as otherwise provided in these rules.
>
> (b) Disqualification of witness in general.—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.

We hold that the court did not err in holding the witness was competent to testify. The court was not required from the voir dire testimony to find that the child was incapable of expressing herself concerning the case or was incapable of understanding the duty of a witness to tell the truth. The fact that the child may not have told the truth in the past and was uncertain about some times and dates does not prevent her from being a competent witness. *See State v. Hicks*, 319 N.C. 84, 352 S.E. 2d 424 (1987); and *State v. McNeely*, 314 N.C. 451, 333 S.E. 2d 738 (1985). This assignment of error is overruled.

[4] The defendant also assigns error to the sustaining of an objection to a question asked of the child during the voir dire hearing. The following colloquy occurred on cross-examination:

> Q. Did Nannie tell you? You are shaking your head, yes. All right, when you told me a minute ago nobody told you, that was a lie wasn't it, that was not the truth?
>
> A. (Shakes head up and down)
>
> Q. Why weren't you telling me the truth?
>
> MR. HARDING: Objection, Your Honor.
>
> COURT: Sustained.

The witness was questioned extensively before and after this question as to whether she was telling the truth. The purpose of the voir dire hearing was for the court to be able to determine whether the child was capable of expressing herself and whether she was capable of understanding the duty of a witness to tell the truth, upon which her competency as a witness depended. The sustaining of the objection to this question could not have affected this determination by the court. This assignment of error is overruled.

[5] Defendant next contends the trial court erred in allowing the child to use anatomical dolls to illustrate her testimony. Defendant argues that this was error because "this use of anatomical dolls was tendered pursuant to Rule 803(24) of the North Carolina Rules of Evidence . . . and the court failed to make proper findings of trustworthiness . . .," "[t]he use of such dolls by other than an expert is certainly open to suggestiveness on the part of the examiner," and "[a]t no time did any expert evaluate this technically complex procedure and give the jury an opinion as to the use and meaning of anatomical dolls."

We find defendant's argument to be meritless. Clearly, the use of the dolls was not tendered pursuant to Rule 803(24), which allows certain hearsay testimony, because no hearsay was involved in the child's testimony. We cannot find that the use of anatomical dolls is inherently open to suggestiveness by the examiner, if the witness is "other than an expert." Finally, we see no need to have an expert evaluate the use of anatomical dolls or explain it to a jury; there is nothing technically complex about it. In fact, it is precisely because the use of the dolls can be readily understood by everyone involved, especially the child, that they are so often employed in the investigation of child abuse. This Court has heard several cases in which anatomical dolls were used by children to illustrate their testimony and we have never disapproved of the practice. *See, e.g., State v. Watkins*, 318 N.C. 498, 349 S.E. 2d 564 (1986); *State v. DeLeonardo*, 315 N.C. 762, 340 S.E. 2d 350 (1986); and *State v. Smith*, 315 N.C. 76, 337 S.E. 2d 833 (1985). The practice is wholly consistent with existing rules governing the use of photographs and other items to illustrate testimony. It conveys the information sought to be elicited, while it permits the child to use a familiar item, thereby making him more comfortable. Defendant's assignment of error is overruled.

[6] The defendant next contends the court erred in admitting numerous hearsay statements under the residual hearsay exception established by N.C.G.S. § 8C-1, Rule 803(24), without placing in the record the specific findings required by *Smith*, 315 N.C. 76, 337 S.E. 2d 833. The defendant supports this assignment of error with sixteen exceptions in the record. An examination of the record reveals that not one of these exceptions relates to any evidence admitted under Rule 803(24). Ten of the exceptions relate to evidence admitted to corroborate a witness' testimony, three exceptions relate to evidence admitted under the medical diagnosis exception established by N.C.G.S. § 8C-1, Rule 803(4), one exception relates to a ruling on the relevance of testimony and two of the exceptions are to no ruling by the court. This assignment of error is overruled.

[7] The defendant assigns error to the exclusion of certain testimony of Dr. Lewis Bradbard, a clinical psychologist. The defendant called Dr. Bradbard as a witness and proposed that he testify pertaining to three subjects. These subjects were (1) the sexual awareness and habits of young children, (2) the ability of children to remember, and (3) typical and atypical reactions of sexually abused young children. Dr. Bradbard had not examined the child in this case and no evidence had been offered as to psychological difficulties the child may have had as the result of her experience. The court refused to allow the witness to testify to the reactions of sexually abused young children.

An expert witness is allowed to testify to facts within his knowledge if it will assist the jury to understand the evidence or to determine a fact in issue. *State v. Kennedy*, 320 N.C. 20, 357 S.E. 2d 359 (1987). N.C.G.S. § 8C-1, Rule 702 might be read as requiring that such testimony be in the form of an opinion. We do not believe this is the case. Rule 702 is a rule of admission which allows opinion evidence in certain cases. If a witness, whether or not an expert, has knowledge of facts which would be helpful to a jury in reaching a decision, he may testify to such relevant facts.

In this case we hold it was not error to exclude the testimony of Dr. Bradbard as to the reactions of sexually abused children. There was no evidence of the reaction of the child to the incident in this case and Dr. Bradbard's testimony would not be helpful to the jury in reaching a decision.

[8] The defendant next assigns error to the denial of his motion to dismiss. He bases this assignment of error on what he contends is the lack of proof of vaginal intercourse. He contends that the child did not testify as to penetration of her vagina by the defendant's penis. The child testified that the defendant "stuck his ding dong up her po po." She demonstrated, using male and female dolls, that the "po po" is a vagina and the "ding dong" is a penis. This is substantial evidence from which the jury could find the defendant engaged in vaginal intercourse with his daughter. *See State v. Bruce*, 315 N.C. 273, 337 S.E. 2d 510 (1985). This assignment of error is overruled.

[9] The defendant next assigns error to the charge of the court. The court charged the jury in part as follows:

> You are aware that we are trying three counts of a bill of indictment wherein the defendant is accused of first degree rape, taking indecent liberties with a minor, and with incest. You are aware of the possible punishments for each of these offenses and you realize that at least one of the sentences carries a mandatory sentence of life imprisonment. I instruct you that it is your duty to find the true facts of this case and your concern is not that of punishment but simply the finding of the facts. The sentence and punishment only comes into being when the defendant has been found guilty, and at this point he is presumed to be innocent.

The defendant argues that it was error for the court to tell the jury what is the punishment for rape. In *State v. Rhodes*, 275 N.C. 584, 169 S.E. 2d 846 (1969), Justice, later Chief Justice, Sharp said:

> In the absence of some compelling reason which makes disclosure as to punishment necessary in order "to keep the trial on an even keel" and to insure complete fairness to all parties, the trial judge should not inform the jurors as to punishment in noncapital cases. If information is requested he should refuse it and explain to them that punishment is totally irrelevant to the issue of guilt or innocence. When, however, such information is inadvertently given, the error will be evaluated like any other.

Id. at 592, 169 S.E. 2d at 851. The jury argument was not recorded in this case and we cannot determine whether the court's re-

marks were in response to a statement by counsel. We do not know whether the judge, for this reason or any other reason, was trying to "keep the case on an even keel." Assuming it was error to make the remark, we hold it was error favorable to the defendant. The jury would be more reluctant to return a verdict of guilty if they thought the defendant would be sentenced to life imprisonment instead of a lesser term. *See State v. Washington*, 283 N.C. 175, 195 S.E. 2d 534 (1973), *cert. denied*, 414 U.S. 1132, 38 L.Ed. 2d 757 (1974); and *State v. Hairston*, 121 N.C. 579, 28 S.E. 492 (1897). This assignment of error is overruled.

[10] The defendant contends there was error in the jury instruction on vaginal intercourse. The court charged as follows:

> First of all, the State must prove that the defendant engaged in vaginal intercourse with [the child]. Vaginal intercourse is penetration, however slight, of the female sex organ by the male sex organ. The actual emission of semen is not necessary. It is not necessary that the vagina be entered or that the hymen be ruptured. The entering of the vulva or labia is sufficient.

The defendant argues that the last two sentences are in error. It appears that these two sentences were taken verbatim from our opinion in *State v. Murray*, 277 N.C. 197, 176 S.E. 2d 738 (1970). Nevertheless, the defendant argues that the evidence of penetration was so slight that for the court to give this charge amounted to an expression of opinion by the court on the strength of the evidence. However weak the evidence may be, it is not an expression of an opinion for the court to make a correct statement of the law. *State v. Barnes*, 307 N.C. 104, 296 S.E. 2d 291 (1982), upon which the defendant relies, is not helpful to him. In *Barnes*, this Court held that under the evidence in that case it was error not to define intercourse. In this case, the court defined intercourse. This assignment of error is overruled.

[11] Finally the defendant assigns error to what he contends is the failure of the court to separately support with findings of aggravating and mitigating circumstances the sentences for incest and taking indecent liberties with a minor. In *State v. Ahearn*, 307 N.C. 584, 598, 300 S.E. 2d 689, 698 (1983), we said:

> We therefore hold that in every case in which the sentencing judge is required to make findings in aggravation and mitigation to support a sentence which varies from the presumptive term, each offense, whether consolidated for hearing or not, must be treated separately, and separately supported by findings tailored to the individual offense and applicable only to that offense.

In this case the court used only one form to find the factors in aggravation and mitigation. At the top of the form is typed "Charge of Incest & Taking Indecent Liberties With Child." On the judgment and commitment form for each offense there is a recital that the court makes findings set forth on the attached findings of factors in aggravation and mitigation of punishment. Although there is one form upon which findings in aggravation and mitigation are listed, it is clear that the court intended to make them applicable to both convictions. *See State v. Hall*, 81 N.C. App. 650, 344 S.E. 2d 811, *cert. dismissed*, 318 N.C. 510, 349 S.E. 2d 868 (1986). We hold the court complied with the rule of *Ahearn*.

No error.

LEROY D. McNEILL, JR. v. DURHAM COUNTY ABC BOARD AND RONALD D. ALLEN

No. 524PA87

(Filed 2 June 1988)

1. **Trial § 10— trial court's remarks during trial—appearance of antagonism toward defendants**

In plaintiff's action to recover damages sustained when defendant ABC enforcement officer allegedly assaulted him while trying to search plaintiff's mother's home for illegal intoxicating beverages, the trial court's numerous extraneous remarks, attitude of levity, and deference toward plaintiff and his witnesses gave the appearance of antagonism and therefore prejudiced defendants and denied them a fair and impartial trial.

2. **Appeal and Error § 64— evenly divided court—lower court decision affirmed without precedential value**

Where one member of the Supreme Court did not take part in this decision, and the other members were equally divided, the decision of the Court of Appeals that governmental immunity attached to the enforcement and in-

vestigative duties of local ABC boards is left undisturbed and stands without precedential value.

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

Justice MEYER concurring in part and dissenting in part.

Justice MITCHELL joins in this concurring and dissenting opinion.

ON grant of petitions by plaintiff and defendants, pursuant to N.C.G.S. § 7A-31, for discretionary review of a decision of the Court of Appeals, 87 N.C. App. 50, 359 S.E. 2d 500 (1987), finding no error in part and reversing in part the judgment entered by *Bailey, J.*, on 6 December 1984, in Superior Court, DURHAM County. Heard in the Supreme Court 12 April 1988.

McMillan, Kimzey, Smith & Roten, by Russell W. Roten, Duncan A. McMillan, and Katherine E. Jean, for plaintiff.

Haywood, Denny, Miller, Johnson, Sessoms & Patrick, by George W. Miller, Jr., and E. Elizabeth Lefler, for defendants.

Jeff Erick Essen and William G. Simpson, Jr., for North Carolina Civil Liberties Union Legal Foundation, amicus curiae.

FRYE, Justice.

[1] After reviewing the assignments of error brought forward by both the plaintiff and defendants, we find that the Court of Appeals erred in holding that the cumulative effect of extraneous remarks made by the trial judge in no way deprived defendants of a fair and impartial trial. Having found that the cumulative effect of these remarks was prejudicial to the defendants, we order a new trial.

Plaintiff instituted this action against defendant Durham County ABC Board and defendant Ronald D. Allen, an ABC enforcement officer who is an agent of defendant Durham County ABC Board. Plaintiff alleged Allen unlawfully and maliciously assaulted him and used unnecessary and excessive force while apparently attempting to serve a warrant at the home of plaintiff's mother. The evidence showed that the defendant Durham County ABC Board suspected plaintiff's mother of operating an illegal "liquor house." Plaintiff's evidence further showed that when plaintiff did not cooperate with defendant Allen's efforts to search the premises for intoxicating beverages, Allen struck him

over the head with a flashlight. Defendants denied the import of plaintiff's allegations and asserted several different defenses. Defendant Allen counterclaimed, alleging that plaintiff assaulted him. The Board stipulated that defendant Allen was acting within the scope of his employment.

At the conclusion of plaintiff's evidence, defendant Board moved for a directed verdict on both the liability and punitive damages issues on the grounds of governmental immunity. Both motions were denied. At the close of all the evidence and after deliberation, the jury found that defendant Allen committed an assault and battery on plaintiff with excessive force, and that plaintiff did not assault Allen. The jury awarded plaintiff $105,500 in compensatory damages and $7,000 in punitive damages, including $5,000 from defendant Board and $2,000 from defendant Allen. Judgment was entered on the verdict. Defendants appealed the verdict and award to the Court of Appeals.

The Court of Appeals held there was no error in the trial or judgment against defendant Allen. However, the Court of Appeals held that governmental immunity attached to the investigative and enforcement activities of local ABC Boards and therefore no action could be brought against them when acting in this capacity unless their immunity had been waived by the purchase of liability insurance. That court then remanded the case to the trial court with instructions to determine whether the Board had in fact purchased liability insurance and if it had not, to set aside the judgment against it; but if defendant Board had such insurance, the award was to be limited to the amount of the coverage and the judgment was to so provide.

We granted the petitions of both parties pursuant to N.C.G.S. § 7A-31 to review the decision of the Court of Appeals.

Defendants, in their first assignment of error, contend that the Court of Appeals erred by not granting them a new trial because of extraneous remarks made by the trial judge which exhibited to the jury the court's antagonism towards the defendants and their cause. We agree that the extraneous statements of the trial judge, in their totality, gave the appearance of antagonism and therefore prejudiced the defendants and denied them a fair and impartial trial. *See Board of Transportation v. Wilder*, 28 N.C. App. 105, 220 S.E. 2d 183 (1975).

Our review is limited to the record. We are mindful of the difficulty faced in attempting to capture in the printed word "the emphasis and the nuances that may be conveyed by tone of voice, inflection, or facial expressions" inherent in all speech. *State v. Frazier*, 278 N.C. 458, 460, 180 S.E. 2d 128, 130 (1971). Any determination of prejudice then must be premised upon reason and deduction; that is, "whether the remarks assigned as error were so disparaging in their effect that they could reasonably be said to have prejudiced the defendant[s]." *Id.*

Important in our review of the record are the circumstances involved in this particular trial. The circumstances surrounding this trial concerned the sale and distribution of intoxicating beverages from the home of plaintiff's mother. The trial had the effect of positioning the defendant ABC Board and its agent, as enforcer of alcoholic beverage control laws, against plaintiff and his mother, suspected violators of such laws. Any intimation by the trial court aligning itself with either side was certain to have effect in this environment. Against this backdrop, defendants contend that some thirty-seven remarks or commentaries were made by the trial judge to jurors, witnesses, and defense counsel, which when viewed *in toto* were prejudicial to them. Examples of the trial court's remarks support that contention and evidence the irreparable harm to defendants' right to a fair and impartial trial.

In the opening remarks to the jury pool, the trial judge stated: "I regret to say that the ABC Board has refused to provide any free samples, so we'll be trying the case without the benefit of that sort of evidence. (General laughter.) They could have gotten right popular if they'd seen it the other way." When several members of the jury pool stated they knew defendant Allen, the court inquired, "[w]hat did y'all do, just meet him while I was talking? (General laughter.) Well, Mr. Allen, the way you know these folks, you ought to run for Congress."

The trial court made additional remarks as the trial progressed. In one exchange, the court interrupted defense counsel's examination of a witness. The court interposed, "[w]hat in the world has that got to do with this case?" When defense counsel stated, "I'm gonna' move on—I'm gonna' move on," the court responded, "I hope so." In yet another exchange during defense counsel's cross-examination of a witness, the court interrupted,

"I'm bored with the repetition, frankly, and I think everybody else is. Let's get on to something that's got something to do with this case without repeating other things." Defense counsel asked if he might approach the bench. The court replied, "[n]o, sir, not if you just want to tell me something I already know; that's what you're doing now . . . . But for the love of Mike, let's get down to something new."

After denying defense counsel's request for a recross-examination of a character witness for plaintiff, the trial judge exhorted, "I'm not going to do that . . . . I don't know why we're getting so torn to pieces by a little liquor and gambling going on." The trial judge later asked an expert medical witness for plaintiff if the witness knew a certain doctor who was an "old drinking buddy of mine." The record reflects that general laughter ensued.

The same disaffection seemed not to be visited upon plaintiff's witnesses. On one occasion, in an effort to lay the foundation for an award of damages against defendants, an expert witness for plaintiff testified to the hearing loss of plaintiff apparently resulting from the blow perpetrated by defendant Allen. When plaintiff's counsel made a request that this witness be excused, the request was granted and the trial court stated, "[t]hank you for being here, sir. I enjoyed—I enjoyed your explanation." When viewed against the ostensible hostility exhibited against defendants, such deference may be read to suggest an alignment with plaintiff's cause.

We note the esteemed station occupied by our state's trial judges. Because of this esteem, "jurors entertain great respect for [a judge's] opinion, and are easily influenced by any suggestion coming from him. As a consequence, he must abstain from conduct or language which tends to discredit or prejudice" any litigant in his courtroom. *State v. Carter*, 233 N.C. 581, 583, 65 S.E. 2d 9, 10 (1951).

Throughout the trial, the court maintained an atmosphere of levity. The record reveals episodic laughter sufficient in time and manner to warrant notation by the court reporter. The trial judge's comments, perhaps unbeknownst to him, diminished the seriousness of the mission assigned to the jury and gave the appearance of antagonism towards the defense attorney. Reason and deduction lead us to conclude that the cause of defendants was

diluted by the frequent commentary of the trial judge. As noted in *Frazier*, any one comment standing alone, even when erroneous, might not be regarded as prejudicial. *Frazier*, 278 N.C. at 464, 180 S.E. 2d at 132. However,

> when all of the incidents are viewed in light of their cumulative effect upon the jury, we are constrained to hold that the cold neutrality of the law was breached to the prejudice of . . . defendant[s]. The content, tenor, and frequency of the remarks, and the persistence on the part of the trial judge portray an antagonistic attitude toward the defense and convey to the jury the impression of judicial leaning . . . .

Id.

We hold that the extraneous remarks made by the trial court were so disparaging in their effect that they prejudiced the defendants' right to a fair and impartial trial. Accordingly, the result is a new trial.

Defendants bring forward on this appeal other assignments of error, most of which concern evidentiary rulings made by the trial judge. Since we order a new trial on defendants' first argument, it is unnecessary to address the other assignments of error as they may not recur during the course of a subsequent trial.

[2] Plaintiff sought discretionary review of that part of the decision of the Court of Appeals which held that governmental immunity attached to the enforcement and investigative duties of local ABC Boards. With one member of the Court not taking part in this decision, we have considered this issue and are equally divided with three members voting to affirm the decision of the Court of Appeals and three members voting to reverse on this issue. Therefore, the decision of the Court of Appeals, as it concerns this issue, is left undisturbed and stands without precedential value. *See State v. Johnson*, 286 N.C. 331, 210 S.E. 2d 260 (1974).

The case is remanded to the Court of Appeals for further remand to the Superior Court, Durham County, for further proceedings. If it is determined that defendant Durham County ABC Board did not purchase liability insurance, the case shall be dismissed as to it. If liability insurance was purchased, then, upon

retrial, any judgment for damages against the Durham County ABC Board shall be limited in amount to the coverage of such insurance.

Affirmed in part; reversed in part; and remanded.

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

Justice MEYER concurring in part and dissenting in part.

I agree with that portion of the majority opinion in which a new trial is granted on the basis that the cumulative effect of the extraneous remarks made by the trial judge during the proceedings below was sufficiently prejudicial to the defendants' cause to require such a result. Another section of the majority opinion, however, causes me great concern.

At the end of its opinion, the majority notes that, with one member of the Court not taking part, the Court is split evenly as to the question of whether defendant Durham County ABC Board is insulated by governmental immunity in exercising its enforcement and investigative duties. Therefore, states the majority, the decision of the Court of Appeals—specifically, that governmental immunity does attach to the enforcement and investigative activities of local ABC boards—is left undisturbed and stands without precedential value. While this is the effect of our evenly divided vote, I am convinced to a certainty that the Court of Appeals was correct in that the officers, acting as they were in a police capacity, were performing a governmental function.

As a general matter, ABC officers are required by statute to take the oath prescribed for all peace officers. N.C.G.S. § 18B-501(b) (1983). Moreover, although their primary responsibilities relate to the enforcement of ABC laws and article 5 of chapter 90 of the North Carolina General Statutes, they have the clear authority to make arrests and to "take other investigatory and enforcement actions for any criminal offense." N.C.G.S. § 18B-501(b) (1983). *See State v. Taft*, 256 N.C. 441, 124 S.E. 2d 169 (1962). More specific to this case, the officers in question were serving a warrant at the time of the incident that gave rise to this lawsuit. It seems clear to me therefore that the officers were thus per-

forming a governmental police function, and thus bore the shield of governmental immunity. Whether the Court of Appeals was correct on the issue is not determinative in the case at bar, as our evenly divided vote produces the same result, i.e., the officers here were clothed with governmental immunity while serving the warrant.

The feature of the majority opinion with which I disagree is its affirmance of the order remanding the case for a determination as to whether the ABC Board has purchased liability insurance. Inherent in this remand is the notion that, if the ABC Board has in fact purchased liability insurance, it has waived its governmental immunity to the extent of the insurance coverage. Simply because the Court is evenly divided as to the governmental immunity issue, it does not necessarily follow that the case must be remanded to determine the availability of insurance coverage.

If the Durham County ABC Board is entitled to governmental immunity by reason of our equally divided vote, that immunity cannot be waived by the purchase of insurance absent an express statutory authorization. *See Guthrie v. State Ports Authority*, 307 N.C. 522, 299 S.E. 2d 618 (1983). Our legislature has provided that *cities* and *counties* may waive governmental immunity by the purchase of insurance. *See* N.C.G.S. § 160A-485 (1987) (cities); N.C.G.S. § 153A-435 (1987) (counties). The statutory definition of the term "city" appears in N.C.G.S. § 160A-1(2) and does not encompass a local ABC board. A county is defined in N.C.G.S. § 153A-13, which provides that a county is one of the one hundred listed in N.C.G.S. § 153A-10, and thus the term "county" does not encompass a local ABC board.

In its opinion in this case, the Court of Appeals drew an analogy between cities and counties and local ABC boards, concluding that the same waiver possibility would exist for the latter as for the former. Governmental immunity, however, can only be waived if there is statutory authority authorizing and permitting the waiver. While, admittedly, the legislature has explicitly created waivers for *cities* and *counties*, it has done no such thing for local ABC boards. As a result, the majority's order that the case be remanded for a determination as to the Durham County ABC Board's liability insurance coverage seems clearly erroneous.

It is for that reason that I dissent only from that portion of the majority opinion.

Justice MITCHELL joins in this concurring and dissenting opinion.

STATE OF NORTH CAROLINA v. J. T. TAYLOR, JR., J. H. SIMPSON AND HARRELL M. CARPENTER

No. 317A87

(Filed 2 June 1988)

State § 4; Betterments § 1— betterments claim—not claim of title—sovereign immunity applies

The State was entitled to the full protection of sovereign immunity in an action for betterments in which the issues of title and damages had previously been severed because N.C.G.S. § 41-10.1 permits a claim of title to land to be brought against the State and a betterments claim is not a claim of title.

Chief Justice EXUM dissenting.

Justice WEBB joins in this dissenting opinion.

APPEAL by the State pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals. *State v. Taylor*, 85 N.C. App. 549, 355 S.E. 2d 169 (1987). That decision affirmed in part and reversed in part the trial court's 1 July 1985 order dismissing both the State's sovereign immunity defense and its untimely filed defense to defendant's betterments petition and its 14 April 1986 order dismissing the betterments claim itself, which orders were entered in Superior Court, CRAVEN County, by *Reid, Jr.*, and *Phillips, JJ.* We allowed the State's petition for discretionary review on 28 July 1987. Heard in the Supreme Court 15 March 1988.

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

Nelson W. Taylor, III, for defendant-appellee J. T. Taylor, Jr.

MEYER, Justice.

In this case, we address the issue of the State's sovereign immunity defense to a betterments claim for improvements made to

certain timberland in Craven County, North Carolina. Contrary to the Court of Appeals' conclusion, we hold that under the facts of this case, the State is shielded by its sovereign immunity from Taylor's claim for betterments. We therefore reverse the Court of Appeals on this issue.

On 20 January 1971, defendant J. T. Taylor, Jr. ("Taylor") obtained from the Brandenburg Land Company ("Brandenburg") a deed for a tract of timberland in Craven County. After receiving and recording his deed, Taylor acquired a right-of-way, built an access road, cleared a large portion of the land and sold the timber therefrom. He allegedly constructed roads and a canal, converted 157 acres of the property to farmland and planted 12.5 acres with pine seedlings.

On 1 May 1978 the State of North Carolina filed suit against Taylor and others, alleging that it owned the land and that the defendants were trespassing thereon. The State sought to eject the defendants and to require them to pay damages to the State.

The trial court severed the issues of title and damages for trial. On 12 November 1981 the trial court entered judgment for the State on the issue of title and permanently enjoined Taylor from going on the land. Taylor appealed. The Court of Appeals affirmed the trial court. This Court denied Taylor's petition for discretionary review and his subsequent petition for reconsideration. *State v. Taylor*, 63 N.C. App. 364, 304 S.E. 2d 767 (1983), *disc. rev. denied*, 310 N.C. 311, 312 S.E. 2d 655, *reconsideration denied*, 310 N.C. 311, 313 S.E. 2d 160 (1984). The original damages issue is still pending.

The denial of Taylor's petition for reconsideration was entered on 6 March 1984. Some ten months later, on 14 January 1985, Taylor filed a petition for betterments under N.C.G.S. § 1-340 seeking $300,000 for improvements he had allegedly made to the State's land. The State filed a response setting forth its claim of sovereign immunity as a complete defense and contending both that Taylor's betterments petition was not timely filed and that in any event it failed because Taylor did not have color of title to the land when he made the improvements.

On 1 July 1985 the trial court dismissed the State's defenses of sovereign immunity and untimely filing of the betterments

petition. On 16 April 1986 the trial court dismissed Taylor's betterments claim on the ground that the Brandenburg-Taylor deed did not constitute color of title as a matter of law. Taylor appealed. The State cross-assigned error to the order dismissing its defenses of sovereign immunity and untimely filing. The Court of Appeals majority resolved all three issues in favor of Taylor. One judge dissented on the issue of sovereign immunity. It is that issue alone that is before us as a matter of right. The State petitioned for discretionary review on the issues of untimely filing and color of title, which petition we allowed on 27 July 1987.

The State of North Carolina is immune from suit unless and until it expressly consents to be sued. Absent consent or waiver, this immunity is absolute and unqualified. *General Electric Co. v. Turner*, 275 N.C. 493, 498, 168 S.E. 2d 385, 389 (1969). The State has, however, waived its sovereign immunity to suits involving "claims of title to land."

> Whenever the State of North Carolina . . . asserts a claim of title to land which has not been taken by condemnation and any individual . . . likewise asserts a claim of title to the said land, such individual . . . may bring an action in the superior court . . . against the State . . . for the purpose of determining such adverse claims.

N.C.G.S. § 41-10.1 (1984).

The specific phrase at issue in N.C.G.S. § 41-10.1 is "claim of title to land." A betterments claim is not a "claim of *title* to land." It is, instead, a claim demanding payment for *permanent improvements* to the land over and above the value of the use and occupation of the land. N.C.G.S. § 1-340 (1983). Indeed, the betterments statute is not part of the Chapter of the General Statutes, chapter 41, entitled *Estates*, which includes the waiver of the State's sovereign immunity with regard to trying *title* to land where the State claims an interest. In the case *sub judice*, the issue of title was severed from the issue of the State's claim for damages against Taylor. Title to the land was settled in the State by the trial court on 12 November 1981, which action was affirmed by the Court of Appeals. This Court then denied Taylor's petition for discretionary review and his petition for reconsideration. Taylor at that point had exhausted his right of appeal on the issue of title. Title to the land was properly vested

in the State. As the dissenting judge in the Court of Appeals correctly noted, "[t]his [present case] is not [one] where, in the words of G.S. 41-10.1, 'the State of North Carolina or any agency or department thereof asserts a claim of title to land.' " The claim here is solely one for betterments.

N.C.G.S. § 1-340 provides in pertinent part:

> A defendant against whom a judgment is rendered for land may, at any time before execution, present a petition to the court rendering the judgment, stating that he, or those under whom he claims, while holding the premises under a color of title believed to be good, have made permanent improvements thereon, and praying that he may be allowed for the improvements, over and above the value of the use and occupation of the land.

N.C.G.S. § 1-340 (1983). Taylor argues that N.C.G.S. § 1-340 mandates that payment for betterments is a part of the plaintiff's action of claim of title to land, not an independent action or counterclaim. *Wharton v. Moore*, 84 N.C. 479 (1881). Taylor contends that the issue of betterments arose when the State instituted its action against him. Once the suit was begun, he argues, a concomitant part of it was the payment for improvements under N.C.G.S. § 1-340, so that the State could not bring the action without giving rise to the obligation to pay for betterments. The obligation, he argues, became a part of the State's claim of title. The Court of Appeals majority agreed with Taylor. Based on the reasoning that since a claim for betterments can arise only "by virtue of" a claim of title, the majority held that a claim for betterments is a "claim of title" as that term is used in N.C.G.S § 41-10.1. Therefore, the Court of Appeals majority concluded that Taylor's claim for betterments was not barred by sovereign immunity.

In broadening the scope of the waiver of sovereign immunity in N.C.G.S. § 41-10.1 so as to permit a betterments action against the State, the Court of Appeals majority erred.

Sovereign immunity is a common law doctrine to which the existing exceptions or waivers have been mandated by the legislature. *Huyck Corp. v. C.C. Mangum, Inc.*, 309 N.C. 788, 309 S.E. 2d 183 (1983). *See, e.g.*, N.C.G.S. § 40-10.1 (1984); N.C.G.S. § 143-291 (1987). Statutes which waive the benefits of the doctrine of

sovereign immunity are to be strictly construed. *Guthrie v. State Ports Authority*, 307 N.C. 522, 299 S.E. 2d 618 (1983); *Floyd v. Highway Commission*, 241 N.C. 461, 85 S.E. 2d 703 (1955). Applying this admonition here, the phrase "claim of title to land" contained in N.C.G.S. § 41-10.1 cannot be broadened to include a claim for betterments under N.C.G.S. § 1-340. The betterments statute does not, by its terms, create a right against the State. All waivers of sovereign immunity are statutorily created. *Huyck Corp. v. C.C. Mangum, Inc.*, 309 N.C. 788, 309 S.E. 2d 183. N.C.G.S. § 40-10.1 is such a waiver. Had the legislature intended to create a concomitant waiver with regard to claims for betterments under N.C.G.S. § 1-340 when the State asserts a "claim of title to land," it could have done so in plain language. It did not. There is no waiver of the State's sovereign immunity in N.C.G.S. § 1-340.

Taylor mistakenly relies upon *Mattox v. State*, 21 N.C. App. 677, 205 S.E. 2d 364 (1974). In *Mattox*, the plaintiff originally claimed, and brought an action to enforce, a reverter provision in a deed. He was ultimately successful. He subsequently brought a second action for damages based upon loss of rents. Since title had been earlier settled, the Court of Appeals correctly ruled against him on the question "whether the plaintiffs may bring an action for damages under the statutory provisions of G.S. 41-10.1." *Id.* at 679, 205 S.E. 2d at 365. In *Mattox*, as in the case before us, title had been settled, so that under the statute the State was not asserting a "claim of title to land."

Construing N.C.G.S. § 41-10.1 strictly, as we must, *Guthrie v. State Ports Authority*, 307 N.C. 522, 299 S.E. 2d 618, we hold that a claim for betterments is not a claim of title to land. The State therefore has not consented to be sued and is entitled to the full protection of its sovereign immunity. On this issue, the Court of Appeals is reversed.

In view of our disposition of this case on the issue of the State's sovereign immunity, we do not address the two additional issues before us on discretionary review.

Reversed.

Chief Justice EXUM dissenting.

Believing that the trial court and the Court of Appeals correctly concluded that the state was not entitled to rely on sovereign immunity to defeat a claim for betterments in an action to try title successfully prosecuted by the state, I respectfully dissent from the majority's conclusion to the contrary and vote to affirm the decision of the Court of Appeals.

A claim for betterments is not a separate action in the nature of an action for damages against one who successfully prosecutes an action for title to real property. It is, instead, a petition filed in the cause itself. The purpose of the betterments doctrine is to prevent the successful title claimant from being unjustly enriched by taking not only the title but also the value of permanent improvements made to the land in good faith by the one who loses title. The one who loses title may recover for betterments only when (1) the improvements are permanent in nature and made under a bona fide belief that the improver had good title, and (2) reasonable grounds for such belief existed. N.C.G.S. § 1-340 (1983); *Pamlico County v. Davis*, 249 N.C. 648, 107 S.E. 2d 306 (1959). The betterments doctrine is rooted in the equitable notion that one who successfully claims title to realty from another who held the land in a good faith belief that he owned it ought to pay for the permanent improvements which will be acquired with the title. Otherwise the successful title claimant will be unjustly enriched and the good faith improver unjustly deprived to the extent of the value of the improvements.

> This right to betterments is a doctrine that has gradually grown up in the practice of courts of equity . . . . [I]t may now be considered as an established principle of equity that whenever a plaintiff seeks the aid of a court of equity to enforce his title against an innocent person, who has made improvements on land, without notice of superior title, believing himself to be the absolute owner, aid will be given to him, only upon the terms that he shall make due compensation to such innocent person to the extent of the enhanced value of the premises, by reason of the meliorations or improvements, upon the principle that he who seeks equity must do equity.

Wharton v. Moore, 84 N.C. 479, 482 (1881).

When the doctrine of betterments is so understood, it seems clear that sovereign immunity should not relieve the state from its equitable obligation to pay for permanent improvements to realty it receives when it successfully prosecutes an action for title to the realty. To apply sovereign immunity to relieve the state from this kind of obligation skirts dangerously close to depriving a citizen of property without due process of law. The state takes but it does not pay.

Since the doctrine of sovereign immunity is of the common law, it is this Court's province to say how it will be applied or whether it will be applied at all. *Smith v. State*, 289 N.C. 303, 222 S.E. 2d 412 (1976). I would not apply it to defeat a citizen's claim for betterments in an action for title brought by the state.

This result may be reached by the application of at least three legal theories, all of which seem equally appropriate. The first is that a betterments claim is not a claim against the state to which the doctrine of sovereign immunity properly applies. To enforce a betterments claim against the state does not mean that the state must pay out public funds without receiving concomitant benefits; it means, rather, that the state must pay only for what, at its own instance, it demands and receives. The doctrine of sovereign immunity is a shield against payments of the former kind, not a sword to cut off a citizen's right to be paid for what the state takes.

The second is that when the state brings an action for title to realty, it impliedly waives the benefits of sovereign immunity as to whatever claim for betterments may be shown and consents to pay this claim. We held in *Smith* that sovereign immunity would not be available to the state as a defense to a contract action against it, concluding that, "whenever the State . . . enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract." 289 N.C. at 320, 222 S.E. 2d at 423-24. The Court in *Smith* felt that since the state had voluntarily obtained the services of the other contracting party it was simply unfair to preclude that party via the doctrine of sovereign immunity from having any recourse against the state for the state's alleged breach of the agreement. So it is with the state's voluntary decision to institute against a citizen an action for title to realty. If the state prevails

it is unfair to absolve the state from its equitable obligation under the betterments doctrine to pay the citizen who loses title for the permanent improvements to the realty which the state receives.

Finally, I think N.C.G.S. § 41-10.1 (1984) should be interpreted, as the Court of Appeals interpreted it, to constitute an express waiver of sovereign immunity as a defense to a claim for betterments in an action for title brought by the state.

My position is consistent with the result in *Pamlico County v. Davis*, 249 N.C. 648, 107 S.E. 2d 306. Counties in North Carolina enjoy sovereign immunity. *Guthrie v. Ports Authority*, 307 N.C. 522, 299 S.E. 2d 618 (1983). Although the sovereign immunity point was not raised, we nevertheless in *Davis* upheld, under the betterments doctrine, a jury award for the defendant against Pamlico County, which had successfully prosecuted its action for title.

Justice WEBB joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. LEOPOLDO TORRES

No. 470A87

(Filed 2 June 1988)

1. Constitutional Law § 31— interpreter for defendant—qualifications

The trial court was properly within its discretion in appointing and continuing to use a certain person as interpreter for defendant, who neither spoke nor understood English, where the evidence showed that the interpreter's native tongue was Spanish; he had taken five years of English during high school; he had recently taken English courses at Wilkes Community College; he had passed the GED exam given in English; he had received a degree in electronics technology at Wilkes Community College; he was at the time of trial employed at a discount store as hardware department manager; and he had previously acted as a courtroom interpreter in North Carolina.

2. Criminal Law § 169.3— homicide—victim's threat to defendant—evidence excluded—similar evidence admitted

Defendant was not prejudiced by the trial court's exclusion of a statement made by the victim two weeks before his death concerning his intent to buy a gun and kill defendant, since defendant presented three witnesses who testified that the victim had threatened to harm defendant; defendant testified

that the victim had threatened him with a gun sometime before the fatal shooting; and numerous witnesses testified that the victim was known to carry a gun and that he had an assaultive and abusive character.

3. Criminal Law § 138.21— aggravating circumstance of heinous, atrocious, or cruel murder—insufficiency of evidence

The evidence did not support a finding that a murder was especially heinous, atrocious, or cruel where the evidence tended to show that the defendant emptied his pistol by firing shots at close range in rapid succession into the victim's head and chest, killing him instantly, and this evidence did not show that the victim suffered psychologically or physically in a manner not normally present in other second degree murders, nor did the evidence show that the murder was excessively brutal or dehumanizing when compared to other second degree murders. N.C.G.S. § 15A-1340.4(a)(1)f (1983).

APPEAL as of right by the defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by *Gray, J.*, at the 11 May 1987 Criminal Session of Superior Court, WILKES County. Heard in the Supreme Court on 11 May 1988.

Lacy H. Thornburg, Attorney General, by David F. Hoke, Associate Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by David W. Dorey, Assistant Appellate Defender, for the defendant appellant.

MITCHELL, Justice.

The defendant was tried upon a proper bill of indictment charging him with first-degree murder. A jury found the defendant guilty of second-degree murder, and the trial court entered judgment sentencing the defendant to life imprisonment. The defendant appealed to this Court pursuant to N.C.G.S. § 7A-27(a).

The defendant has brought forward assignments of error relative to the guilt-innocence phase and the sentencing phase of his trial. Having reviewed his assignments, we hold that the guilt-innocence phase of the defendant's trial was free from reversible error. We conclude that error was committed in the sentencing phase of his trial and award the defendant a new sentencing hearing.

On 2 November 1986, the defendant shot and killed Guuadalupe Ramirez in the parking lot of the Brushy Mountain Service Station. The State's evidence at trial tended to show, *inter alia*,

that the defendant was at the service station, which also contained a bar and pool tables, on the afternoon of the shooting. Ramirez entered the service station and walked over to the defendant's table and spoke to him in Spanish. Several minutes later the two men went outside to Ramirez's car. Ramirez sat down in the driver's seat beside his friend, Alejandro Sanchez, who was already in the car. The defendant stood outside the car. Shortly thereafter, Harvey Herman, the station's owner, heard a shot fired. He looked outside and saw the defendant shoot Ramirez several times. Herman estimated that all of the shots were fired within three to four seconds. Herman told an employee to call the police, and then he spoke with the police dispatcher. By the time Herman reached the scene, a number of customers had gathered around the body. Herman told them to move away and not to touch anything.

When the rescue squad arrived, Ramirez was dead. The pathologist who performed the autopsy testified that the victim died of gunshot wounds to the head and chest. Ballistic reports indicated that the weapon seized from the defendant at the time of his arrest was the gun that fired the fatal shots. Investigating officers did not find any weapons at the scene.

The defendant testified in his own behalf. Since he neither spoke nor understood English, his testimony and the questions put to him were translated by a court-appointed interpreter. The defendant testified that Ramirez had repeatedly confronted and threatened him because the defendant's cousin was dating Ramirez's former girlfriend. The day of the shooting, Ramirez came into the service station and insisted that the defendant go outside and talk with him. The defendant testified that Ramirez sat down in his car, reached under the seat "real fast" and pulled out a revolver. Ramirez told the defendant he was going to shoot him. The defendant testified that he then pulled a pistol from his back pocket and shot Ramirez in self-defense.

The defendant introduced the testimony of two witnesses who corroborated his testimony about the moments before the shooting. He also introduced the testimony of numerous witnesses who testified that Ramirez had a violent and abusive character and had threatened the defendant on previous occasions.

Following the guilty verdict, the trial court held a sentencing hearing in which it found in mitigation that the defendant had no record of criminal convictions and that he was a person of good character with a good reputation in the community in which he lived. The trial court found in aggravation that the offense was especially heinous, atrocious, or cruel. The trial court concluded that the aggravating factor outweighed the mitigating factors and sentenced the defendant to life imprisonment.

[1] By his first assignment of error, the defendant contends that the trial court erred in denying his motion to have his court-appointed interpreter replaced. In the case at bar, the trial court appointed an interpreter, Delores Henriquez, to assist the defendant in the preparation of his case. Henriquez acted as interpreter in pre-trial preparations, but she notified the court that she would be unable to serve as interpreter for the trial. She was discharged, and the trial court appointed Manuel Prince to assist the defendant throughout the trial. Nancy Foster served as an interpreter for the State.

During the trial, the defendant moved to have Prince replaced because he thought Prince lacked the qualifications and expertise to serve as a trial interpreter. Following a *voir dire* hearing during which Prince and Henriquez testified, the trial court first noted that it had "inquired of both counsel for the State and counsel for Defendant at the outset of the trial as to whether or not they were satisfied with each other's interpreters and they indicated that they were." The trial court then found that: (1) Prince had been an interpreter in several criminal cases; (2) he had satisfactorily passed a course in connection with speaking and interpreting English; (3) he had conversed for several years in English; (4) Spanish is his native tongue; (5) he had taken some English courses at Wilkes Community College; and (6) he had been employed by several American employers where he was required to speak and understand English. The trial court concluded that Prince was adequately prepared to act as an interpreter and denied the defendant's motion.

A court has the inherent authority to appoint an interpreter when one is necessary. *Wise v. Short*, 181 N.C. 320, 322, 107 S.E. 134, 136 (1921); *State v. McLellan*, 56 N.C. App. 101, 102, 286 S.E. 2d 873, 874 (1982). The decision to appoint an interpreter rests

within the sound discretion of the trial court. Any person who is competent to perform the duty assumed may be appointed as an interpreter. *Wise v. Short*, 181 N.C. at 322, 107 S.E. at 136. The court's selection of an interpreter will be deemed error only upon a showing of abuse of discretion. *See State v. McLellan*, 56 N.C. App. at 102, 286 S.E. 2d at 875.

After reviewing the transcript, we conclude that the trial court was properly within its discretion in appointing and continuing to use Manuel Prince as the defendant's interpreter. Although there are some discrepancies between the trial court's findings of fact and the evidence presented at the *voir dire* hearing, the findings concerning the interpreter's competence are borne out by the record. Prince testified, *inter alia*, that he had taken five years of English during high school, that he had recently taken English courses at Wilkes Community College, that he had passed the GED examination given in English, that he had received a degree in electronics technology at Wilkes Community College, that he was presently employed at Sky City as hardware department manager, and that he had previously acted as a courtroom interpreter in North Carolina. This evidence, in addition to other *voir dire* testimony, supported the trial court's finding that Prince had a sufficient command of the English language to act as interpreter for the defendant. This assignment of error is, therefore, overruled.

[2] By his next assignment of error, the defendant contends that the trial court erred in excluding a statement made by the victim two weeks before his death. On surrebuttal, the defendant offered the testimony of Jose Cervin. Defense counsel asked Cervin "what, if anything, did Lupe [the victim] say to you about Leopoldo Torres?" The trial court sustained the State's objection to this question. The defendant then made an offer of proof for the record that Cervin would have testified that two weeks before his murder, the victim said he "wanted to buy a gun to kill 'Poldo' [the defendant]."

It is well established that a trial court's ruling on an evidentiary point will be presumed correct unless the complaining party can demonstrate that the particular ruling was in fact erroneous. *State v. Lloyd*, 321 N.C. 301, 309, 364 S.E. 2d 316, 322 (1988). 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.* "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." N.C.G.S. § 15A-1443(a) (1983). In the case at bar even if it is assumed *arguendo* that the exclusion of the testimony was erroneous, we conclude that the defendant has not carried his burden of showing that he was prejudiced.

The defendant presented three witnesses who testified that the victim had threatened to harm the defendant. Also, the defendant testified that the victim had threatened him with a gun sometime before the shooting. Finally, numerous witnesses testified that the victim was known to carry a gun and that he had an assaultive and abusive character. This testimony tended to show that Ramirez had threatened the defendant prior to the shooting and that Ramirez was a person likely to carry out his threats with lethal force. Because this testimony was extensive and of similar import to the tendered testimony of Cervin, we conclude that the exclusion of Cervin's testimony was harmless to the defendant.

[3] By his next assignment of error, the defendant contends that the trial court erred during the sentencing phase in finding as an aggravating factor that the offense was especially heinous, atrocious, or cruel under N.C.G.S. § 15A-1340.4(a)(1)f (1983). We agree.

Second-degree murder is a Class C felony which carries a presumptive sentence of fifteen years imprisonment. N.C.G.S. § 14-17 (1977 Cum. Supp.); § 15A-1340.4(f)(1) (1983). The trial court may impose a sentence at variance with the presumptive sentence if aggravating or mitigating factors merit a longer or shorter sentence. *State v. Marley*, 321 N.C. 415, 364 S.E. 2d 133 (1988). Here, the trial court sentenced the defendant to life imprisonment after finding one aggravating and two mitigating factors and after determining that the aggravating factor outweighed the mitigating factors.

In determining whether the crime was especially heinous, atrocious, or cruel, "the focus should be on whether the facts of the case disclose *excessive* brutality, or physical pain, psychological suffering, or dehumanizing aspects *not normally present in*

that offense." State v. Blackwelder, 309 N.C. 410, 414, 306 S.E. 2d 783, 786 (1983), *quoted in State v. Mancuso*, 321 N.C. 464, 466, 364 S.E. 2d 359, 361 (1988).

The evidence in the case at bar tended to show, *inter alia*, that the defendant was inside the Brushy Mountain Service Station when Ramirez entered and insisted that the defendant walk outside with him. Ramirez and the defendant walked to Ramirez's car where the defendant fired multiple shots in rapid succession into Ramirez's head and chest. Witnesses testified that the shots were fired within a matter of a few seconds. An autopsy revealed that the victim died from any one of the gunshot wounds to the head and chest and that each of the wounds was sufficient to cause death. Ernest Sawyer, the first person to respond to the emergency call, testified that he arrived at the scene shortly after the shooting. He attempted to administer first aid, but Ramirez was already dead. Although there were three eyewitnesses to the shooting, there was no evidence tending to indicate that Ramirez did not die instantly upon being shot. There was no evidence that the victim suffered psychologically or physically in a manner not normally present in other *second-degree* murders.

Neither is there evidence that the murder was excessively brutal or dehumanizing when compared to other *second-degree* murders. The evidence tended to show that the defendant emptied his pistol by firing shots at close range in rapid succession into Ramirez's head and chest killing him instantly. Testimony of numerous witnesses tended to show that Ramirez usually carried a pistol, was a violent man apt to use it, had threatened the defendant, and initiated the contact with the defendant which led to this killing. On the peculiar facts of this case, at least, the single fact that the defendant inflicted multiple wounds did not make the second-degree murder especially heinous, atrocious, or cruel under N.C.G.S. § 15A-1340.4(a)(1)f. We conclude that the evidence did not support a finding that the murder here was especially heinous, atrocious, or cruel when compared, as it must be, to other *second-degree* murders.

We hold the guilt-innocence phase of the defendant's trial was free of reversible error. Because the trial court erroneously found as an aggravating factor that the offense was especially hei-

nous, atrocious, or cruel, the case is remanded to the Superior Court, Wilkes County, for resentencing.

Remanded for resentencing.

STATE OF NORTH CAROLINA v. RONALD LEE BURTON

No. 64A87

(Filed 2 June 1988)

Criminal Law § 89.4— murder—prior inconsistent statement of witness—erroneously admitted—prejudicial

The trial court erred in a prosecution for murder and assault with a deadly weapon with intent to kill inflicting serious injury by admitting as corroborative evidence a witness's recorded statement to an officer where the recorded statement was inconsistent with the witness's trial testimony. Although corroborative testimony may contain new or additional information which tends to strengthen or add credibility to the testimony which it corroborates, the statement in this case directly contradicted the witness's sworn testimony. There was prejudice in that defendant's only defense was defense of others from the victim's assault and the prior statement was that the victim was lying flat on his back when he was shot by defendant. N.C.G.S. § 15A-1443(a).

APPEAL of right by the defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment for first degree murder entered by *Ellis, J.*, at the 27 October 1986 Criminal Session of Superior Court, ALAMANCE County. Heard in the Supreme Court on 17 March 1988.

Lacy H. Thornburg, Attorney General, by Reginald L. Watkins, Special Deputy 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, Ronald Lee Burton, was tried upon separate bills of indictment for the murder of Willard Jones and for assault with a deadly weapon with intent to kill inflicting serious injury

on Adrian Miles. The jury returned verdicts finding the defendant guilty of both charges. The trial court arrested judgment in the assault case and sentenced the defendant to life imprisonment for first degree murder.

On appeal to this Court, the defendant brings forward three assignments of error relating to the jury instructions and the admissibility of evidence. Having concluded that the trial court erred in overruling the defendant's objection to the use of a tape recorded statement for corroborative purposes, we award the defendant a new trial.

The State's evidence at trial tended to show, *inter alia*, that on the evening of 23 March 1986, two groups of friends were drag racing on rural Graham Fleming Road in Alamance County. One of the drag racing groups consisted of Gregory Florence, Harry Teal, and the defendant. The other group consisted of Adrian Miles, Gattis Farris, Willard Jones, and Jones' girlfriend. During the evening Miles and Florence got into an argument about a twenty dollar bet on one of the races. Miles quickly got the upper hand, pinned and straddled Florence, and began beating him on the head. Florence yelled to the people in the crowd, "Get this man off me, he is trying to kill me." The defendant, who was carrying a .22 pistol, yelled for someone to get Miles off, otherwise he was going to shoot. Miles and Florence continued struggling. The defendant fired one shot, which struck Miles in the arm. He then fired again and struck Miles in the leg. The defendant then turned around and shot two more times "in the air." These two shots struck Willard Jones in the left chest and right back. He died later from blood loss. The defendant said that he knew a car was parked in the direction he was shooting, but that he did not know anyone was over there because it was very dark.

The defendant left the scene with Florence and Teal. Teal took the defendant home. Because the defendant was afraid, he went to a friend's house for about an hour, and then left for the home of another friend where he "believes" he may have spent the night. The next morning the defendant threw his gun into a field near his home and had his mother drive him to the police station.

The defendant was tried for the felony murder of Jones with the underlying felony being the assault on Miles. He presented as

a defense the "defense of others," i.e., that he was lawfully defending Florence from Miles' assault.

At trial the State offered the testimony of Samuel Herbin, who had observed the shooting. In response to the prosecutor's question as to who was on top just before the shooting, Herbin testified, "[Miles], he was on top of him. Well, it was like [Miles], he was on top of Florence. He was trying to hit him . . . in the face." Later, the State called Detective Phil Ayers to play a tape recording of an interview he had with Herbin on 2 April 1986. Defense counsel objected and requested a voir dire. During the voir dire, the trial court listened to a reading of the transcripts of the tape and specifically ruled on the admissibility of each particular challenged question and answer on the tape. The trial court overruled all of the defendant's objections and stated with respect to Herbin's answers, it would "let the jury determine whether or not that is consistent with the testimony." In the tape recorded interview Detective Ayers asked Herbin, "Was [Miles] facing [defendant] when he got shot?" Herbin answered, "He was turning around like this. *He was lying flat down on his back.*" (Emphasis added.)

In his first assignment of error, the defendant contends that the trial court committed prejudicial error by overruling his objections to the playing of witness Herbin's recorded statements. The defendant argues that Herbin's recorded statement that Miles was lying flat down on his back when he was shot was not hearsay admissible for corroborative purposes as a prior consistent statement, because it was not in fact consistent with Herbin's trial testimony.

Herbin did not testify, either explicitly or implicitly, that Miles was on his back when he was shot. Quite to the contrary, Herbin testified that Miles was on top of Florence trying to hit him in the face. Because Herbin's recorded statement was inconsistent with his trial testimony, the defendant argues that the recorded statement should have been excluded from evidence as noncorroborative.

Corroboration is defined as the "process of persuading the trier of facts that a witness is credible." 1 Brandis on North Carolina Evidence § 49 (2d ed. 1982). Prior consistent statements of a witness are admissible as corroborative evidence, even when

the witness has not been impeached. *State v. Martin*, 309 N.C. 465, 308 S.E. 2d 277 (1983). To be admissible as corroborative evidence, prior consistent statements must tend to add weight or credibility to the witness's testimony, but it is well established that the corroborative testimony may contain "new or additional information when it tends to strengthen and add credibility to the testimony which it corroborates." *State v. Kennedy*, 320 N.C. 20, 35, 357 S.E. 2d 359, 368 (1987). *Accord, State v. Howard*, 320 N.C. 718, 360 S.E. 2d 790 (1987); *State v. Ramey*, 318 N.C. 457, 349 S.E. 2d 566 (1986) (disapproving prior cases *contra*); *State v. Higgenbottom*, 312 N.C. 760, 324 S.E. 2d 834 (1985); *State v. Burns*, 307 N.C. 224, 297 S.E. 2d 384 (1982).

In *State v. Ramey*, 318 N.C. 457, 349 S.E. 2d 566 (1986), we stated:

> In order to be corroborative and therefore properly admissible, the prior statement of the witness need not merely relate to specific facts brought out in the witness's testimony at trial, so long as the prior statement in fact tends to add weight or credibility to such testimony. . . . Our prior statements are disapproved to the extent that they indicate that additional or "new" information, contained in the witness's prior statement but not referred to in his trial testimony, may never be admitted as corroborative evidence. . . . However, the witness's prior statements as to facts not referred to in his trial testimony *and not tending to add weight or credibility* to it are not admissible as corroborative evidence. Additionally, the witness's *prior contradictory statements may not be admitted under the guise of corroborating* his testimony.

Id. at 469, 349 S.E. 2d at 573-74 (emphasis added) (citations omitted).

In the instant case Herbin testified on direct examination that Miles was on top of Florence only moments before the defendant started shooting. In the tape recorded interview with Detective Ayers, however, Herbin stated that Miles was lying flat on his back when he was shot. The State contends that Herbin's statement tended to add weight or credibility to his trial testimony even though his testimony did not refer to the same facts contained in his statement. The State argues that any inconsist-

encies "go only to [Herbin's] credibility at trial, however, not the admissibility of the corroborative evidence . . . ." *State v. Baize*, 71 N.C. App. 521, 525, 323 S.E. 2d 36, 39 (1984), *disc. rev. denied*, 313 N.C. 174, 326 S.E. 2d 33 (1985). We disagree.

The facts in the present case are not analogous to those in *Ramey* in which the victim's prior statements, although including additional facts not referred to in his testimony, tended to strengthen and add credibility to his trial testimony. Herbin's prior recorded statement actually directly contradicted his sworn testimony. Therefore, it was not admissible under the guise of corroborative evidence. *State v. Ramey*, 318 N.C. at 469, 349 S.E. 2d at 574.

Moreover, the defendant was prejudiced by the erroneous introduction of Herbin's prior inconsistent statement. The defendant's only defense in this case was the defense of others; that he was lawfully defending Florence from Miles' assault. A jury would not be inclined to accept such a defense if it believed that the alleged assailant who had to be stopped was lying flat on his back when he was shot.

The defendant testified that Miles was on top of and astraddle Florence beating him in the head when the defendant fired both shots. In sharp contrast, Miles testified that he was shot in the shoulder, that he "rolled off," that he "laid down," and that the defendant "then . . . shot me again in the leg." Thus, Herbin's inadmissible prior inconsistent statement that Miles was lying flat down on his back when he was shot by the defendant went to a hotly contested question of fact which was crucial to the defense. The defendant has met his burden of showing a reasonable possibility that a different result would have been reached had the error in question not been committed. N.C.G.S. § 15A-1443(a) (1983). Therefore, the defendant must receive a new trial.

We decline to address the defendant's remaining assignments of error, as they are not likely to arise upon a new trial.

New trial.

STATE OF NORTH CAROLINA v. DARRELL WILLIAMS

No. 551A87

(Filed 2 June 1988)

Criminal Law § 89.4— defense witness—no impeachment by use of extrinsic evidence of prior inconsistent statements

Where one of defendant's witnesses denied that defendant had told him that he raped the victim, and the witness denied that he had told his probation officer and an employee of the officer that defendant told him he had raped the victim, the trial court erred in allowing the State to call the probation officer and the employee to testify that the witness had told them of defendant's statement, since the State may not impeach a defense witness by use of extrinsic evidence of prior inconsistent statements; furthermore, where the question of defendant's guilt hinged solely upon whether the jury believed his or the prosecutrix's testimony, there was a reasonable possibility of a different result had the evidence not been erroneously admitted.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a life sentence entered by *Herring, J.*, at the 22 June 1987 Criminal Session of Superior Court, WARREN County, upon defendant's conviction of first degree rape. Heard in the Supreme Court 14 April 1988.

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

Malcolm Ray Hunter, Jr., Appellate Defender, by Mark D. Montgomery, Assistant Appellate Defender, for defendant appellant.

EXUM, Chief Justice.

The issue on appeal is whether the trial court erred in allowing the state to impeach one of defendant's witnesses, David Small, by use of extrinsic evidence of prior inconsistent statements. We conclude admission of the impeachment testimony constitutes reversible error.

I

At trial, the nineteen-year-old prosecutrix testified that on the evening of 28 December 1986 she went to the Starlight Palace Club with Mary Small, David Small, Lennie Alston and defendant. She later left the club with defendant and Alston. As the three

drove home, defendant "took a short cut," stopped the car and told the victim that she would have to "give him something." Defendant then continued driving. About fifteen minutes later defendant again stopped the car. The victim testified that, while Lennie Alston held her down, defendant got on top of her and used the weight of his body to pin her hands down so that she could not move. Defendant then took off her pantyhose and panties and, after several attempts, inserted his penis in her vagina. After having sexual intercourse with her, defendant took her home.

Defendant testified on his own behalf. He admitted leaving the Starlight Palace Club with the victim and Lennie Alston. However, he testified that he took the victim directly to her house and denied ever having sexual intercourse with her.

Defendant's sister, Mary Small, testifying on defendant's behalf, said the victim had flirted with defendant and had insisted on leaving the Starlight Palace Club with him. She also testified the victim had called and told her she had been raped.

Robert Small, defendant's brother-in-law, also testified on defendant's behalf. Robert Small corroborated his wife Mary's testimony and stated the victim had also flirted with him on 28 December. On cross-examination Small admitted he was on probation for driving under the influence. The following exchange then occurred:

> Q. And isn't it true that [defendant] told you that he did have sex with her that evening?
>
> A. He ain't never told me that. He ain't never told me that. . . .
>
> Q. And isn't it true that you have discussed this matter with your probation officer, Robert Terry? . . . .
>
> A. No . . . .
>
> Q. You deny that you were in Robert Terry's office on this day and that you told him that . . . Darrell Williams told you that he had in fact had sex with [victim]?
>
> A. I deny it all. I didn't tell. I didn't tell my probation officer that.

Following this testimony the state called two rebuttal witnesses in an attempt to impeach Small's testimony. The state first called Robert Terry, Small's probation officer, and proposed to ask him whether Small had told him that defendant had admitted raping the victim. Over objection, Robert Terry testified as follows:

> Q. . . . Did he specifically at any time tell you whether or not his brother-in-law had told him what had gone on between he and [victim]?
>
> A. Yes. . . . He stated that the conversation that he had with Darrell Williams, his brother-in-law, was that his brother-in-law told him the whole detail of what happened, and that he did rape. [sic] And so I didn't ask him for any details, because I didn't want to hear any more.

Following the testimony of Robert Terry, the state called a second rebuttal witness, Monique Mills. Ms. Mills, a summer employee of Robert Terry, had been present in the room at the time of the alleged conversation between David Small and Robert Terry. Before allowing Ms. Mills to testify the trial court instructed the jury as follows:

> All right. Members of the jury, the testimony of Mr. Terry and of this witness [Ms. Mills] is offered by the State solely for the purpose of impeaching the truthfulness and credibility of the testimony of the defendant's witness [David Small].

Over objection, Ms. Mills testified as follows:

> Q. Were you in [Robert Terry's] office this afternoon when Mr. Small came in to the office?
>
> A. Yes.
>
> Q. What, if anything, did you hear Mr. Small say?
>
> . . . .
>
> A. . . . He said he [defendant] told him about that night. . . . he said that Darrell told him about that night and that it did happen, or something like that. . . .

II

Defendant argues, and we agree, that it was error for the trial court to allow the state to use extrinsic evidence of prior in-

consistent statements, *i.e.*, the testimony of Robert Terry and Monique Mills, to impeach David Small.

As we stated in *State v. Green*, 296 N.C. 183, 250 S.E. 2d 197 (1978):

> A witness may be cross-examined by confronting him with prior statements inconsistent with any part of his testimony, but where such questions concern matters collateral to the issues, the witness's answers on cross-examination are conclusive, and the party who draws out such answers will not be permitted to contradict them by other testimony.

Id. at 192, 250 S.E. 2d at 203. For a general understanding of this rather complex area of evidence law, see 1 Brandis on North Carolina Evidence § 48 (2d rev. ed. 1982), and cases therein cited and discussed.

In *State v. Moore*, 275 N.C. 198, 166 S.E. 2d 652 (1969), defendant was tried and convicted of the first degree murder of his wife. Defendant's brother, Ray Moore, testified on defendant's behalf. Ray Moore denied on cross-examination that defendant had admitted to him that he [defendant] had shot the victim. Thereafter, over defendant's objection, Sheriff E. O. Davis was permitted to testify that Ray Moore had told him that defendant had admitted shooting the victim. We concluded that, when Ray Moore denied that defendant had made the disputed statement to him, the state was bound by Moore's answer because his "denial did not tend to establish any material fact in the case; it was negative testimony which proved nothing. . . ." We held that, because Ray Moore's testimony concerned a collateral matter, the trial court erred in permitting the state to impeach him by use of extrinsic evidence.

In *State v. Cutshall*, 278 N.C. 334, 180 S.E. 2d 745 (1971), defendant's son, Dewayne Cutshall, denied telling anyone that his father was "down at Riverside making up alibis." Over defendant's objection, Sheriff Roy Roberts and Blanche Cutshall were permitted to testify that they heard Dewayne Cutshall make such a statement. In concluding that the trial court committed reversible error by permitting the testimony, we stated that:

> [W]hen Dewayne Cutshall denied making the collateral statement, the State was bound by his answer and could not offer

> extrinsic evidence for the purpose of impeaching the witness as to his prior inconsistent statements. Yet the admission of the incompetent testimony of Blanche Cutshall and Sheriff Roy Roberts contradicting Dewayne's denial gave the State the benefit of evidence which tended to weaken and undermine defendant's sole defense of alibi . . . .

Id. at 350, 180 S.E. 2d at 755.

Moore and *Cutshall* control the case at bar. Under these holdings Robert Small's testimony concerning what he did or did not tell his probation officer was collateral to the issues in the case; therefore, it was improper to impeach him on this point by offering the testimony of Robert Terry and Monique Mills. Robert Terry's and Monique Mills' testimony was not offered to prove that defendant had, in fact, made the alleged statements to David Small. Rather, the testimony was offered solely to contradict Small's testimony that he had not *told* Robert Terry that defendant made these statements. While the *substance* of those statements and whether defendant made them would be material, whether Robert Small had *told* anyone about defendant's statements is clearly collateral.

We recognize that on 1 July 1984 our current Rules of Evidence, N.C.G.S. § 8C-1, went into effect and governed this trial. While these Rules control almost all evidence questions that arise, "there are some evidentiary questions that are not within the coverage of these rules. In these instances, North Carolina precedents will continue to control unless changed by our courts." N.C.G.S. § 8C-1, Commentary, Rule 102 (1986). Arguably, Rule 403 is designed to render the evidence considered here inadmissible. *See* Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 So. Cal. L. Rev. 220 (1976). Indeed the Court in *Moore* gave as one reason for excluding the evidence that "the prejudicial effect of such evidence outweighs its legitimate use . . . ." 275 N.C. at 213, 166 S.E. 2d at 662. Since, however, our precedents speak so clearly to the evidence question presented and the Rules speak, if at all, only obliquely, we have no hesitancy in following our precedents to resolve the issue. In either event, the result is the same.

Under N.C.G.S. § 15A-1443(a) (1983), reversible error exists "where there is a reasonable possibility that, had the error in question not been committed, a different result would have been

reached at trial." Here, the statements attributed to defendant constituted an admission that he had, indeed, raped the victim. In light of the sharp conflict in the evidence, with the question of defendant's guilt hinging solely upon whether the jury believed his testimony or the prosecutrix's testimony, we conclude that had this evidence not been erroneously admitted there is a reasonable possibility of a different result at trial. *See State v. Cutshall*, 278 N.C. 334, 180 S.E. 2d 745. Defendant, therefore, must be given a

New trial.

STATE OF NORTH CAROLINA v. BRYAN ERIC GRAY

No. 588A87

(Filed 2 June 1988)

1. **Constitutional Law § 60; Jury § 7.14— peremptory challenges—purposeful racial discrimination—insufficiency of evidence**

Defendant failed to make a *prima facie* showing of racial discrimination by the State's exercise of its peremptory challenges where the prosecuting attorney asked all the jurors essentially the same questions; no questions indicated any prejudice or discrimination on the part of the prosecuting attorney; the State used all its peremptory challenges, four to white jurors and two to black jurors; and the prosecuting attorney knew that by using four peremptory challenges for white jurors which helped to exhaust his peremptory challenges that some white jurors could be replaced by black jurors.

2. **Jury § 6— voir dire examination—asking questions of individual jurors—discretion of trial court**

The trial court did not err in refusing to allow defense counsel to ask individual prospective jurors questions which could be addressed to the whole panel since a black defendant does not have a constitutional right to make an individualized inquiry into the existence of racial bias in potential jurors; the rule in this state is that the court may require certain general questions to be asked of the panel as a whole; the trial judge stated that defense counsel could ask individual jurors questions if he wanted to ask questions which the whole panel couldn't answer; and the trial court did allow defense counsel to ask the potential jurors questions about racial bias.

3. **Burglary and Unlawful Breakings § 5.11— intent to commit rape—sufficiency of evidence of felonious intent**

Evidence that defendant committed rape after he entered a building was evidence he intended to commit rape at the time he broke into the building, and the trial court therefore properly submitted the charge of felonious breaking or entering to the jury.

4. Burglary and Unlawful Breakings § 7— felonious intent at time of breaking or entering—failure to instruct on lesser offenses error

If the jury did not find that defendant intended to commit rape at the time he entered a building but found other elements of breaking or entering, the jury should have found defendant guilty of misdemeanor breaking or entering, and the trial court therefore erred in failing to submit misdemeanor breaking or entering as a possible verdict.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a life sentence entered by *Wood, Judge*, at the 6 July 1987 Session of Superior Court, CABARRUS County. This Court allowed defendant's motion to bypass the Court of Appeals as to the judgment imposing a sentence of less than life imprisonment. Heard in the Supreme Court 11 April 1988.

The defendant was tried for first degree rape and felonious breaking or entering. The defendant, a black man, was charged with raping a white woman. Margaret Thompson testified that at 7:45 a.m. on 5 March 1987 she was at home with her four-year-old daughter while her husband was at work. She heard the dog barking in the backyard, and went to investigate. As she reached the kitchen, she noticed that the door to the back porch was open. She then noticed that her pocketbook was on the ironing board on the back porch, and her wallet was lying open beside it. A man whom she identified as defendant emerged from behind the door, holding a small silver handgun. He made her put her hands and head on the washing machine. He learned from her that her daughter was in the house, and threatened to kill Ms. Thompson and her daughter because he "had nothing to lose." He told her at gunpoint to stand up, started kissing her, took out his penis, ordered her to undress, and told her to get on the dryer. He began to lick her vagina and then told her to lie on the floor at which time he had sexual intercourse with her. He held the gun on her at all times during the incident. As he left her house, the defendant handed Mrs. Thompson some money and said, "Here, I'm not a thief."

Defendant admitted that he had intercourse with Ms. Thompson but claimed it was with her consent.

The defendant was convicted of both charges. He appealed from the imposition of prison sentences.

Lacy H. Thornburg, Attorney General, by Steven F. Bryant, Assistant 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's first assignment of error is to the denial of his motion for mistrial based on what the defendant contends was purposeful racial discrimination by the State in the selection of the jury. The defendant made this motion immediately after the jury was selected and before it was impaneled. The court had a hearing and made findings which were supported by the evidence that (1) the prosecuting attorney asked all the jurors essentially the same questions, (2) no questions indicated any prejudice or discrimination on the part of the prosecuting attorney, and (3) the State used all its peremptory challenges, four to white jurors and two to black jurors. The court found the prosecuting attorney knew that by using four peremptory challenges for white jurors which helped to exhaust his peremptory challenges that some white jurors could be replaced by black jurors. The court held the defendant had not made a prima facie showing of racial discrimination by the State in the exercise of its peremptory challenges.

In *Batson v. Kentucky*, 476 U.S. 79, 90 L.Ed. 2d 69 (1986), the United States Supreme Court held a defendant may make a prima facie case of racial discrimination in the selection of a jury solely on evidence concerning the prosecutor's exercise of peremptory challenges. If a defendant challenges the jury selection on the grounds that the State has purposefully discriminated on the basis of race, the trial court must determine if the defendant has made a prima facie case. The court may consider all relevant circumstances including the pattern of strikes against black jurors and questions during the voir dire. In this case the court considered the questions on voir dire and the pattern of strikes against black jurors and held the defendant had not made a prima facie showing of discrimination in the selection of the jury. The factors considered by the court support its ruling. Paying due deference, as we must, to the ruling of the superior court, we can-

not disturb its order. *See State v. Jackson*, 322 N.C. 251, 368 S.E. 2d 838 (1988).

[2] Defendant next contends the trial court erred in refusing to allow defense counsel to ask individual prospective jurors questions which could be addressed to the whole panel. Defendant argues that this was error because under *Ham v. South Carolina*, 409 U.S. 524, 35 L.Ed. 2d 46 (1973), and *Turner v. Murray*, 476 U.S. 28, 90 L.Ed. 2d 27 (1986), "a black defendant has a constitutional right to make an individualized inquiry into the existence of racial bias in potential jurors." We disagree. The cases defendant cites do not stand for the proposition for which he cites them. Both of those cases merely hold that defendant has the right to have the jurors interrogated on the issue of racial bias. In *Turner*, the Court clearly states that "the trial judge retains discretion as to the form and number of questions on the subject, including the decision whether to question the venire individually or collectively." *Turner v. Murray*, 476 U.S. at 37, 90 L.Ed. 2d at 37. The rule in this state is that the court may require certain general questions to be asked of the panel as a whole. *State v. Phillips*, 300 N.C. 678, 268 S.E. 2d 452 (1980). The trial judge in the present case, while requiring that counsel address the panel as a whole when the question applied to the whole panel, clearly stated, "If you want to ask them questions that the whole panel can't answer, that will be fine, I'll let you ask them." We also find, in examining the record, that the trial court did allow defense counsel to ask the potential jurors questions about racial bias. This assignment of error is overruled.

[3] The defendant next contends it was error to deny his motion to dismiss the charge of felonious breaking or entering. The essential elements of felonious breaking or entering are (1) the breaking or entering (2) of any building (3) with the intent to commit any felony or larceny therein. N.C.G.S. § 14-54(a) (1986). The felonious intent required to satisfy the third element must be the intent set out in the indictment. *State v. Dawkins*, 305 N.C. 289, 287 S.E. 2d 885 (1982). In this case, because the defendant was indicted for breaking or entering with the intent to commit rape, the State was obligated to prove the defendant intended to commit rape at the time he entered the victim's house.

The defendant argues that all the evidence showed that at the time he entered the house he intended to commit larceny

rather than rape and the proof of the third element is lacking. We have held or said in several cases that evidence of what a defendant does after he breaks and enters a house is evidence of his intent at the time of the breaking and entering. *See State v. Peacock*, 313 N.C. 554, 330 S.E. 2d 190 (1985); *State v. Warren*, 313 N.C. 254, 328 S.E. 2d 256 (1985); *State v. Bell*, 285 N.C. 746, 208 S.E. 2d 506 (1974); and *State v. Tippett*, 270 N.C. 588, 155 S.E. 2d 269 (1967). In this case the evidence that the defendant committed rape after he entered the building is evidence he intended to commit rape at the time he broke into the building.

The defendant argues that the rule is not as broad as we have stated it. He says that in *Tippett* this Court said in the absence of contrary evidence, proof that the defendant attempted to commit rape after he entered the building is evidence he intended to commit rape at the time he entered. In this case, says the defendant, there is contrary evidence, which is that he intended to commit larceny. In *Tippett* the defendant was tried for burglary. The indictment alleged that he broke into the house with the felonious intent to steal goods therein and to commit rape upon the woman therein. The evidence showed he first took some money from a pocketbook and then attempted to rape a woman occupant of the house. We held the evidence was sufficient to find the defendant intended to commit larceny or rape at the time of the breaking or entering. We believe that under the rule of *Tippett*, felonious breaking or entering was properly submitted to the jury.

[4] In his last assignment of error, the defendant contends misdemeanor breaking or entering should have been submitted as a possible verdict to the jury. This assignment of error has merit. Misdemeanor breaking or entering is a lesser included offense of felonious breaking or entering. The jury was not compelled to find from the evidence that the defendant intended to commit rape at the time he entered the building. *Tippett*, 270 N.C. 588, 155 S.E. 2d 269. If the jury had not found the defendant intended to commit rape at the time he entered the building and found the other elements of breaking or entering, they should have found him guilty of misdemeanor breaking or entering. This possible verdict should have been submitted to the jury. *Peacock*, 313 N.C. 554, 330 S.E. 2d 190. *State v. Faircloth*, 297 N.C. 388, 255 S.E. 2d 366 (1979), relied on by the State, is not controlling. In that case

the defendant testified the prosecuting witness invited him into her home. If the jury had believed the defendant's evidence there would have been no breaking or entering. We held misdemeanor breaking or entering should not be submitted to the jury under those circumstances.

We find no error in the conviction of rape. We hold there must be a new trial for the charge of felonious breaking or entering.

No error in 87CRS197.

New trial in 87CRS198.

STATE OF NORTH CAROLINA v. GERALD WAYNE BEAVER

No. 383A87

(Filed 2 June 1988)

Criminal Law § 122.2— jury deliberations—inquiries by court—no coercion

The trial court did not coerce a jury into reaching a verdict in a prosecution for first degree rape, first degree sexual offense, and first degree kidnapping where the record shows that the court was at all times polite to the jury; it did not intimate that it would be displeased with them if the jury failed to reach a verdict; it did not threaten to hold them on the jury for any length of time if they did not reach a verdict; and it did not tell them every trial would be a burden on the court system. The fact that the jury deliberated for a considerable length of time and into the weekend, the several inquiries made of the jury by the court, the length of time the jury deliberated relative to length of trial and the fact that the numerical division was reported at one point as being eleven to one do not show that there was coercion. N.C.G.S. § 15A-1235(b).

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from judgments imposing concurrent life sentences entered by *Battle, J.*, at the 5 May 1987 Criminal Session of Superior Court, ALAMANCE County. Heard in the Supreme Court 9 May 1988.

The defendant was tried for first degree rape, first degree sexual offense, and first degree kidnapping. The prosecuting witness testified to facts sufficient to submit the case to the jury on all three charges.

The court finished its charge to the jury on Thursday afternoon and the jury began its deliberations on Friday morning. At some time that morning the jury returned to the courtroom and asked to examine some exhibits. The jury, with the consent of counsel, was allowed to take the exhibits to the jury room. At that time the court suggested to the jury that they take a fifteen minute recess. Deliberation by the jury continued after the recess until the court recessed for lunch. The jury resumed its deliberations after lunch.

At some time during the afternoon the court had the jury return to the courtroom and inquired as to their progress. The foreman indicated progress "up to a point, Your Honor, and then it seems like we've run into a stump." The court then instructed the jury in accordance with N.C.G.S. § 15A-1235(b). The jury was then given a recess and resumed its deliberations. The jury was not able to reach a verdict on Friday afternoon and a recess was taken until 9:30 a.m. on Saturday morning.

After the jury began its deliberations on Saturday morning, they returned to the courtroom and requested a dictionary in order to look for a definition of "cunnilingus." The court defined this word for them and they resumed deliberations. Later in the morning the court had the jury return to the courtroom and asked the foreman whether the jury "was making any progress." The foreman said, "We've still got a lot of discussion going on, Your Honor, but I don't know if we're making any progress." The court gave the jury a recess and they then resumed deliberations. Later in the morning the court had the jury return to the courtroom at which time the foreman told the court the jury was making progress. At this time the court ordered a break for lunch.

After the jury had deliberated for some time in the afternoon, the court once again had the jury return to the courtroom to inquire whether they were making progress. The foreman responded in the affirmative. The court ordered the jury to continue its deliberations.

Later in the afternoon the defendant's attorney moved for a mistrial based on the apparent inability of the jury to reach a unanimous verdict after deliberating for a period which, counsel noted, had lasted longer than the time required for the presentation of the evidence. The court then had the jury return to the

courtroom and inquired as to their progress. The foreman said, "I guess I keep lying to you, but I think we are." The court then asked for the numerical division and the foreman responded "eleven to one." The court again asked if the foreman felt that the jury might reach a decision and the foreman said, "We think so. We're having a struggle." The jury returned to the jury room and the court denied the defendant's motion for a mistrial. At 5:17 p.m. the jury returned its verdict.

The defendant was found not guilty of rape and guilty of first degree sexual offense and first degree kidnapping. The court imposed life sentences to be served concurrently for each of the crimes for which the defendant was convicted. The defendant appealed.

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

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

WEBB, Justice.

The defendant's only assignment of error is to what he contends is the court's coercion of the jury into reaching a verdict. He says this was done by the questions and comments of the court to the jury. The question of a court's coercion of a jury to reach a verdict has been considered in several cases. *See State v. Forrest*, 321 N.C. 186, 362 S.E. 2d 252 (1987); *State v. Bussey*, 321 N.C. 92, 361 S.E. 2d 564 (1987); *State v. Fowler*, 312 N.C. 304, 322 S.E. 2d 389 (1984); and *State v. Yarborough*, 64 N.C. App. 500, 307 S.E. 2d 794 (1983). The rule from these cases is that the totality of circumstances will be considered in determining whether the jury's verdict was coerced. An inquiry as to a division, without asking which votes were for conviction or acquittal, is not inherently coercive. Without more, it is not a violation of the defendant's right to a jury trial. Some of the factors considered in the above cases in judging the totality of circumstances are whether the court conveyed an impression to the jury that it was irritated with them for not reaching a verdict, whether the court intimated to the jury that it would hold them until they reached a verdict, and whether the court told the jury a retrial would burden the court system if the jury did not reach a verdict. In this case the

record shows the court was at all times polite to the jury; it did not intimate it would be displeased with them if the jury failed to reach a verdict; it did not threaten to hold them on the jury for any length of time if they did not reach a verdict; and it did not tell them a retrial would be a burden on the court system. We cannot hold, considering the totality of the circumstances, that the court's actions coerced a verdict from the jury.

The defendant contends that the length of time the jury deliberated relative to the length of the trial, the fact that the jury was repeatedly called upon to report its progress in open court, and the deliberations well into the weekend, go to show the jury was coerced. He says that when these factors are added to the fact that one juror had resisted the will of the majority for an extended period of time and was put in a difficult position when the division was announced, it shows there was coercion and there must be a new trial. We have no way of knowing how long the division had been eleven to one and we cannot say that one juror had held out for any length of time. The fact that the jury deliberated for a considerable length of time and into the weekend does not show the court coerced a verdict. The court made several inquiries of the jury because the jury took as much time as it did in the deliberations. The number of inquiries does not show there was coercion.

No error.

IN THE MATTER OF: WILLIAM H. MILLER v. NORTH CAROLINA STATE BOARD OF REGISTRATION FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS

No. 370PA87

(Filed 2 June 1988)

ON discretionary review of the decision of the Court of Appeals, 86 N.C. App. 91, 356 S.E. 2d 793 (1987), reversing a judgment entered by *Brannon, J.*, on 21 July 1986, in Superior Court, WAKE County. Heard in the Supreme Court on 10 February 1988.

Maupin Taylor Ellis & Adams, P.A., by William W. Taylor, Jr., John C. Cooke, and Ronald R. Rogers, for plaintiff-appellee.

Bailey & Dixon, by David M. Britt, Wright T. Dixon, Jr., and Dorothy V. Kibler, for defendant-appellant.

PER CURIAM.

The Court of Appeals reversed the judgment of the trial court and vacated a decision of the North Carolina State Board of Registration for Professional Engineers and Land Surveyors (Board). The Board's decision reprimanded petitioner and suspended his license.

The Notice of Action Without Hearing sent to petitioner by the Board informed petitioner that the Board's "intended action" was a reprimand and fine. While the applicable disciplinary statute (N.C.G.S. § 89C-21) permits the Board to suspend or even revoke petitioner's license, the notice to him was misleading, lulling him into believing that his conduct would, at most, result in a reprimand or fine—not suspension of his license. The Court of Appeals was thus correct in vacating the Board's decision.

The Court of Appeals held that petitioner was entitled to notice that the proceedings could result in the suspension of his license. N.C.G.S. § 89C-22 provides that such proceedings shall be heard in accordance with Chapter 150A (now Chapter 150B) of the General Statutes. At the time of the hearing in the case *sub judice*, N.C.G.S. § 150A-3(b) required the Board to give notice "of alleged facts or alleged conduct warranting the *intended action*." (Emphasis added.) The Board, in its notice to petitioner, limited its "intended action" to a fine and a reprimand, although the applicable disciplinary statute, N.C.G.S. § 89C-21, authorizes disciplinary action ranging from a fine to license revocation. The Court of Appeals held that the Board was precluded from imposing the greater sanction of license suspension. We agree with the Court of Appeals.

The Administrative Procedures Act was amended and recodified at N.C.G.S. § 150B-1 through § 150B-64, effective 1 January 1986. Under the recodification, the language requiring notice "of alleged facts or alleged conduct warranting the intended action" was omitted from N.C.G.S. § 150B-3(b) (formerly § 150A-3(b)).

That section now requires that before commencement of proceedings involving an occupational license the agency shall give notice in accordance with N.C.G.S. § 150B-38. Section 150B-38(b)(2) requires licensing boards to include in their notices "[a] reference to the particular sections of the statutes and rules involved." The statute does not appear to require a board to state which sanction under the applicable disciplinary statute it intends to impose. However, once a board states with specificity that it is proposing to impose only one or two sanctions available under a referenced disciplinary statute for the stated alleged infractions, the board is then precluded from imposing a greater sanction for these infractions. Thus, it would appear that under either the old or the amended statute, the result would be the same in the instant case.

The decision of the Court of Appeals, which reversed the judgment of the trial court and vacated the decision of the Board, is affirmed. The Board, of course, may reinstate proceedings on the same facts, if it so desires.

Affirmed.

STATE OF NORTH CAROLINA v. MARK H. SCHULTZ

No. 47A88

(Filed 2 June 1988)

APPEAL by defendant from a decision of a divided panel of the Court of Appeals finding no error in defendant's trial before *Strickland, J.*, at the 2 December 1986 Criminal Session of Superior Court, ONSLOW County, where defendant was convicted of attempted second degree rape and second degree kidnapping and sentenced to twenty years' imprisonment. The opinion for the Court of Appeals, 88 N.C. App. 197, 362 S.E. 2d 853 (1987), is by *Parker, J.*, with *Johnson, J.*, concurring and *Becton, J.*, dissenting. Heard in the Supreme Court 9 May 1988.

Lacy H. Thornburg, Attorney General, by Kaye R. Webb, Assistant Attorney General, for the state.

Malcolm Ray Hunter, Jr., Appellate Defender, by Teresa A. McHugh, Assistant Appellate Defender, for defendant appellant.

PER CURIAM.

Affirmed.

LYNDA DOVE AVRIETT v. ROBERT JAMES AVRIETT, JR.

No. 81A88

(Filed 2 June 1988)

APPEAL by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, reported at 88 N.C. App. 506, 363 S.E. 2d 875 (1988), which affirmed the order of *Pate, J.*, granting summary judgment for defendant entered at the 4 August 1986 Session of District Court, CUMBERLAND County, and a subsequent order denying plaintiff's motion for a new trial pursuant to Rule 59 of the North Carolina Rules of Civil Procedure entered on 13 November 1986. Heard in the Supreme Court 12 May 1988.

Harris, Sweeny & Mitchell, by Ronnie M. Mitchell, and Blackwell, Russ & Strickland, by John V. Blackwell, Jr., for plaintiff-appellant.

Reed, Lewis & Deese, by Renny W. Deese, for defendant-appellee.

PER CURIAM.

The decision of the Court of Appeals is

Affirmed.

STATE OF NORTH CAROLINA v. DONALD JOSEPH ROLAND

No. 18A88

(Filed 2 June 1988)

APPEAL of right by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 88 N.C. App. 19, 362 S.E. 2d 800 (1987), finding no error in the judgment entered by *Lewis (Robert D.), J.*, on 5 November 1986 in Superior Court, MECKLENBURG County. Heard in the Supreme Court 12 May 1988.

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

Lipsitz, Green, Fahringer, Roll, Schuller & James, pro hac vice, by Paul J. Cambria, Jr., Herbert L. Greenman, and James, McElroy & Diehl, by Edward T. Hinson, Jr., for the defendant appellant.

North Carolina Civil Liberties Legal Foundation, by William G. Simpson, Jr., and Smith, Helms, Mulliss & Moore, by William Sam Byassee and Jon Berkelhammer, amicus curiae.

PER CURIAM.

The decision of the Court of Appeals is

Affirmed.

State v. Allen

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
TIMOTHY LANIER ALLEN	)	

No. 70A86

(Filed 13 June 1988)

UPON consideration of the opinion of the United States Supreme Court in the case of *Mills v. Maryland* (No. 87-5367, decided 6 June 1988) the following order was entered and is hereby certified to the Superior Court, HALIFAX County:

Defendant-appellant shall, on or before 29 June 1988, file with this Court a supplemental brief relating solely to the effect, if any, of the decision of the United States Supreme Court in *Mills v. Maryland* (No. 87-5367, decided 6 June 1988) on any issue(s) presented in this appeal. The State shall file a responsive brief on or before 11 July 1988; said brief shall not, however, be restricted to arguments made in defendant-appellant's supplemental brief, but may discuss as fully as desired the effect, if any, of *Mills v. Maryland* on the issue(s) presented in this appeal.

The Court will decide the issue(s) without further oral arguments.

By order of the Court in Conference, this the 13th day of June, 1988.

WHICHARD, J.
For the Court

State v. Benson

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
JON LEE BENSON	)	

No. 124A86

(Filed 13 June 1988)

UPON consideration of the opinion of the United States Supreme Court in the case of *Mills v. Maryland* (No. 87-5367, decided 6 June 1988) the following order was entered and is hereby certified to the Superior Court, ONSLOW County:

Defendant-appellant shall, on or before 29 June 1988, file with this Court a supplemental brief relating solely to the effect, if any, of the decision of the United States Supreme Court in *Mills v. Maryland* (No. 87-5367, decided 6 June 1988) on any issue(s) presented in this appeal. The State shall file a responsive brief on or before 11 July 1988; said brief shall not, however, be restricted to arguments made in defendant-appellant's supplemental brief, but may discuss as fully as desired the effect, if any, of *Mills v. Maryland* on the issue(s) presented in this appeal.

The Court will decide the issue(s) without further oral arguments.

By order of the Court in Conference, this the 13th day of June, 1988.

WHICHARD, J.
For the Court

State v. Fullwood

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
MICHAEL LEE FULLWOOD	)	

No. 37A86

(Filed 13 June 1988)

UPON consideration of the opinion of the United States Supreme Court in the case of *Mills v. Maryland* (No. 87-5367, decided 6 June 1988) the following order was entered and is hereby certified to the Superior Court, BUNCOMBE County:

Defendant-appellant shall, on or before 29 June 1988, file with this Court a supplemental brief relating solely to the effect, if any, of the decision of the United States Supreme Court in *Mills v. Maryland* (No. 87-5367, decided 6 June 1988) on any issue(s) presented in this appeal. The State shall file a responsive brief on or before 11 July 1988; said brief shall not, however, be restricted to arguments made in defendant-appellant's supplemental brief, but may discuss as fully as desired the effect, if any, of *Mills v. Maryland* on the issue(s) presented in this appeal.

The Court will decide the issue(s) without further oral arguments.

By order of the Court in Conference, this the 13th day of June, 1988.

WHICHARD, J.
For the Court

State v. Green

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
HARVEY LEE GREEN, JR.	)	

No. 385A84

(Filed 13 June 1988)

UPON consideration of the opinion of the United States Supreme Court in the case of *Mills v. Maryland* (No. 87-5367, decided 6 June 1988) the following order was entered and is hereby certified to the Superior Court, PITT County:

> Defendant-appellant shall, on or before 29 June 1988, file with this Court a supplemental brief relating solely to the effect, if any, of the decision of the United States Supreme Court in *Mills v. Maryland* (No. 87-5367, decided 6 June 1988) on any issue(s) presented in this appeal. The State shall file a responsive brief on or before 11 July 1988; said brief shall not, however, be restricted to arguments made in defendant-appellant's supplemental brief, but may discuss as fully as desired the effect, if any, of *Mills v. Maryland* on the issue(s) presented in this appeal.
>
> The Court will decide the issue(s) without further oral arguments.

By order of the Court in Conference, this the 13th day of June, 1988.

WHICHARD, J.
For the Court

State v. Hunt

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
HENRY LEE HUNT AND ELWELL BARNES	)	

No. 5A86

(Filed 13 June 1988)

UPON consideration of the opinion of the United States Supreme Court in the case of *Mills v. Maryland* (No. 87-5367, decided 6 June 1988) the following order was entered and is hereby certified to the Superior Court, ROBESON County:

> Defendant-appellant shall, on or before 29 June 1988, file with this Court a supplemental brief relating solely to the effect, if any, of the decision of the United States Supreme Court in *Mills v. Maryland* (No. 87-5367, decided 6 June 1988) on any issue(s) presented in this appeal. The State shall file a responsive brief on or before 11 July 1988; said brief shall not, however, be restricted to arguments made in defendant-appellant's supplemental brief, but may discuss as fully as desired the effect, if any, of *Mills v. Maryland* on the issue(s) presented in this appeal.
>
> The Court will decide the issue(s) without further oral arguments.

By order of the Court in Conference, this the 13th day of June, 1988.

WHICHARD, J.
For the Court

State v. McKoy

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
DOCK McKOY, JR. A/K/A	)	
DOCK McKOY A/K/A DOCK	)	
McKAY A/K/A PAUL McCOY	)	

No. 585A85

(Filed 13 June 1988)

UPON consideration of the opinion of the United States Supreme Court in the case of *Mills v. Maryland* (No. 87-5367, decided 6 June 1988) the following order was entered and is hereby certified to the Superior Court, STANLY County:

> Defendant-appellant shall, on or before 29 June 1988, file with this Court a supplemental brief relating solely to the effect, if any, of the decision of the United States Supreme Court in *Mills v. Maryland* (No. 87-5367, decided 6 June 1988) on any issue(s) presented in this appeal. The State shall file a responsive brief on or before 11 July 1988; said brief shall not, however, be restricted to arguments made in defendant-appellant's supplemental brief, but may discuss as fully as desired the effect, if any, of *Mills v. Maryland* on the issue(s) presented in this appeal.
>
> The Court will decide the issue(s) without further oral arguments.
>
> By order of the Court in Conference, this the 13th day of June, 1988.
>
> WHICHARD, J.
> For the Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
ELTON OZELL McLAUGHLIN	)	

No. 637A84

(Filed 13 June 1988)

UPON consideration of the opinion of the United States Supreme Court in the case of *Mills v. Maryland* (No. 87-5367, decided 6 June 1988) the following order was entered and is hereby certified to the Superior Court, BLADEN County:

The opinion of this Court, filed on 2 June 1988 but not yet certified, is hereby withdrawn.

Defendant-appellant shall, on or before 29 June 1988, file with this Court a supplemental brief relating solely to the effect, if any, of the decision of the United States Supreme Court in *Mills v. Maryland* (No. 87-5367, decided 6 June 1988) on any issue(s) presented in this appeal. The State shall file a responsive brief on or before 11 July 1988; said brief shall not, however, be restricted to arguments made in defendant-appellant's supplemental brief, but may discuss as fully as desired the effect, if any, of *Mills v. Maryland* on the issue(s) presented in this appeal.

The Court will decide the issue(s) without further oral arguments.

By order of the Court in Conference, this the 13th day of June, 1988.

WHICHARD, J.
For the Court

State v. McNeil

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
LEROY McNEIL	)	

No. 37A87

(Filed 13 June 1988)

UPON consideration of the opinion of the United States Supreme Court in the case of *Mills v. Maryland* (No. 87-5367, decided 6 June 1988) the following order was entered and is hereby certified to the Superior Court, WAKE County:

Defendant-appellant shall, on or before 29 June 1988, file with this Court a supplemental brief relating solely to the effect, if any, of the decision of the United States Supreme Court in *Mills v. Maryland* (No. 87-5367, decided 6 June 1988) on any issue(s) presented in this appeal. The State shall file a responsive brief on or before 11 July 1988; said brief shall not, however, be restricted to arguments made in defendant-appellant's supplemental brief, but may discuss as fully as desired the effect, if any, of *Mills v. Maryland* on the issue(s) presented in this appeal.

The Court will decide the issue(s) without further oral arguments.

By order of the Court in Conference, this the 13th day of June, 1988.

WHICHARD, J.
For the Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
EDDIE CARSON ROBINSON	)	

No. 689A84

(Filed 13 June 1988)

UPON consideration of the opinion of the United States Supreme Court in the case of *Mills v. Maryland* (No. 87-5367, decided 6 June 1988) the following order was entered and is hereby certified to the Superior Court, BLADEN County:

Defendant-appellant shall, on or before 29 June 1988, file with this Court a supplemental brief relating solely to the effect, if any, of the decision of the United States Supreme Court in *Mills v. Maryland* (No. 87-5367, decided 6 June 1988) on any issue(s) presented in this appeal. The State shall file a responsive brief on or before 11 July 1988; said brief shall not, however, be restricted to arguments made in defendant-appellant's supplemental brief, but may discuss as fully as desired the effect, if any, of *Mills v. Maryland* on the issue(s) presented in this appeal.

The Court will decide the issue(s) without further oral arguments.

By order of the Court in Conference, this the 13th day of June, 1988.

WHICHARD, J.
For the Court

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

COUCH v. N.C. EMPLOYMENT SECURITY COMM.

No. 212PA88.

Case below: 89 N.C. App. 405.

Petition by defendant (ESC) for discretionary review pursuant to G.S. 7A-31 allowed 2 June 1988.

DANNA v. DANNA

No. 122P88.

Case below: 88 N.C. App. 680.

Petition by Teresa Debra Danna for discretionary review pursuant to G.S. 7A-31 denied 2 June 1988.

DEPT. OF TRANSPORTATION v. CRAINE

No. 165P88.

Case below: 89 N.C. App. 223.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 2 June 1988. Motion by plaintiff to dismiss appeal for lack of substantial constitutional question allowed 2 June 1988.

GUY v. TOYOTA WORLD, INC.

No. 141P88.

Case below: 89 N.C. App. 153.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 June 1988.

HARPER v. MORRIS

No. 150P88.

Case below: 89 N.C. App. 145.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 June 1988.

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

HOGSED v. RAY

No. 118P88.

Case below: 88 N.C. App. 673.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 2 June 1988.

HOWELL v. NATIONWIDE MUT. INS. CO.

No. 126P88.

Case below: 88 N.C. App. 612.

Petition by defendant (Nationwide) for discretionary review pursuant to G.S. 7A-31 denied 2 June 1988.

IN RE CONDITIONAL APPROVAL OF CERTIFICATE OF NEED

No. 100P88.

Case below: 88 N.C. App. 563.

Petition by Britthaven, Inc. for discretionary review pursuant to G.S. 7A-31 denied 2 June 1988.

IN RE FORECLOSURE OF ALLAN & WARMBOLD CONSTR. CO.

No. 120P88.

Case below: 88 N.C. App. 693.

Petition by Robert R. Rhyne, Jr. for discretionary review pursuant to G.S. 7A-31 denied 2 June 1988.

IN RE LYNETTE H.

No. 252P88.

Case below: 90 N.C. App. 373.

Petition for temporary stay filed by the State is allowed 6 June 1988 pending receipt and consideration of the State's notice of appeal, or petition for discretionary review, or both. The State shall, within 10 days of the date of this order, file a brief in support of its petition for supersedeas, and respondent may file a responsive brief within 10 days of the filing of the State's brief.

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

IN RE PILKINGTON

No. 172P88.

Case below: 89 N.C. App. 356.

Petition by respondents for discretionary review pursuant to G.S. 7A-31 denied 2 June 1988.

IN RE WILL OF SIMPSON

No. 173P88.

Case below: 89 N.C. App. 356.

Petition by caveator for discretionary review pursuant to G.S. 7A-31 denied 2 June 1988.

IN THE MATTER OF N.C.L.

No. 144P88.

Case below: 89 N.C. App. 79.

Petition by Edward L. Garrison for discretionary review pursuant to G.S. 7A-31 denied 2 June 1988.

MYERS & CHAPMAN, INC. v. THOMAS G. EVANS, INC.

No. 140PA88.

Case below: 89 N.C. App. 41.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 2 June 1988.

N.C. FARM BUREAU MUT. INS. CO. v. WARREN

No. 127P88.

Case below: 89 N.C. App. 148.

Petition by all parties for discretionary review pursuant to G.S. 7A-31 denied 2 June 1988.

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

OAK MANOR, INC. v. NEIL REALTY CO.

No. 67P88.

Case below: 88 N.C. App. 402.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 2 June 1988.

PATE v. THOMAS

No. 164P88.

Case below: 89 N.C. App. 312.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 2 June 1988.

SOUTH CAROLINA INS. CO. v. HALLMARK ENTERPRISES

No. 119P88.

Case below: 88 N.C. App. 642.

Petition by defendant (Gurtha Huggins) for discretionary review pursuant to G.S. 7A-31 denied 2 June 1988.

STATE v. BANKS

No. 121P88.

Case below: 88 N.C. App. 737.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 June 1988.

STATE v. BREWER

No. 184P88.

Case below: 89 N.C. App. 431.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 2 June 1988.

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

STATE v. FOWLER

No. 142P88.

Case below: 89 N.C. App. 10.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 June 1988.

STATE v. HICKS

No. 101P88.

Case below: 88 N.C. App. 612.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 June 1988.

STATE v. HOWELL

No. 597P87.

Case below: 87 N.C. App. 294.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 2 June 1988.

STATE v. JACOBS

No. 231P88.

Case below: 88 N.C. App. 313.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 2 June 1988.

STATE v. LLOYD

No. 191P88.

Case below: 89 N.C. App. 630.

Petitions by defendants (Lloyd and May) for discretionary review pursuant to G.S. 7A-31 denied 2 June 1988.

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

STATE v. MONROE

No. 183P88.

Case below: 83 N.C. App. 143.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 2 June 1988.

STATE v. NORMAN

No. 161PA88.

Case below: 89 N.C. App. 384.

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 2 June 1988.

STATE v. PUGH

No. 104P88.

Case below: 88 N.C. App. 765.

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 2 June 1988.

STATE v. ROBERSON

No. 253P88.

Case below: 90 N.C. App. 219.

Petitions by defendant for discretionary review pursuant to G.S. 7A-31 and for supersedeas and temporary stay denied 6 June 1988.

STATE v. ROWLAND

No. 162PA88.

Case below: 89 N.C. App. 372.

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 2 June 1988.

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

STATE v. SCOTT

No. 233A88.

Case below: 89 N.C. App. 680.

Petition by Attorney General for writ of supersedeas allowed 31 May 1988.

STATE v. WASHINGTON

No. 157P88.

Case below: 86 N.C. App. 235.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 2 June 1988.

STATE v. WATSON

No. 112P88.

Case below: 88 N.C. App. 624.

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 2 June 1988. Notice of appeal by Attorney General pursuant to G.S. 7A-30 dismissed 2 June 1988.

STATE v. WELCH

No. 146P88.

Case below: 89 N.C. App. 135.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 June 1988. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 2 June 1988.

STATE v. WILHITE

No. 189P88.

Case below: 58 N.C. App. 654.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 2 June 1988.

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

SUGGS v. NORRIS

No. 226P88.

Case below: 88 N.C. App. 539.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 2 June 1988.

WAGONER v. DOUGLAS BATTERY MFG. CO.

No. 143P88.

Case below: 89 N.C. App. 67.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 June 1988.

PETITIONS TO REHEAR

PEOPLES SECURITY LIFE INS. CO. v. HOOKS

No. 437PA87.

Case below: 320 N.C. 794.

Petition for plaintiff to rehear denied 2 June 1988.

WILLIAMS v. JONES

No. 538A87.

Case below: 322 N.C. 42.

Petition by defendants to rehear denied 2 June 1988.

STATE OF NORTH CAROLINA v. RICHARD CRANDELL

No. 288A87

(Filed 30 June 1988)

1. **Constitutional Law § 50— Sixth Amendment right to speedy trial—trial eleven months after arrest—no constitutional violation**

There was no violation of defendant's Sixth Amendment right to a speedy trial in a first degree murder prosecution because defendant's trial was eleven months after his original arrest where much of the evidence and much of the laboratory analysis was being handled through Georgia law enforcement agencies; defendant filed numerous motions at various times; the record does not reflect that defendant at any time sought to have the case brought to a speedy trial; defendant failed to demonstrate that his ability to present his defense was impaired; and there was no indication of neglect or willfulness on the part of the prosecution.

2. **Criminal Law § 91.14— Speedy Trial Act—134 days from indictment to motion to dismiss—no violation**

There was no violation of the Speedy Trial Act in a first degree murder prosecution where 134 days elapsed from defendant's indictment to his motion to dismiss because all but 70 days were excluded by continuances granted by the court based upon a determination that each continuance would serve the ends of justice. A particular order which granted "the continuance" referred to a particular continuance which the State had requested and was not open-ended. N.C.G.S. § 15A-701(b)(7).

3. **Constitutional Law § 31— first degree murder—denial of private investigator—no abuse of discretion**

There was no abuse of discretion in a first degree murder prosecution from the denial of defendant's motion for a court-appointed private investigator where defendant broadly stated that the case was complicated and involved a large number of witnesses, but failed to point to any evidence that might have been obtained by a private investigator and been beneficial to its defense. N.C.G.S. § 7A-450(b).

4. **Constitutional Law § 30— first degree murder—discovery denied—no error**

There was no error in a first degree murder prosecution from the denial of defendant's pretrial motions for discovery where there was no indication that there was any favorable evidence to be disclosed as to defendant's use of public transportation; the State fully complied with statutory requirements for disclosing agreements between prosecutors and any potential witnesses, and there is no mention in N.C.G.S. § 15A-1054(c) of law enforcement agencies; and defendant was not prejudiced by the denial of his motion to require the State to divulge any prior association of a witness with law enforcement agencies where defendant was already aware that the witness had operated in the past as a police informant and there is no statutory or other authority for the proposition that the information sought here is of a type properly subject to mandatory disclosure.

5. Criminal Law § 91.2— first degree murder—motion for continuance—pretrial publicity from another murder—denied

The trial court did not err in a first degree murder prosecution by denying defendant's motion for a continuance based upon local publicity arising from the arrest of a suspect in a different murder case three and a half weeks prior to defendant's trial where defendant did not exhaust his peremptory challenges and failed entirely to make any showing that the denial of his motion for continuance made it impossible to obtain a fair trial before an impartial jury.

6. Jury § 6— first degree murder—individual voir dire and sequestration of jurors denied—no abuse of discretion

The trial court did not abuse its discretion in a first degree murder prosecution by denying an individual voir dire and sequestration of individual jurors. N.C.G.S. § 15A-1214(j).

7. Jury § 7.14— murder—peremptory challenges—not racially motivated

A first degree murder defendant failed to carry his initial burden of establishing an inference of purposeful discrimination in a prosecutor's use of peremptory challenges where the case involved the killing of a black woman by a black man; five black persons were called as potential jurors; two of the potential jurors were peremptorily challenged by the State; one was dismissed by the trial court because he had sat in the courtroom on the previous day during hearings on motions; and the other two blacks were seated on the jury. Art. I, § 26, N. C. Constitution.

8. Criminal Law § 42.1— first degree murder—admission of insulation particles—no error

The trial court did not err in a first degree murder prosecution by admitting into evidence certain insulation particles where the State's theory of the case was that defendant crawled through an attic linking his girlfriend's duplex unit with that of the victim; pieces of insulation were found in the victim's apartment; and material taken from defendant's clothing was consistent with the sample pieces of insulation taken from the attic. The evidence was relevant, defendant was under lawful arrest when clothes containing the fibers were taken from him, and defendant had shown no way in which the admission of the evidence in question unfairly prejudiced his case. N.C.G.S. § 8C-1, Rule 403.

9. Criminal Law § 43.4— first degree murder—photographs admissible

The trial court did not err in a first degree murder prosecution by admitting certain photographs where three of the five photos showed the victim's body as found in the trunk of a car in an Atlanta parking lot, each was admitted to illustrate specific testimony of the parking lot attendant, and the victim's body appeared in each to be fully clothed and apparently bore no obvious signs of trauma or serious injury. The photos were not excessive in number and were not excessively gruesome or inflammatory.

10. Criminal Law § 42.1— murder—evidence as to insulation particles—no unfair surprise

Defendant was not unfairly surprised or prejudiced in a first degree murder prosecution by the testimony of an SBI agent that insulation was found throughout the victim's apartment and that the covering to the attic access was not pulled down tight; moreover, even assuming error, defendant did not show a reasonable possibility that a different result would have been reached absent the error. N.C.G.S. § 15A-1443(a).

11. Criminal Law § 88— murder—irrelevant items—cross-examination not erroneously limited

The trial court in a first degree murder prosecution did not erroneously limit defendant's right of cross-examination by granting the State's motion to prevent discussion of certain items which were not relevant to this case. N.C.G.S. § 8C-1, Rule 402.

12. Criminal Law § 89.10— criminal activities and charges—limiting impeachment of witnesses—harmless error

Assuming arguendo that the trial court erroneously limited defendant's right to impeach two State's witnesses by cross-examining them concerning criminal activities or pending charges, the error was harmless beyond a reasonable doubt in light of the overwhelming evidence against defendant. N.C.G.S. § 15A-1443(b).

APPEAL as of right by the defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing life imprisonment for first degree murder entered by *Brown, J.*, at the 12 January 1987 Criminal Session of Superior Court, NASH County. Heard in the Supreme Court 9 May 1988.

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

Raymond M. Sykes, Jr., for the defendant appellant.

MITCHELL, Justice.

The defendant, Richard Crandell, was convicted of the first degree murder of Lenora Moore. Because there was no evidence of aggravating factors, the trial court sentenced the defendant to life imprisonment. In his appeal to this Court, the defendant brings forward numerous assignments of error concerning the guilt-innocence phase of his trial. Having considered the entire record and each of the defendant's assignments of error, we detect no error in the defendant's trial.

The State's evidence at trial tended to show, *inter alia*, that the defendant frequently lived with his girlfriend, Faye Hinton, in a duplex apartment on Belvedere Street in Rocky Mount, North Carolina. The deceased, Lenora Moore, lived in the other half of the apartment building.

In late December 1985 and early January 1986, the defendant and two friends, Timothy Battle and Kenneth Battle, twice broke into Moore's apartment and stole various items. The defendant gained entry on each occasion by going into the attic of Faye Hinton's apartment, through the crawl space above the apartments, and down into Moore's apartment. These crimes were investigated by the Rocky Mount Police Department, and the defendant and Kenneth Battle confessed to the break-ins. They returned some of the items stolen, and Kenneth Battle's parents paid Moore $800 for those items that could not be recovered. There was conflicting evidence regarding Moore's desire that the defendant be prosecuted.

On the afternoon of Saturday, 18 January 1986, Faye Hinton saw the victim, Lenora Moore, entering her apartment. At that time Moore told Hinton that she had been shopping and showed her a lamp and a blanket that she had purchased. Later that evening, Moore visited her cousin, Randy Smith, and left after telling him that she was going home to watch television. She left Smith's residence alone, driving her red 1985 Nissan Sentra. That was the last time anyone reported seeing Moore alive.

On Tuesday, 21 January 1986, a parking lot attendant discovered a red Nissan Sentra in a parking deck in Atlanta, Georgia. When the car was still there on Wednesday, the attendant informed his supervisor and was told to open the car. When he did, he discovered Moore's body in the trunk of the car.

The pathologist who performed the autopsy testified that Moore's death was caused by a combination of strangling and choking. He estimated that at the time he performed the autopsy on Thursday, 23 January 1986, she had been dead for approximately four days. The doctor also testified, however, that due to the cool weather, the death could possibly have occurred as much as two days earlier or later than his estimate.

The defendant was arrested on 23 January 1986 and charged with breaking and entering in connection with the 27 December 1985 break-in of the deceased's apartment. At the time of his arrest, the defendant's clothes were taken from him. There was material in the defendant's clothes that was "consistent with" known insulation samples from the deceased's attic. Additionally, pieces of this attic insulation were found in the deceased's bathroom, bedroom, kitchen, and living room. With the exception of the insulation, the house appeared very neat and clean with no appearance of any disturbance having occurred there.

John Graham, a friend of the defendant, testified that the defendant had come by his house between 10:00 and 11:00 p.m. on Saturday, 18 January 1986. At that time, the defendant had told Graham that he needed to come up with $800 to pay for items stolen from the victim. On Tuesday, 21 January 1986, the defendant asked Graham to tell the police that it was between 2:30 and 3:30 a.m. on Sunday, 19 January 1986, that they had visited rather than the actual time. The defendant also told Graham that he had killed the victim.

Graham testified that the defendant told him he had gotten to Faye Hinton's apartment at around 1:30 a.m. Sunday morning. After sleeping for about an hour, he decided to kill Moore and went through the attic to gain access to her apartment. He watched her from a closet as she was hanging some curtains. He then choked her and placed something in her mouth to keep her from screaming. He also had sex with her. He then changed her clothes and cleaned up the apartment. He also found $700 in the apartment. He put the deceased's body in the trunk of her car and drove to Georgia. On the way he threw her pocketbook and the sweatsuit that he had been wearing at the time he killed her out of the car. He left her body in the car at a high-rise parking lot in Atlanta, took an airplane to Raleigh, and then rode a bus from Raleigh to Rocky Mount. He got back to Rocky Mount between 6:30 and 7:00 p.m. on Sunday, 19 January 1986. Witness Graham admitted that he had lied to the police several times before finally telling them the truth, which he said was what he had testified to in court. Two of the defendant's cell mates also testified that the defendant had confessed to them that he had killed Moore.

The victim's pocketbook was found beside Interstate Highway 20 in South Carolina. It contained no money. Her credit card was discovered to have been retained by an automatic teller machine at a bank in Rocky Mount. Someone had attempted to use it to withdraw money at 7:47 p.m. on Sunday, 19 January 1986.

The defendant testified that he had played cards with friends until 2:00 a.m. on Sunday, 19 January 1986. He then walked to the home of John Graham and spent the night there, getting up at 12:30 Sunday afternoon. He remained there until he went to Faye Hinton's apartment around 7:00 p.m. According to the defendant, John Graham was in the house when he first got there but not thereafter. On cross-examination the defendant stated that he had sex with the victim on the afternoon of Saturday, 18 January 1986, but that he had never mentioned this to the police. He did tell the police that he had "gone into" her pocketbook and might have touched her credit card. The defendant also introduced evidence to the effect that certain of the State's witnesses had bad reputations for truthfulness and that fingerprints found in the victim's automobile and on her wallet were not his.

I.

In his first assignment of error, the defendant contends that his conviction should be reversed because of violations of his right to a speedy trial under both the Sixth Amendment and the North Carolina Speedy Trial Act. Initially, we address the Sixth Amendment argument.

[1] The Sixth Amendment to the Constitution of the United States guarantees every individual the right to a speedy trial. In *Barker v. Wingo*, 407 U.S. 514, 33 L.Ed. 2d 101 (1972), the Supreme Court set forth the important factors all courts must follow in determining whether a defendant's Sixth Amendment right to a speedy trial has been violated. These factors are identified as "length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.* at 530, 33 L.Ed. 2d at 117. This Court has adopted these principles in analyzing and balancing alleged violations of the constitutional right to a speedy trial. *See State v. McKoy*, 294 N.C. 134, 240 S.E. 2d 383 (1978); *State v. Wright*, 290 N.C. 45, 224 S.E. 2d 624 (1976), *cert. denied*, 429 U.S. 1049, 50 L.Ed. 2d 765 (1977). No single factor is determinative. Rather, "the circumstances of each par-

ticular case must determine whether a speedy trial has been afforded or denied, and the burden is on an accused who asserts denial of a speedy trial to show that the delay was due to the neglect or wilfulness of the prosecution." *State v. McKoy*, 294 N.C. 134, 141, 240 S.E. 2d 383, 388. With these principles in mind, we now weigh the four balancing factors in light of the evidence in this case.

First, the defendant's trial was held eleven months after the date of his original arrest. Some delay, however, is permissible in any case.

> The possibility of unavoidable delay is inherent in every criminal action. The constitutional guarantee does not outlaw good-faith delays which are reasonably necessary for the State to prepare and present its case. . . . The proscription is against purposeful or oppressive delays and those which the prosecution could have avoided by reasonable effort.

State v. Johnson, 275 N.C. 264, 273, 167 S.E. 2d 274, 280 (1969). Because we do not determine whether the constitutional right to a speedy trial has been violated by the calendar alone, we must consider the length of the delay in relation to the three remaining factors.

Turning to the reason for the delay, we find no indication of neglect or willfulness on the part of the prosecution. This murder case was complicated by the fact that much of the evidence and much of the laboratory analysis was being handled through Georgia law enforcement agencies. The record shows that the defendant filed ten separate motions at various times prior to the filing of the State's first motion to continue on 30 June 1986. In that motion, the State related that results of tests by the Georgia Bureau of Investigation were pending. Thereafter, there were numerous other motions filed by the defendant, and two motions by the State to continue. In one dated 4 September 1986, the State indicated that there had been inadequate time to prepare the case for trial and that results of some laboratory tests had not been received by the prosecutor. On 22 October 1986, the State again moved to continue the case, stating that a hearing on various pretrial motions of the defendant was necessary before the case could be tried. All of these matters tend to indicate that there was no willful delay on the part of the State.

Next, we examine the defendant's demand for a speedy trial. The record does not reflect that the defendant at any time sought to have the case brought to trial. The first motion in this regard was a motion *to dismiss* dated 2 September 1986. The defendant has not shown that he attempted to have the case brought to a speedy trial.

Finally, we look to the issue of prejudice. The defendant argues that the delay in his trial made it impossible for him to reconstruct the events of the Saturday evening or Sunday morning in question through the testimony of any witnesses. We disagree. According to the defendant's own testimony, the only person he saw between 2:00 a.m. and 7:00 p.m. on the crucial Sunday was John Graham. John Graham directly contradicted this alibi testimony when he testified that the defendant had in fact come by his house around 10:00 or 11:00 p.m. on Saturday and had subsequently asked Graham to lie to the police by saying that the defendant had stayed through Sunday. Thus, the defendant has failed to demonstrate that his ability to present his defense was impaired by delay in the trial.

The proceedings from the time of the defendant's arrest until the conclusion of his trial, analyzed in light of the constitutionally mandated factors, reveal no violation of the defendant's constitutional right to a speedy trial. Having addressed the defendant's Sixth Amendment concerns, we now turn to an analysis under the Speedy Trial Act.

[2] The North Carolina Speedy Trial Act provides that the trial of a defendant charged with a criminal offense shall begin within 120 days from the date the defendant is arrested, served with criminal process, waives an indictment, or is indicted, whichever occurs last. N.C.G.S. § 15A-701(a)(1) (1983). The Act further provides:

> (b) The following periods shall be excluded in computing the time within which the trial of a criminal case must begin:
>
> . . . .
>
> (7) *Any* period of delay resulting from a continuance granted by any judge if the judge granting the continuance finds that the ends of justice served by granting the continuance outweigh the best interests of the public and the de-

> fendant in a speedy trial and sets forth in writing in the record of the case the reasons for so finding. . . .
>
> . . . .
>
> When a judge grants a continuance pursuant to this subsection, he *may* specify in his order the period of time which shall be excluded from the time within which the trial of the criminal case must begin.

N.C.G.S. § 15A-701(b)(7) (emphasis added).

At the 2 September 1986 term of Superior Court, Nash County, the defendant moved the court to dismiss the charges against him for failure of the State to comply with the Speedy Trial Act. At that time 134 days had passed since the defendant had been indicted on 21 April 1986. Nevertheless, we find no violation of the Speedy Trial Act.

The statute explicitly provides that a period of delay resulting from a continuance granted by a judge, after considering the factors set forth in N.C.G.S. § 15A-701(b)(7), shall be excluded in computing the 120 day period. The additional provision allowing a judge to specify the time to be excluded is purely permissive, there being no requirement for the judge to do so. In this case there were four continuances granted. The wording of each order was the same:

> Considering the factors set forth in G.S. 15A-701(b)(7), the Court finds that the ends of justice served by granting the continuance outweigh the best interests of the public and defendant in a speedy trial and therefore grants the continuance for the reasons above. The Court orders that the following time be excluded in determining whether a trial has been held within the time limits established by G.S. 15A-701.

The defendant was indicted on 21 April 1986. Seventy days later, on 30 June 1986, Judge Tillery entered an order continuing the trial from 30 June to 1 September 1986. On 2 September 1986, Judge Strickland entered an order continuing the trial until 19 October 1986. On 22 October 1986, Judge Lewis entered an order continuing the trial from 20 October through 15 December. Finally, on 12 December 1986, Judge Allsbrook entered an order continuing the trial from 15 December until 12 January 1987. The

case came to trial on 12 January 1987. As previously noted each order granting a continuance was based upon a determination that it would serve the ends of justice. Therefore, the *only period* of time from the defendant's indictment until the date of the trial that was *not excluded* from the 120 day computation was the *seventy days* between 21 April and 30 June 1986. The defendant's trial was held well within the time allowed by the statute.

The defendant cites *State v. Smith*, 87 N.C. App. 474, 361 S.E. 2d 422 (1987), for the proposition that, because Judge Tillery did not specify in a separate space in his order the period to be excluded, there was no time excluded from the 120 day computation. We find that case to be distinguishable. In *Smith* the motion requested that the trial be continued from 5 May 1986, but did not provide any time for the continuance to end and trial of the case to begin. The court's order followed the same open-ended format. Thus, there was no ending date to the continuance and no way to determine what period, if any, should be excluded from the 120 days. The Court of Appeals stated that in determining what time is excludable as having resulted from a continuance, "the trial court should be able to determine the excluded period from the face of the order or with reference to easily obtainable, undisputed facts." *Id.* at 477, 361 S.E. 2d at 425.

In the instant case the motion in question requested a continuance from 30 June 1986 through 1 September 1986. Judge Tillery's order stated that he "grants *the continuance* for the reasons above." (Emphasis added.) By the words "the continuance," Judge Tillery could only have been referring to the continuance from 30 June 1986 to 1 September 1986 that the State had requested. Therefore, this was not an open-ended continuance as was the case in *Smith*.

The defendant has failed to demonstrate that he was denied his right to a speedy trial under either the Sixth Amendment or the North Carolina Speedy Trial Act. This assignment of error is without merit and is overruled.

II.

In his second assignment of error, the defendant complains that he was deprived of his rights to due process and equal protection because he was denied access to evidence favorable to his

defense and likely to affect the outcome of his trial. First, the defendant contends under this assignment that the trial court erred in denying his motion for a court appointed private investigator.

[3] N.C.G.S. § 7A-450(b) requires the State to provide indigents with counsel and the other necessary expenses of representation. The statute, however, requires the appointment of expert assistance only upon a showing by the defendant that: (1) he will be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood that it will materially assist him in the preparation of his defense. *State v. Johnson*, 317 N.C. 193, 344 S.E. 2d 775 (1986).

The defendant cites *Ake v. Oklahoma*, 470 U.S. 68, 84 L.Ed. 2d 53 (1985), for the proposition that a defendant is entitled to the appointment and the assistance of experts if he makes a threshold showing of specific necessity of the expert requested. Although the defendant broadly stated that the case was complicated and involved a large number of witnesses, he failed to point to any evidence that might have been obtained by a private investigator and been beneficial to his defense. "Mere hope or suspicion that such evidence is available will not suffice." *State v. Tatum*, 291 N.C. 73, 82, 229 S.E. 2d 562, 568 (1976). The defendant in this case offered only "undeveloped assertions that the requested assistance would be beneficial." *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1, 86 L.Ed. 2d 231, 236 n.1 (1985). That alone was not enough to require the appointment of additional assistance. *See State v. Penley*, 318 N.C. 30, 347 S.E. 2d 783 (1986).

Moreover, the question of whether an expert should be appointed at State expense to assist an indigent defendant lies within the sound discretion of the trial court. *State v. Tatum*, 291 N.C. 73, 229 S.E. 2d 562. Here, the defendant has shown neither an abuse of that discretion, nor that he was deprived of a fair trial.

[4] In his second argument under this assignment, the defendant complains that he was prejudiced by the denial of, or the State's incomplete response to, three pretrial motions dealing with the discovery of various evidentiary matters. The defendant's motions included a motion to compel discovery of favorable evidence, a motion to expose witness agreements, and a motion to disclose

any prior association between a State's witness and local law enforcement agencies. We address each of these motions in turn.

The defendant first sought the results of the State's investigation into his use of public transportation services from Atlanta to Raleigh and from Raleigh to Rocky Mount. N.C.G.S. § 15A-904 specifically states that, except for statements of a defendant or codefendant, a defendant's prior record, or reports of examinations and tests, our statutes providing for discovery in criminal cases do not require the production of any reports, memoranda, or other internal documents made by law enforcement officers or other persons acting on behalf of the State in connection with the investigation of the case. Moreover, we have held that the trial court has no authority to order discovery contrary to N.C.G.S. § 15A-904. *State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977).

The defendant relies upon *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed. 2d 215 (1963), for the proposition that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or the bad faith of the prosecution." *Id.* at 87, 10 L.Ed. 2d at 218. *Brady* involved a situation in which the prosecution deliberately withheld evidence favorable to the accused. That case is easily distinguishable from the facts here. In this case there is no indication that there was any favorable evidence to be disclosed. The failure of the State to offer any evidence that the defendant used the public transportation system to return from Atlanta to Rocky Mount at or about the time the victim's body was found in Atlanta may have been a proper matter for jury argument. Evidence of the State's failure to develop such proof, however, was not subject to discovery.

Next, the defendant contends that he was prejudiced by the trial court's failure to compel the State to disclose any agreements between the prosecutor *or any law enforcement agency* and any potential witness. In the State's response the prosecutor only indicated that no agreements or promises had been made to any witness by the "District Attorney's Office," with no mention of law enforcement agencies. We find the defendant's argument unpersuasive. The pertinent statute provides: "When a *prosecutor* enters into any arrangement authorized by this section, written notice fully disclosing the terms of the arrangement must be

provided to defense counsel . . . ." N.C.G.S. § 15A-1054(c) (1983) (emphasis added). There is no mention in the statute of law enforcement agencies. The State fully complied with the statutory requirements for exposing such agreements, and this contention is without merit.

Finally, the defendant argues under this assignment that he was prejudiced by the denial of his motion to require the State to divulge any prior association of the witness Grady Tart with law enforcement agencies. The State called Tart to testify to the defendant's "quasi" admission in jail that he had killed the deceased and that he had a motive to kill her.

The defendant, through his counsel, was aware that Tart had operated as an informant for the Rocky Mount Police Department in the past. The defendant maintains that further evidence of such prior associations between Tart and officers was material and important to his case in two ways. First, it would have given the defendant valuable information with which to impeach the witness. Second, the failure of the trial court to compel disclosure of this information may have precluded the defendant from attacking the admission of the statement.

We find the defendant's argument meritless. There is no statutory or other authority for the proposition that the information sought here is of a type properly subject to mandatory disclosure. Furthermore, the defendant already had information that Tart had served as a police informant in the past. He was certainly free to use this information for impeachment purposes or to attack the admissibility of the witness's statements. This assignment is overruled.

III.

In his next assignment of error, the defendant contends that the trial court committed prejudicial error by denying his motions to continue, to allow individual voir dire and sequestration of jurors, and to prohibit the State's use of racially motivated peremptory challenges. We consider these assignments *seriatim*.

[5] The defendant moved at trial for a continuance based on local publicity arising from the arrest of a suspect in a murder case that occurred three and one-half weeks prior to the defendant's trial. The defendant presents an interesting question in this

regard: whether the prejudicial pretrial publicity surrounding a different and unrelated case is sufficient to deny the defendant his Sixth Amendment right to an impartial jury. All of our cases on the issue of prejudicial pretrial publicity have been decided in the context of publicity surrounding the particular defendant's case itself and the denial of the defendant's motion to change venue or for a special jury venire. *See, e.g., State v. Baker*, 312 N.C. 34, 320 S.E. 2d 670 (1984); *State v. Watson*, 310 N.C. 384, 312 S.E. 2d 448 (1984); *State v. Jerrett*, 309 N.C. 239, 307 S.E. 2d 339 (1983). The defendant urges that the present case is distinguishable from such cases, because it did not involve a request for a change of venue or a special venire. This defendant simply asked the court for a postponement of his trial: relief that he contends is substantially less extraordinary.

We find it unnecessary, however, to decide whether a defendant's right to an impartial jury will ever be denied by publicity about an unrelated case. Addressing a defendant's motion to continue in *State v. Thomas*, 294 N.C. 105, 240 S.E. 2d 426 (1978), we stated:

> A motion for continuance is ordinarily addressed to the sound discretion of the trial court and its ruling is not subject to review absent an abuse of discretion. However, if the motion is based on a right guaranteed by the Federal and State constitutions, the question presented is one of law and not of discretion, and the ruling of the trial court is reviewable on appeal. Whether a defendant bases his appeal upon an abuse of discretion or a denial of his constitutional rights, he must show both that there was error in the denial of the motion and that he was prejudiced thereby before he will be granted a new trial.

Id. at 111, 240 S.E. 2d at 431. The defendant has failed entirely to make any showing tending to support his contention that the denial of his motion for a continuance made it impossible for him to obtain a fair trial before an impartial jury. To the contrary, the defendant did not even exhaust his peremptory challenges. The defendant has failed to show either error or that he was prejudiced.

[6] In addition, the defendant argues that he was rendered incapable of presenting a detailed showing of prejudice because of the

trial court's error in denying his motion for an individual voir dire and the sequestration of the potential jurors. N.C.G.S. § 15A-1214(j) states that a judge may "for good cause shown" allow the individual voir dire of jurors. The defendant contends that due to the short time span between the "inflammatory" publicity and the beginning of the trial, it was absolutely necessary for him to be allowed to document, through individual questioning, the personal biases of prospective jurors. Without the opportunity for individual voir dire of the jurors, the defendant argues that he could not show that he had suffered prejudice sufficient to warrant a new trial.

We note that motions for individual voir dire and for sequestration of jurors, like motions to continue, are addressed to the sound discretion of the trial court, and its rulings will be disturbed only for an abuse of discretion. *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1980). Again, the defendant has failed to make any showing of an abuse of discretion on the part of the trial court in the instant case.

[7] Finally, the defendant contends under this assignment that the trial court erred in refusing to prohibit the State's use of racially motivated peremptory challenges. Article 1, section 26 of the Constitution of North Carolina prohibits any action by the State to deny jury service to any individual based on race. Such practices were also prohibited by the landmark decision in *Batson v. Kentucky*, 476 U.S. 79, 90 L.Ed. 2d 69 (1986). There, the Supreme Court of the United States admonished that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Id.* at 89, 90 L.Ed. 2d at 83.

In *Batson* the Supreme Court established a three-part test for determining whether a defendant has established 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." . . . Finally, the defendant must show that these facts and other relevant circumstances raise an inference that the prosecutor used that practice to exclude veniremen from the petit jury on account of their race.

Id. at 96, 90 L.Ed. 2d at 87-88. The initial burden is on a criminal defendant who alleges such racial discrimination in the selection of the jury to establish an inference of purposeful discrimination. *State v. Mitchell*, 321 N.C. 650, 365 S.E. 2d 554 (1988). The defendant here has failed to carry that burden.

This case involved the killing of a black woman by a black man. Five black persons were called as potential jurors. Two of them were peremptorily challenged by the State. One was dismissed by the trial court because he had sat in the courtroom on the previous day during hearings on motions in this case. The other two blacks were seated on the jury. The defendant has failed to show that these facts and any other relevant circumstances raise an inference that the State, in exercising its peremptory challenges, was acting out of any racial bias or any desire to exclude black persons from the jury on the basis of race.

In *State v. Belton*, 318 N.C. 141, 347 S.E. 2d 755 (1986), twelve black jurors were tendered to the State. It peremptorily challenged six of them and thus accepted fifty percent of the blacks tendered. In *State v. Abbott*, 320 N.C. 475, 358 S.E. 2d 365 (1987), five blacks were tendered as prospective jurors to the State, and it exercised peremptory challenges to three of them. As in both *Belton* and *Abbott*, we conclude here that the defendant failed to make a prima facie showing that the prosecutor used peremptory challenges to exclude jurors because of their race. He has not met the test set out in *Batson*, and this assignment of error is overruled.

IV.

In his final assignment of error, the defendant argues that the trial court erred by allowing prejudicial evidence to be submitted to the jury and by denying his Sixth Amendment right to

confrontation. Here, the defendant challenges several evidentiary rulings of the trial court. We consider each separately.

[8] First, the defendant challenges the admission of certain insulation particles into evidence. The State's theory of this case was that the defendant crawled through the attic linking the duplex unit of the victim Moore with that of the defendant's girlfriend. William Rose of the State Bureau of Investigation testified that pieces of insulation were found in the victim's apartment. He further testified that material taken from the defendant's clothing, which he was wearing at the time of his arrest on 29 January, was "consistent with" the sample pieces of insulation taken from the attic. Although the fact that insulation particles in the defendant's clothing had apparently come from the attic used to gain access to the victim's apartment does not prove that he killed her, it was relevant to the State's case. Evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue in the case. *State v. Wingard*, 317 N.C. 590, 346 S.E. 2d 638 (1986); *State v. Sloan*, 316 N.C. 714, 343 S.E. 2d 527 (1986); N.C.G.S. § 8C-1, Rule 401 (1986). Certainly a fact of consequence in this action was the presence of fiber on the defendant's clothing consistent with that found in the victim's apartment.

The defendant also contends that the insulation fibers were unlawfully obtained from him. The defendant concedes, however, that he was under lawful arrest at the time his clothes containing the fibers were taken from him. That being the case, the clothing worn by him at the time of the arrest and the relevant evidence it yielded were properly taken. *State v. Dickens*, 278 N.C. 537, 180 S.E. 2d 844 (1971).

Finally, with respect to this evidence, the defendant contends that it should have been excluded pursuant to Rule 403 of the North Carolina Rules of Evidence because of the danger of unfair prejudice. The defendant, however, has shown no way in which the admission of the evidence in question *unfairly* prejudiced his case. Accordingly, we find no error in the admission of the insulation particles.

[9] In his second argument under this assignment, the defendant complains that certain photographs introduced by the State were prejudicial to his case. It appears from the record that five photographs were admitted into evidence. Three of these photo-

graphs showed the victim's body in the trunk of the vehicle discovered in the parking lot in Atlanta. Each was admitted to illustrate specific testimony of the parking attendant. In each the victim's body appeared to be fully clothed and apparently bore no obvious signs of trauma or serious injury.

The defendant argues that these pictures were inflammatory and cites *State v. Mercer*, 275 N.C. 108, 165 S.E. 2d 328 (1969), for the proposition that photographs of a deceased's body that are inflammatory and without probative value should not be admitted into evidence. In that case four photographs of the dead body of the victim, depicting substantially the same scene, were held to be competent and admissible to illustrate the trial testimony. The pictures that this Court concluded should not have been admitted in *Mercer* were photographs of the deceased in the funeral home with probes projecting from his body indicating the entry, course, and exit of the bullets that caused his death. The photographs that we specifically found were not objectionable in *Mercer* were very similar to those in question here.

The photographs in the present case were not excessive in number, nor were they excessively gruesome or inflammatory. They did illustrate the testimony of the witnesses with respect to the location and position of the deceased's body. Therefore, they were properly admissible.

[10] In his next argument under this assignment, the defendant contends that he was unfairly surprised and prejudiced by the testimony of Agent Rose to the effect that insulation was found throughout the victim's apartment and that the covering to the attic access was not pulled down tight. The defendant has not attempted to show how he was unfairly prejudiced by the testimony regarding the attic door. Moreover, he has failed to show how he was prejudiced by learning at the trial that there was insulation in more places than he had originally been told. Accordingly, even assuming error *arguendo*, the defendant clearly failed to meet his burden of showing a reasonable possibility that, absent the error, a different result would have been reached at trial. N.C.G.S. § 15A-1443(a) (1983).

[11] The defendant also argues that the trial court erroneously limited his right to cross-examination. First, the defendant cites as error the granting of the State's motion to prevent discussion

at trial of a sanitary napkin and some other items found in Forsyth County, Georgia, near Interstate Highway 85. The items were unrelated to this case and therefore did not qualify as relevant evidence under Rule 401. Because they were not relevant, they were not admissible. N.C.G.S. § 8C-1, Rule 402 (1986).

[12] Next, the defendant asserts that his ability to cross-examine and confront the State's witness Tommy Odom was improperly restricted by the trial court. He cites *Davis v. Alaska*, 415 U.S. 308, 39 L.Ed. 2d 347 (1974), for the proposition that the Sixth Amendment right of confrontation requires that a defendant be allowed to impeach prosecution witnesses by cross-examination directed to their possible bias in the case on trial.

The defendant's counsel attempted to impeach the credibility of the witness Odom by delving vigorously into his use of narcotics and his ties with the Rocky Mount Police Department. He asked the witness whether his house was known as the local "crack house" and whether he used heroin and cocaine. The trial court sustained objections to all these questions. The defendant's theory seems to have been that this information was relevant as to whether the witness believed that his testimony at trial would garner favor with the police.

It is well established that a trial court's ruling on an evidentiary point is 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.* A defendant is prejudiced by a violation of a right arising under the Constitution of the United States unless such violation was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1983). In the present case, even assuming *arguendo* that the trial court erroneously limited the defendant's right to impeach the State's witnesses, we conclude that the error was harmless beyond a reasonable doubt.

The evidence against the defendant was overwhelming. At the time of his arrest, the defendant's clothes were taken from him. There was material in his clothes that was "consistent with" known insulation samples from the deceased's attic. John Graham, a friend of the defendant, testified that the defendant had come

by his house between 10:00 and 11:00 p.m. on Saturday, 18 January 1986. At that time, the defendant told Graham that he needed to come up with $800 to pay for the items stolen from the victim. On Tuesday, 21 January 1986, the defendant asked Graham to tell the police that it was between 2:30 and 3:30 a.m. on Sunday, 19 January 1986, that they had visited rather than the actual time. The defendant also told Graham and others that he had killed the deceased. In light of all of the evidence against the defendant, we conclude that any error by the trial court in failing to allow the defendant to more fully impeach witness Odom's testimony was harmless beyond a reasonable doubt.

Finally, the defendant argues that the trial court erroneously limited his cross-examination of the witness Grady Tart. The defendant attempted to ask Tart about charges that were pending against him for which he was to have been arraigned on the week of the defendant's trial. The defendant speculates that as a result of the charges pending, the witness testified so as to curry favor with the State. For the reasons previously stated, however, we conclude that any error in the trial court's ruling was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1983).

In conclusion, having carefully reviewed the record and each of the defendant's assignments of error, we hold that the defendant received a fair trial, free of prejudicial error.

No error.

STATE OF NORTH CAROLINA v. WILLIE JAMES WHITE

No. 222A87

(Filed 30 June 1988)

1. Constitutional Law § 34; Criminal Law § 26.8— mistrial for prosecutorial misconduct—when retrial barred

Where the defendant moves for a mistrial because of prosecutorial misconduct, and the trial court grants the motion, retrial is not barred by the "law of the land" clause of Art. I, § 19 of the N. C. Constitution unless the defendant shows that the prosecutor was motivated by the intent to provoke a mistrial instead of merely the intent to prejudice the defendant. This is the same test established by *Oregon v. Kennedy*, 456 U.S. 667 (1982), for deter-

mining whether retrial is barred under the double jeopardy provision of the federal constitution.

2. **Constitutional Law § 34; Criminal Law § 26.8— mistrial for prosecutorial misconduct—retrial not barred**

Retrial of defendant for armed robbery after the trial court granted defendant's motion for a mistrial because of prosecutorial misconduct in asking defendant an improper question on cross-examination was not barred by double jeopardy provisions in the federal constitution or by the law of the land clause in the state constitution where the record shows that it is highly unlikely that the prosecutor intended to provoke defendant into moving for a mistrial because the State's evidence against defendant was substantial; the prosecutor requested that the court give a limiting instruction rather than grant a mistrial; after granting defendant's motion, the court told the jury that the case would have to be tried again; and at a hearing to dismiss the indictment on the ground of double jeopardy, the prosecutor stated that based on the record "it would have been foolish on the part of the State to goad the Defendant to move for a mistrial."

3. **Larceny § 1; Robbery § 1.2— larceny as lesser included offense of armed robbery—reversion to former rule**

The Supreme Court reverts to its former rule that larceny is a lesser included offense of armed robbery and overrules the contrary decision of *State v. Hurst*, 320 N.C. 589, 359 S.E. 2d 776 (1987), in light of the legislative intent in enacting N.C.G.S. § 14-87, the longstanding and extensive case law interpreting this statutory section and establishing our former rule that larceny is a lesser included offense of armed robbery, and the natural relationship between armed robbery and larceny.

4. **Robbery § 5.4— armed robbery case—refusal to instruct on misdemeanor larceny**

The trial court in an armed robbery case erred in refusing to instruct the jury on the lesser included offense of misdemeanor larceny where defendant presented evidence that he drove off in the victim's car after the victim and a passenger jumped out and ran, and that he was not armed.

Justice WEBB dissenting.

Justices MEYER and MITCHELL join in this dissenting opinion.

APPEAL by the State pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 85 N.C. App. 81, 354 S.E. 2d 324 (1987), which found prejudicial error in a trial by *Friday, J.*, at the 24 March 1986 regular term of Superior Criminal Court, MECKLENBURG County. On 7 July 1987 we allowed defendant's petition for discretionary review of the issue of whether the case should have been dismissed on double jeopardy grounds. Heard in the Supreme Court 10 November 1987.

Lacy H. Thornburg, Attorney General, by G. Patrick Murphy, Assistant Attorney General, for the State.

Isabel Scott Day, Public Defender, by Marc D. Towler, Assistant Public Defender, for defendant-appellee.

WHICHARD, Justice.

Defendant was charged with armed robbery. The initial trial began on 9 December 1985 before Judge Robert E. Gaines. Defense counsel moved for a mistrial after the prosecutor asked defendant on re-cross examination, "Isn't it true that on [the] assault on [a] female conviction you were originally tried on second degree rape?" The court granted the motion and admonished the prosecutor for asking the question.

Prior to retrial, defendant moved to dismiss the indictment on double jeopardy grounds, arguing that the prosecutor's intentional misconduct provoked the mistrial. On 17 March 1986, Judge Chase B. Saunders denied the motion, finding as a fact that "[b]ased upon [counsels' briefs, affidavits, the transcript of part of the trial proceeding] and arguments of counsel . . . the Assistant District Attorney did not intend to goad the defendant into moving for a mistrial so as to improve the chances of the State upon retrial for a conviction." The court concluded as a matter of law that

> assuming arguendo, the Assistant District Attorney acted in bad faith, a review of the record and affidavits fails to establish that the prosecutor's behavior in question was conducted so as to afford the prosecution a more favorable opportunity to convict the defendant, the record reflecting that there was ample evidence before the jury upon which a verdict favorable to the State could be returned.

On retrial, the State's evidence tended to show that in the early morning hours of 20 June 1985, Roberta Stitt was driving to a convenience store with Sheila Smith, her friend, in the passenger seat. When Stitt slowed down to round a sharp curve, defendant opened the door on the driver's side, put a gun to Stitt's head, and pulled her out of the car. Smith jumped out and ran. Defendant got in Stitt's car and drove off.

Defendant testified on his own behalf. He said that on the night in question Stitt agreed to give him a ride to Belmont. While in the car with Stitt and Smith, defendant gave Stitt $35.00 to buy him some cocaine. Stitt told him he would have to wait while she went to get the drugs, so he demanded the return of his money. Stitt became "hysterical" and refused to return the money. Defendant said, "Ya'll going to give me somethin' back, my money or somethin,' " and he reached toward the women in the front seat. Stitt and Smith jumped out of the car. Defendant got in the driver's seat and drove the car to Forest City. He hid some credit cards, which he found in the car, under a couch cushion in his girlfriend's home, and hid the car keys in a stove outside her home. He sold the car radio.

During the instructions conference, defendant asked the court to charge the jury on misdemeanor larceny. The court denied this request. The jury found defendant guilty of armed robbery, and the court sentenced him to fourteen years imprisonment.

On appeal, the Court of Appeals held that because misdemeanor larceny is a lesser included offense of armed robbery, the trial court erred in not charging the jury on misdemeanor larceny. *State v. White*, 85 N.C. App. 81, 354 S.E. 2d 324 (1987). It found no error in the denial of defendant's motion to dismiss on double jeopardy grounds. Judge Johnson concurred on the double jeopardy question, but dissented on the issue of whether misdemeanor larceny is a lesser included offense of armed robbery. He noted that he agreed with the majority's reasoning, but believed that he was compelled to dissent by prior decisions of this Court. *Id.* at 92-93, 354 S.E. 2d at 331-32.

The State appealed as a matter of right on the lesser included offense question. We allowed defendant's petition for discretionary review of the double jeopardy question. We now affirm the Court of Appeals on both issues.

I.

Defendant argues that retrial was barred by the double jeopardy clauses of the federal and state constitutions. We disagree.

The Fifth and Fourteenth Amendments to the United States Constitution guarantee freedom from multiple prosecutions for

the same offense. *United States v. Dinitz*, 424 U.S. 600, 606 & n.8, 47 L.Ed. 2d 267, 273 & n.8 (1976). Reprosecution for the same offense is not usually barred, however, when a trial terminates in a mistrial with the consent of the defendant or upon the defendant's motion, even if that motion is motivated by prosecutorial error.

> Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion . . . does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause. A defendant's motion for a mistrial constitutes "a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact." *United States v. Scott*, 437 U.S. 82, 93, [57 L.Ed. 2d 65, 76] (1978). . . . Only where the governmental conduct in question is intended to "goad" the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion.
>
> . . . Knowing that the granting of the defendant's motion . . . would all but inevitably bring with it an attempt to bar a second trial on grounds of double jeopardy, the judge presiding over the first trial might well be more loath to grant a defendant's motion for mistrial.

Oregon v. Kennedy, 456 U.S. 667, 675-76, 72 L.Ed. 2d 416, 424-25 (1982). In deciding whether Judge Saunders properly denied defendant's motion to dismiss on federal constitutional grounds, we must apply the above standard.

Article I, Section 19 of the North Carolina Constitution, the "law of the land" clause, prohibits reprosecution for the same offense. *State v. Cameron*, 283 N.C. 191, 197, 195 S.E. 2d 481, 485 (1973); *State v. Ballard*, 280 N.C. 479, 482, 186 S.E. 2d 372, 373 (1972). Under North Carolina law, as under federal law, however, an order of mistrial usually does not bar retrial if the mistrial is entered upon the defendant's motion. *State v. Britt*, 291 N.C. 528, 543, 231 S.E. 2d 644, 654 (1977). The Court of Appeals believed that, in determining defendant's right not to be tried a second time, the test required by the state constitution should be broader than that required by the federal constitution. It believed

that the appropriate test was that stated in the concurring opinion in *Kennedy* and that retrial of a case ending in mistrial upon the defendant's motion should be barred where "bad faith prosecutorial overreaching or harassment aimed at prejudicing the defendant's chances for acquittal . . . 'has rendered unmeaningful the defendant's choice to continue or to abort the proceeding.' " *State v. White*, 85 N.C. App. at 88, 354 S.E. 2d at 329 (quoting *Oregon v. Kennedy*, 456 U.S. at 689, 72 L.Ed. 2d at 433 (Stevens, J., concurring)).

[1] We adopt, instead, as the test for determining under our state constitution whether a case may be retried after the court grants a defendant's motion for a mistrial, the test stated in the majority opinion in *Kennedy*. If a defendant moves for a mistrial, he or she normally should be held to have waived the right not to be tried a second time for the same offense. Where the defendant makes such a motion because of prosecutorial misconduct, and the court grants the motion, retrial is not barred by Article I, Section 19 unless the defendant shows that the prosecutor was motivated by the intent to provoke a mistrial instead of merely the intent to prejudice the defendant. We agree with the majority in *Kennedy* that the prosecutorial intent standard is fairer and easier to apply than an overreaching or harassment standard. We also agree that a trial court might be more reluctant to grant a mistrial based on prosecutorial overreaching or harassment if it knows that to do so will lead to a plea of former jeopardy.

[2] Applying that test here, we conclude that the trial court did not err in denying defendant's motion to dismiss on grounds of double jeopardy. Judge Gaines did not make findings of fact when he granted defendant's motion for mistrial. At the hearing before Judge Saunders, defendant presented a portion of the transcript of the first trial and affidavits by the assistant appellate defender who then represented him. Judge Saunders found as a fact, based upon the affidavits and transcript, that the prosecutor did not intend to goad defendant into moving for a mistrial. The record suffices to permit appellate review of whether this refusal to dismiss the case against defendant was proper.

During the first trial, the prosecutor asked the improper question on re-cross examination of defendant. At that time, the State's evidence against defendant was substantial. Roberta Stitt

and Sheila Smith had testified that: Stitt was driving her car with Smith in the passenger seat; defendant opened a car door, put a gun to Stitt's head, and pulled her out; Smith jumped out, and defendant drove off in the car. In light of the State's strong case against defendant, it is highly unlikely that the prosecutor intended to provoke defendant into moving for a mistrial.

The record contains still further support for this conclusion. First, the prosecutor requested that the court give a limiting instruction rather than grant a mistrial. Second, after granting defendant's motion, the court told the jury that the case would have to be tried again. Finally, in the hearing before Judge Saunders, the prosecutor stated that based on the record "it would have been foolish on the part of the State to goad the Defendant to move for a mistrial."

We hold that the record supports Judge Saunders' conclusion that retrial was not barred by double jeopardy provisions in the federal constitution or by the "law of the land" clause in the state constitution, and that it was not error to deny defendant's motion.

II.

The State contends that the Court of Appeals was incorrect in holding that the trial court erred in refusing to charge the jury on misdemeanor larceny. We again disagree.

We have held that "[a] trial court must submit and instruct the jury on a lesser included offense when, and only when, there is evidence from which the jury could find that defendant committed the lesser included offense." *State v. Rhinehart*, 322 N.C. 53, 59, 366 S.E. 2d 429, 432 (1988) (quoting *State v. Boykin*, 310 N.C. 118, 121, 310 S.E. 2d 315, 317 (1984)). Therefore, if misdemeanor larceny is a lesser included offense of armed robbery, and if there is evidence from which the jury could find that defendant committed misdemeanor larceny, the court should have instructed thereon.

For many years, the law in North Carolina was that larceny was a lesser included offense of armed robbery. This Court has repeatedly held that

> [i]n a prosecution for robbery with a firearm, an accused may be acquitted of the major charge and convicted of an included

> or lesser offense, such as common-law robbery, or assault, or larceny from the person, or simple larceny, if a verdict for the included or lesser offense is supported by allegations of the indictment and by evidence on the trial.

State v. Black, 286 N.C. 191, 194, 209 S.E. 2d 458, 460-61 (1974); *see also State v. Owens*, 277 N.C. 697, 178 S.E. 2d 442 (1971); *State v. Conrad*, 275 N.C. 342, 168 S.E. 2d 39 (1969); *State v. Rogers*, 273 N.C. 208, 159 S.E. 2d 525 (1968); *State v. Parker*, 262 N.C. 679, 138 S.E. 2d 496 (1964); *State v. Weinrich*, 251 N.C. 460, 111 S.E. 2d 582 (1959); *State v. Hare*, 243 N.C. 262, 90 S.E. 2d 550 (1955); *State v. Davis*, 242 N.C. 476, 87 S.E. 2d 906 (1955); *State v. Bell*, 228 N.C. 659, 46 S.E. 2d 834 (1948); *State v. Chapman*, 49 N.C. App. 103, 270 S.E. 2d 524 (1980); *State v. Allen*, 47 N.C. App. 482, 267 S.E. 2d 514 (1980); *State v. Fletcher*, 27 N.C. App. 672, 220 S.E. 2d 101 (1975); *State v. Faulkner*, 5 N.C. App. 113, 168 S.E. 2d 9 (1969). Only recently have we held that felonious larceny is not a lesser included offense of armed robbery. *State v. Hurst*, 320 N.C. 589, 359 S.E. 2d 776 (1987).

In *Hurst*, the Court was faced with the question of "whether [a] defendant . . . may be convicted and sentenced for both armed robbery and felonious larceny when both charges are based on the same incident." *Id.* at 590, 359 S.E. 2d at 777. The Court held that because felonious larceny was not a lesser included offense of armed robbery, a defendant could be convicted of, and sentenced for, both crimes. It reached this result by strictly applying the definitional test of what constitutes a lesser included offense:

> When a defendant is indicted for a criminal offense, he may be convicted of the charged offense or a lesser included offense when the greater offense charged in the bill of indictment contains all of the essential elements of the lesser, all of which could be proved by proof of the allegations in the indictment. Further, when there is some evidence supporting a lesser included offense, a defendant is entitled to a charge thereon even when there is no specific prayer for such instruction, and error in failing to do so will not be cured by a verdict finding a defendant guilty of a higher degree of the same crime.

State v. Weaver, 306 N.C. 629, 633-34, 295 S.E. 2d 375, 377 (1982) (quoting *State v. Banks*, 295 N.C. 399, 415-16, 245 S.E. 2d 743, 754

(1978), quoting *State v. Bell*, 284 N.C. 416, 419, 200 S.E. 2d 601, 603 (1973)). Applying this test to the facts in *Hurst*, the Court held that felonious larceny was not a lesser included offense of armed robbery for two reasons: first, because an attempt to take property does not satisfy the taking element of larceny; and second, because proof of the elements of armed robbery need not include proof that the goods taken are worth more than $400. *Hurst*, 320 N.C. at 592-93, 359 S.E. 2d at 778.

[3] With the issue of whether misdemeanor larceny is a lesser included offense of armed robbery before us now, we have reexamined our decision in *Hurst*. In light of the legislative intent in enacting N.C.G.S. § 14-87, the long-standing and extensive case law interpreting this statutory section and establishing our former rule that larceny is a lesser included offense of armed robbery, and the natural relationship between armed robbery and larceny, we hold that larceny is a lesser included offense of armed robbery, and we overrule *State v. Hurst*.

First, N.C.G.S. § 14-87, captioned "Robbery with firearms or other dangerous weapons," reads in part:

> (a) Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a Class D felony.

N.C.G.S. § 14-87(a) (1986). This statute was originally enacted in 1929 after several bank robberies, in one of which police officers arrived in time to prevent an actual taking but after a bank employee was seriously wounded by gunfire. *State v. Parker*, 262 N.C. 679, 682, 138 S.E. 2d 496, 499 (1964). The purpose of the statute was to increase the punishment for common law robbery when firearms or other dangerous weapons were used to commit a robbery, whether or not the robber succeeded in the effort to take personal property. *State v. Gibbons*, 303 N.C. 484, 490, 279 S.E. 2d 574, 578 (1981); *State v. Jones*, 227 N.C. 402, 405, 42 S.E.

2d 465, 467 (1947). The statute's thrust was not to redefine robbery by eliminating the element of a taking from the offense, but rather to provide that an attempted taking with a dangerous weapon be punished as severely as a completed taking under the same circumstances, and that both be punished more severely than forceful takings committed without dangerous weapons. *See State v. Gibbons*, 303 N.C. 484, 279 S.E. 2d 574; *State v. Hare*, 243 N.C. 262, 90 S.E. 2d 550 (1955).

Second, in light of the statute's historical purpose, this Court, until recently, acknowledged that although actual and attempted takings in the context of an armed robbery resulted in violations of the same statute, giving rise to equal punishments, actual and attempted takings were different crimes comprised of different elements.

> Under G.S. 14-87, an *armed robbery* is defined as the taking of the personal property of another in his presence or from his person without his consent by endangering or threatening his life with a firearm, with the taker knowing that he is not entitled to the property and the taker intending to permanently deprive the owner of the property. An *attempted armed robbery* occurs when a defendant "with the requisite intent to rob, does some overt act calculated and designed to bring about the robbery, thereby endangering or threatening the life of a person." By the terms of G.S. 14-87, the offense is complete if there is an attempt to take personal property by use of firearms or other dangerous weapons. *The attempt itself is a violation of the statute and is a felony.*

State v. May, 292 N.C. 644, 649, 235 S.E. 2d 178, 182, *cert. denied*, 434 U.S. 928, 54 L.Ed. 2d 288 (1977) (emphasis added) (citations omitted); *see also State v. Allison*, 319 N.C. 92, 352 S.E. 2d 420 (1987) (defines attempted armed robbery); *State v. Bates*, 309 N.C. 528, 308 S.E. 2d 258 (1983) (defines armed robbery); *State v. Davis*, 301 N.C. 394, 271 S.E. 2d 263 (1980) (defines armed robbery). Attempted armed robbery, although defined in N.C.G.S. § 14-87 along with armed robbery, is clearly a separate offense.

> One of the elements of an attempt to commit a crime is that defendant have the intent to commit the substantive offense. An attempted robbery with a dangerous weapon occurs when a person, with the specific intent to unlawfully deprive

> another of personal property by endangering or threatening his life with a dangerous weapon, does some overt act calculated to bring about this result.

State v. Allison, 319 N.C. at 96, 352 S.E. 2d at 423 (citations omitted).

As separate crimes, armed robbery and attempted armed robbery each include certain lesser offenses. We have acknowledged the distinction between the lesser included offenses for armed robbery and those for attempted armed robbery. In *State v. Hare*, 243 N.C. 262, 90 S.E. 2d 550, we held that common law robbery is a lesser offense of armed robbery but not of attempted armed robbery, and that attempted common law robbery is a lesser offense of attempted armed robbery. *Id.* at 264, 90 S.E. 2d at 551-52; *see also State v. Joyner*, 312 N.C. 779, 784, 324 S.E. 2d 841, 846 (1985) (common law robbery is a lesser included offense of armed robbery); *State v. Owens*, 73 N.C. App. 631, 327 S.E. 2d 42, *disc. rev. denied*, 314 N.C. 120, 332 S.E. 2d 488 (1985) (common law robbery is a lesser included offense of armed robbery).

Prior to *Hurst*, we often acknowledged that larceny is a lesser included offense of armed robbery. *See, e.g., State v. Black*, 286 N.C. 191, 209 S.E. 2d 458. *Hurst*, however, holds that because armed robbery does not contain all of the essential elements of larceny, larceny cannot be a lesser included offense of armed robbery.

We now reject the rationale in *Hurst* that attempt, which will not satisfy the taking requirement for larceny, is an essential element of armed robbery. N.C.G.S. § 14-87(a) defines two crimes: armed robbery, which requires an actual taking, and attempted armed robbery, which requires an attempted taking. An attempted taking is not, therefore, an essential element of armed robbery.

Third, there is a special relationship between armed robbery and larceny. Both crimes involve an unlawful and willful taking of another's personal property. We have said that armed robbery is an aggravated form of larceny. *State v. Smith*, 268 N.C. 167, 150 S.E. 2d 194 (1966); *State v. Lawrence*, 262 N.C. 162, 167, 136 S.E. 2d 595, 599 (1964).

In *Hurst*, the Court relied on three recent cases which contain language indicating that, for the purpose of resolving double jeopardy issues, larceny is not a lesser included offense of armed robbery. *See State v. Murray*, 310 N.C. 541, 313 S.E. 2d 523 (1984); *State v. Beaty*, 306 N.C. 491, 293 S.E. 2d 760 (1982); *State v. Revelle*, 301 N.C. 153, 270 S.E. 2d 476 (1980). All three of these decisions can, however, be upheld under our former rule that larceny is a lesser included offense of armed robbery. *See State v. Hurst*, 320 N.C. at 594-95, 359 S.E. 2d at 779-80 (Frye, J., dissenting). Both *Revelle* and *Murray* involved two separate takings, not one as in *Hurst* and the present case. Thus, convictions for both larceny and armed robbery could have been sustained without altering the traditional relationship between the two. *See id.* at 595, 359 S.E. 2d at 779-80. In *Beaty*, the language suggesting that larceny is not a lesser included offense of armed robbery was unnecessary to resolve the case. The issue was neither briefed nor argued; thus, the language amounted to dictum.

The dissenting opinion suggests that we are destroying a legal principle established for "a good reason" by refusing to adhere to the *Weaver* definitional test. It fails to acknowledge, however, that the definitional test existed before *Weaver—see State v. Banks*, 295 N.C. 399, 245 S.E. 2d 743 (1978); *State v. Bell*, 284 N.C. 416, 200 S.E. 2d 601 (1973); *State v. Riera*, 276 N.C. 361, 172 S.E. 2d 535 (1970)—and that even after the decisions in *Riera*, *Bell* and *Banks*, this Court continued to recognize larceny as a lesser included offense of armed robbery. *See, e.g., State v. Black*, 286 N.C. 191, 209 N.C. 458. In holding, therefore, that the *Weaver* test is not applicable in this context, we are merely returning to our prior interpretation of the relationship between the definitional test and the crimes of armed robbery and larceny.[1]

1. We also reaffirm our prior holdings that common law robbery is a lesser included offense of armed robbery. *State v. Joyner*, 312 N.C. 779, 324 S.E. 2d 841 (1985), and that larceny is a lesser included offense of common law robbery. *State v. Young*, 305 N.C. 391, 289 S.E. 2d 374 (1982). In *Young*, a case dealing solely with the question of whether the trial court erred in submitting the crime of larceny from the person as a lesser included offense of common law robbery, the crime charged, we stated the following:

> [W]e reaffirm today an established line of precedent in our state and hold that a defendant, who has been formally charged with common law robbery, may be convicted of the "lesser included" offense of larceny from the person pursuant to G.S. 15-170 upon proper instructions to the jury by the trial court.

Id. at 393, 289 S.E. 2d at 376 (1982).

This decision is hardly novel or revolutionary. Rather, the Court merely reverts—following a brief aberrative period—to a well established principle of law, thoroughly familiar to generations of lawyers and jurists. Nothing in our above-cited cases or the treatises—see, *e.g.*, 67 Am. Jur. *Robbery* § 9 (1985); 42 C.J.S. *Indictments and Information* §§ 283, 293 (1944)—indicates that this long-standing principle has proven inscrutable or unworkable. When a defendant is charged with armed robbery, the evidence at trial quite commonly either requires or allows reasonable jurors to find the accused guilty of the lesser offense of larceny. The worthy goals of economy, efficiency, accuracy and fairness in judicial proceedings are furthered by placing all options raised by the indictment and the evidence before the same jury in a single trial.

[4] For the foregoing reasons, we conclude that larceny is a lesser included offense of armed robbery. The State's evidence here tends to show that defendant committed armed robbery. Defendant's version of the events, however, supports the offense of misdemeanor larceny. He claims that he drove off in Stitt's car after she and Smith jumped out and ran, and that he was not armed. To convict of larceny, there must be proof that defendant

(a) took the property of another;

(b) carried it away;

(c) without the owner's consent; and

(d) with the intent to deprive the owner of his property permanently.

State v. Perry, 305 N.C. at 233, 287 S.E. 2d at 815. Because defendant's version of the evidence supported an instruction on the lesser included offense of misdemeanor larceny, the court was required to instruct thereon.

Insofar as *State v. Hurst*, 320 N.C. 589, 359 S.E. 2d 776, is inconsistent with this opinion, it is overruled. The language in *State v. Murray*, 310 N.C. 541, 313 S.E. 2d 523; *State v. Beaty*, 306 N.C. 491, 293 S.E. 2d 760; and *State v. Revelle*, 301 N.C. 153, 270 S.E. 2d 476, which indicates that larceny is not a lesser included offense of armed robbery, is disapproved.

For the foregoing reasons, we affirm the decision of the Court of Appeals. The case is remanded to that court for further

remand to the Superior Court, Mecklenburg County, for a new trial.

Affirmed.

Justice WEBB dissenting.

I dissent. In overruling *State v. Hurst*, 320 N.C. 589, 359 S.E. 2d 776 (1987), this Court has reversed itself on a question it decided less than one year previously. In order to accomplish this result, this Court has not adopted the rationale of the dissent in *Hurst* but has adopted a new theory for application in this case. The dissent in *Hurst* was based on the premise that the General Assembly did not intend a defendant to be punished for armed robbery and larceny for a single taking from a single victim at one time. In this case the majority has concluded that larceny is a lesser included offense of armed robbery. This reversal of itself at the first opportunity, with the application of a principle which not one member of the Court felt was applicable last year, can hardly add to the stability or confidence in our law.

I believe there are stronger reasons why the majority is wrong. We have held that when a crime for which the defendant is charged contains all the essential elements of another crime, all of which could be proved by proof of the allegations in the indictment, the second crime is a lesser included offense of the first crime. *State v. Weaver*, 306 N.C. 629, 295 S.E. 2d 375 (1982). This is a definition which was developed in our common law and is not a legislative creation. The majority has refused to analyze this rule in deciding this case. Indeed they cannot because it leads to the conclusion that larceny is not a lesser included offense of armed robbery. Asportation is an element of larceny, *State v. Perry*, 305 N.C. 225, 287 S.E. 2d 810 (1982), and is not an element of armed robbery. N.C.G.S. § 14-87(a) (1986). One type of felony larceny requires that the property stolen have a value exceeding $400, N.C.G.S. § 14-72(a), while the value of the property stolen is not an element of armed robbery. N.C.G.S. § 14-87(a) (1986). Under the only test we have had until today for what determines a lesser included offense, larceny is not a lesser included offense of armed robbery.

Rather than apply the principle we have always held should be used in determining what is a lesser included offense, the majority simply says, "[i]n light of the legislative intent in enacting N.C.G.S. § 14-87, the long-standing and extensive case law interpreting this statutory section and establishing our former rule that larceny is a lesser included offense of armed robbery, and the natural relationship between armed robbery and larceny, we hold that larceny is a lesser included offense of armed robbery." I do not believe there is validity to any of the propositions which the majority advances to justify its overruling of *Hurst, State v. Murray*, 310 N.C. 541, 313 S.E. 2d 523 (1984); *State v. Beaty*, 306 N.C. 491, 293 S.E. 2d 760 (1982) and *State v. Revelle*, 301 N.C. 153, 270 S.E. 2d 476 (1980). If there were validity to them, I do not believe they are sufficient reasons to support the majority's conclusion.

In support of the proposition that the legislative intent in enacting N.C.G.S. § 14-87(a) was that larceny should be a lesser included offense of armed robbery, the majority goes to some length to establish the legislative history of the act. Nowhere do they tell us why the history of the statute shows the legislative intent was that larceny be a lesser included offense of armed robbery. The fact that the legislative intent was that an attempted taking should be punished as severely as a taking does not help the majority to its conclusion. Whatever the intent of the legislature, it is the courts which must determine what is a lesser included offense.

In support of its proposition that extensive case law has established that larceny is a lesser included offense of armed robbery, the majority says, "[f]or many years, the law in North Carolina was that larceny was a lesser included offense of armed robbery," *quoting State v. Black*, 286 N.C. 191, 194, 209 S.E. 2d 458, 460-61 (1974), and citing several other cases. The quotation from *Black* is dictum. In most of the other cases cited by the majority, the statement that larceny is a lesser included offense of armed robbery is dictum and more significantly in none of the cases does this Court analyze the principles of lesser included offenses as was done in *Murray, Beaty, Revelle* and *Hurst*. I believe we should follow the cases that have taken into account the principles that govern this case. It is true, as the majority says, that *Murray, Beaty* and *Revelle* could have been resolved without

relying on the lesser included offense analysis. This analysis was used in these cases, however, and in *Murray* this was the rationale for deciding the case. We have now overruled the only cases which have discussed the principles of lesser included offenses as the law has developed in North Carolina.

In support of the proposition that there is a natural or special relationship between armed robbery and larceny, the majority says that both crimes involve an unlawful and willful taking of another person's property and we have said armed robbery is an aggravated form of larceny. There are many crimes which are somewhat similar to other crimes. If we are to use as a test that such a relationship makes one of the crimes a lesser included offense of the other, we are on a difficult path. It will be difficult indeed for the bench and bar to know they cannot rely on a well-defined principle in determining what is a lesser included offense. Instead, they must discern whether this Court might determine that a special relationship exists between the two crimes, in which case the rule does not apply.

A lesser included offense is not something a court should define as it wants to do. Lesser included offenses have been defined by following established principles. One reason for the rule is that it is fundamentally unfair to punish a defendant for both offenses when he has been convicted of the greater, unless the legislature evinces a clear intent to the contrary. One method we have for providing impartiality in the law is to follow legal principles. I believe it is a mistake not to do so now.

I also believe the majority is mistaken in saying N.C.G.S. § 14-87(a) defines two crimes, armed robbery and attempted armed robbery. I believe there is one crime of armed robbery with alternate elements, a taking or an attempted taking. If we say, as the majority implicitly does, that N.C.G.S. § 14-87(a) defines a crime of attempted armed robbery, we run head-on into the traditional definition of an attempted crime. An attempted crime is an act done with intent to commit that crime, carried beyond mere preparation to commit it, but falling short of its actual commission. *State v. McNeely*, 244 N.C. 737, 94 S.E. 2d 853 (1956); *State v. Bailey*, 4 N.C. App. 407, 167 S.E. 2d 24 (1969). If there is now to be the crime of attempted armed robbery, which requires proof of the elements defined in N.C.G.S. § 14-87(a), and

the State cannot prove all these elements but can prove a person has done some act with the intent to commit the crime, it could not be attempted armed robbery. That name has been reserved. I suppose it would be attempted attempted armed robbery. If the majority wants to name the new crime they say is defined by N.C.G.S. § 14-87(a), I believe for semantic reasons it should not be called attempted armed robbery.

In deciding this case as we have, I believe we have unnecessarily complicated the law and made it more difficult to apply. In every case of armed robbery which will now be tried, the court must determine if larceny must be submitted to the jury with the risk of a new trial if an appellate court says the decision is wrong. There are different elements of the two crimes and if the State wants larceny submitted as a lesser included offense, I presume it will have to offer evidence of value and asportation in addition to proof of the elements of armed robbery. I believe it is a mistake to require evidence which is irrelevant to the crime for which the defendant is charged. How to charge on a lesser included offense which contains elements different from the greater offense will be difficult but we can leave that for another day.

I believe the principle which the majority declines to follow is a good one. I regret we have not followed it in this case.

Justices MEYER and MITCHELL join in this dissenting opinion.

STATE OF NORTH CAROLINA, EX REL. GRACE H. ROHRER, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF ADMINISTRATION v. SIDNEY ARTHUR CREDLE

No. 480PA87

(Filed 30 June 1988)

Waters and Watercourses § 6— taking oysters in navigable waters—public trust doctrine—no prescriptive use

Defendant was not entitled to a jury trial on the issue of whether he acquired the exclusive right to harvest oysters by prescription in Swan Quarter Bay where the State enjoyed a presumption of title under N.C.G.S. § 146-79; defendant's predecessors in title could only have obtained a perpetual franchise during a twenty-two year period which ended in 1909; defendant could not link himself to the Hayes franchise granted in that period; the court re-

fused to indulge in the lost grant fiction to infer that a grant issued as a result of an application by S. S. Mann; the waters in question were navigable; and the public trust doctrine and N.C.G.S. § 113-206(f) applied.

ON discretionary review of a unanimous decision of the Court of Appeals affirming the orders dismissing defendant's claims and defenses and granting the State's motion for partial summary judgment, and the final judgment granting the State's further motion for summary judgment, entered 25 October 1984, 3 May 1985 and 5 May 1986 in Superior Court, HYDE County, by *Watts, Brown (Frank R.)*, and *Small, JJ. State ex rel. Rohrer v. Credle*, 86 N.C. App. 633, 359 S.E. 2d 45 (1987). Heard in the Supreme Court 14 April 1988.

Lacy H. Thornburg, Attorney General, by Daniel F. McLawhorn, Special Deputy Attorney General, and J. Allen Jernigan, Assistant Attorney General, for the State.

Davis & Davis, by Geo. Thomas Davis, Jr., for defendant-appellant.

Conservation Council of North Carolina, by John D. Runkle, General Counsel, amicus curiae.

MEYER, Justice.

The question presented is whether defendant is entitled to a jury trial to determine if he acquired an exclusive right by prescription to harvest oysters from an oyster bottom in navigable waters. The Court of Appeals resolved the question against defendant. We affirm.

In 1982 the State of North Carolina brought an action to quiet title to a 640-acre tract of land in Hyde County, most of which is submerged land beneath the waters of Swan Quarter Bay, its arms and tributaries. This is a navigable body of water. *State v. Spencer*, 114 N.C. 770, 777, 19 S.E. 93, 96 (1894). In his answer, defendant asserted a claim of ownership to the land, based either on certain grants or on adverse possession. The instruments upon which he relied included (1) two deeds to his father, one from S. S. Mann and the other from Zeb Hayes, which purported to convey portions of a 640-acre grant that the State had made to Joseph Hancock in 1786, (2) a perpetual franchise to take oysters from ten described acres that the State had granted

to J. W. Hayes in 1889 and (3) an application filed in 1891 by S. S. Mann for a perpetual franchise to cultivate shellfish in 640 described acres. The two deeds to defendant's father purported to convey a two-fifteenths undivided interest in the Hancock grant, but defendant admitted in interrogatories that he could not establish that the property was ever partitioned or divided. Defendant contended that the Mann franchise application had resulted in a shellfish grant for the property, but he could not produce the document granting such franchise. Defendant also contended in his answer that in any event he had acquired the exclusive right to harvest oysters from the bottom by prescriptive use. He grounded this contention on the claim that he and his father possessed the land and had been harvesting oysters from the bottom under a claim of right continuously since 1917.

On 25 October 1984, Judge Watts dismissed the claim which relied on the 1786 land grant to Joseph Hancock because defendant had failed to answer certain interrogatories relating to the chain of title connecting him to the 1786 grant. On 3 May 1985, Judge Brown granted partial summary judgment in the State's favor, dismissing defendant's claims that he owned the land by adverse use or prescriptive use, the latter on the express ground that the exclusive right to harvest oysters from the State's submerged lands could not be acquired by prescriptive use. On 5 May 1986, Judge Small granted final summary judgment in the State's favor, ruling that, as a matter of law, (1) defendant admitted that he could not bring his chain of title forward from the 1889 Hayes franchise and (2) defendant could not prove that the State issued a perpetual franchise as a result of the 1891 Mann application. The trial court found that the deeds defendant claimed as links in his chain of title did not describe the tracts described in the Hayes franchise and the Mann franchise application. Finally, the court concluded that defendant had not shown and did not possess a connected chain of title either to the Hayes grant or to the Mann application, so that he could not rebut the presumption of title in the State under N.C.G.S. § 146-79. The State was declared the owner of the submerged lands. Defendant appealed.

Although defendant appealed from all the orders and judgments entered against him, he expressly abandoned all his assignments of error except those relating to his claim of prescriptive

use. The Court of Appeals unanimously held that the exclusive right to take oysters from lands under navigable waters in this State could not be acquired by prescriptive use. Defendant petitioned this Court for discretionary review under N.C.G.S. § 7A-31, which was allowed on 2 December 1987.

At common law the English sovereign owned the sea and the lands over which the tide ebbed and flowed, but this ownership was subject to restraints imposed by the rights of the people to use, for example, the waters for fishing and navigation and the riverbanks and seashores for towing and drying nets. The concept of the "public trust" doctrine evolved from the theory that presumed that the Crown held title to tidal lands and waters for the benefit of the public. *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 10 L.Ed. 997 (1842). *See* T. J. Schoenbaum, *Public Rights and Coastal Zone Management*, 51 N.C.L. Rev. 1 (1972).[1] When the Union was formed, the original thirteen states (including North Carolina) succeeded, in place of the English sovereign, to the ownership of the sea and lands with its concomitant restraints. *Id.; see also Shively v. Bowlby*, 152 U.S. 1, 38 L.Ed. 331 (1894); *Phillips Petroleum Co. v. Mississippi*, --- U.S. ---, 98 L.Ed. 2d 877 (1988). As new states were admitted to the Union they also became owners in trust in this fashion. *Phillips Petroleum Co. v. Mississippi*, --- U.S. ---, 98 L.Ed. 2d 877; *Barney v. Keokuk*, 94 U.S. 324, 24 L.Ed. 224 (1877).

In *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 435, 36 L.Ed. 1018, 1036 (1892), the United States Supreme Court referred to the well-settled principle "that the ownership of and dominion and sovereignty over lands covered by tide waters" passed to the various states after the Revolution. In that case, the Supreme Court expanded the public trust doctrine to include not only waters sub-

1. For the history and development of the public trust doctrine, both in England and in this country, see, for example, L. Butler & M. Livingston, *Virginia Tidal and Coastal Law* (1988); 1 *Waters and Water Rights* §§ 33-44 (R. Clark ed. 1967); Comment, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 Yale L.J. 762 (1970); Comment, *Defining Navigable Waters and the Application of the Public Trust Doctrine in North Carolina*, 49 N.C.L. Rev. 888 (1971). *See also* M. Kalo & J. Kalo, *The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislation, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust*, 64 N.C.L. Rev. 565 (1986).

ject to the ebb and flow of the tides, but also those that were navigable in fact. *Id.* at 435-36, 36 L.Ed. at 1036. *See Collins v. Benbury*, 25 N.C. (3 Ired.) 277, 282 (1842) ("any waters, which are sufficient in fact to afford a common passage for all people in sea vessels, are to be taken as navigable."). Under the public trust doctrine, each state could regulate or dispose of its tidal lands, provided that it could be done "without substantial impairment of the interest of the public in the waters." *Illinois Cent. R.R. v. Illinois*, 146 U.S. at 435, 36 L.Ed. at 1036. In a now famous passage, the United States Supreme Court stated:

> [Title to soil under navigable waters] is a title different in character from that which the State holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to preemption and sale. It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.

Id. at 452, 36 L.Ed. at 1042. *See* L. Butler & M. Livingston, *Virginia Tidal and Coastal Law* § 5.2, at 127 (1988).

This Court recognized the public trust doctrine in *Land Co. v. Hotel*, 132 N.C. 517, 44 S.E. 39 (1903). In deciding that a grant to a riparian owner of land covered by navigable water conveyed no more than an easement and that a conveyance of the land adjoining the navigable water conveyed an easement in the portion of the land covered by the water, the Court quoted the passage above with approval and noted that "[t]he policy of the State from 1777 until 1854 was . . . to preserve its title to the navigable waters, as the same had been held by the King of England, in trust for the free use of all its citizens." *Id.* at 533, 44 S.E. at 44. In *Land Co.*, this Court dealt with a land dispute which arose after the State had chartered the Atlantic and North Carolina Railroad Company in 1852. The railroad was to have its eastern terminus at what is now Morehead City. The Court stated:

> Considered in the light of the then existing conditions, it is difficult to believe that the policy of the State for nearly a century was to be reversed and the growth of the prospective seaport was to be hampered by the grant of the absolute ownership of the entire water-front thereof, separate and

> distinct from the ownership of the abutting lands; that the State was to part with this property which it held in trust for all of its citizens. Nothing, save a clear declaration of such purpose, would justify this conclusion.

Id. at 534, 44 S.E. at 44. *See also Development Co. v. Parmele*, 235 N.C. 689, 695, 71 S.E. 2d 474, 479 (1952) (navigable waters are of public right); *Ward v. Willis*, 51 N.C. (6 Jones) 183, 185-86 (1858) ("The same public purposes require that, [in North Carolina,] as in England, the State should reserve lands [under navigable waters] from private appropriation; . . . although it may please the Legilature [sic] to dispose of them by special grant for the promotion of trade and the growth of a commercial town, accessible to vessels."). Navigable waters, then, are subject to the public trust doctrine, insofar as this Court has held that where the waters covering land are navigable in law, those lands are held in trust by the State for the benefit of the public. A land grant in fee embracing such submerged lands is void. *Land Co. v. Hotel*, 132 N.C. 517, 44 S.E. 39; *Wilson v. Forbes*, 13 N.C. (2 Dev.) 31 (1828). Swan Quarter Bay is a navigable body of water. *State v. Spencer*, 114 N.C. 770, 777, 19 S.E. 93, 96 (1894).

One of the exceptions to the rule that the benefit and enjoyment of North Carolina's submerged lands is available to all its citizens, subject to reasonable legislative regulation, for navigation, fishing and commerce, relates specifically to shellfish. It is this exception upon which defendant must build his claim to the exclusive right to harvest oysters by prescription from the waters of Swan Quarter Bay.

In 1896 the State Board of Agriculture wrote about North Carolina's shellfish as follows:

> In the saline waters of North Carolina abound oysters, clams, scallops, crabs, shrimp, and diamond-back terrapin, in perfection of flavor. In commercial importance the oyster is of far greater value than all the others combined.
>
> It happens that there remains one treasure-house not yet plundered, one great water granary whose doors are not yet thrown wide open. North Carolina, overlooked and despised in the Eldorado of the Chesapeake, now, when the glories of the latter are fading, is found to possess what, with pru-

> dence, patience, legislative wisdom and local self-control, may be converted into a field quite as prolific as the once teeming oyster waters of Maryland and Virginia.

State Board of Agriculture, *North Carolina and its Resources*, Shellfish, at 151-52 (1896). Legislative wisdom had already revealed itself in a series of statutes designed to encourage the cultivation of oysters, while at the same time providing that natural oyster beds were not subject to exclusive entry. *State v. Willis*, 104 N.C. 764, 10 S.E. 764 (1889). A system of licenses for the cultivation of shellfish in non-natural beds was instituted. These were issued by the clerks of court of common pleas and quarter sessions. 1858-1859 N.C. Sess. Laws ch. 33. *See State v. Young*, 138 N.C. 571, 50 S.E. 213 (1905).[2] In 1887 the General Assembly passed "An act to promote the cultivation of shell-fish in the state." 1887 N.C. Sess. Laws ch. 119. The statute provided for a survey and map to be made

> of all the natural beds, and of all the grounds which may have been occupied under authority of previous acts for the growing, planting or cultivation of shell-fish, and upon completion . . . the board of commissioners of shell-fisheries shall determine the location, area, limits and designation of each and every public ground . . . [which] are to include the natural beds, together with such additional areas adjacent thereto as may be deemed . . . necessary to provide for the natural expansion of the . . . natural beds.

1887 N.C. Sess. Laws ch. 119, § 4. The statute covered Hyde County. *State v. Spencer*, 114 N.C. 770, 776, 19 S.E. 93, 95 (1894). The statute went on to provide that

> any person or persons desiring to raise, plant or cultivate shell-fish upon any ground . . . which has not been designated as public ground . . . may . . . make an application in writing . . . for a franchise for [this] purpose . . . .

2. For a comprehensive survey of the statutes relating to shellfish cultivation, see B. Thorsen, *Origins and Early Development of the North Carolina Division of Commercial Fisheries, 1822-1925* (thesis, 1982). *See also* Comment, *Estuarine Pollution: The Deterioration of the Oyster Industry in North Carolina*, 49 N.C.L. Rev. 921 (1971).

> . . . [Upon receipt of an auditor's certificate] [t]he secretary of state . . . shall grant to the applicant a written instrument conveying a *perpetual franchise* for the purpose of raising and cultivating shell-fish in and to the grounds for which application is made; and the said written instrument of conveyance shall be authenticated by the governor, countersigned by the secretary and recorded in his office. The date of the application for the franchise and a description of the ground for which such franchise was granted shall be inserted in each instrument, and no grant shall issue except in accordance with a certificate from the engineer of the commissioners of shell-fisheries as to the area, limits and location of the grounds in which the said franchise is to be granted, and every person obtaining such grant or franchise shall, within three months from the receipt of the same, record said written instrument in the office of the register of deeds for the county wherein the said grounds may lie and shall define the boundaries of the said grounds by suitable stakes, buoys, ranges or monuments; *but no franchise shall be given in or to any of the public grounds* as determined by the commissioners of shell-fisheries, and all franchises granted under this or previous acts shall be and remain in the grantee, his heirs and legal representatives.

1887 N.C. Sess. Laws ch. 119, §§ 5, 6 (emphasis added). *See State v. Spencer*, 114 N.C. 770, 19 S.E. 93. These grants of perpetual franchises were subject to two provisos: the holder had to demonstrate an "actual effort to raise and cultivate shell-fish" on the specified grounds and no grant was to be more than ten acres in size. 1887 N.C. Sess. Laws ch. 119, § 6.

In 1909 the legislature passed an act specifically "to promote the cultivation of the oyster in North Carolina." 1909 N.C. Sess. Laws ch. 871. This act provided that:

> Any citizen of North Carolina . . . shall be granted the privilege of taking up bottoms for purposes of oyster or clam culture . . . of an area not less than one acre nor more than fifty acres.

1909 N.C. Sess. Laws ch. 871, § 2. The "privilege" was in the form of a lease, for which written application was required. Once again, a proviso existed.

> As soon as possible after the application is received, the Shellfish Commissioner shall cause to be made a survey and map of said bottom, at the expense of the applicant. The Shellfish Commissioner shall also thoroughly examine said bottoms by sounding and by dragging thereover a chain to detect the presence of natural oysters. Should any natural oysters be found, the commissioner shall cause examination to be made to ascertain the area and density of oysters on said bottom or bed, to determine whether the same is a natural bed . . . . No application shall be entertained nor lease granted for a piece of bottom within two hundred yards of a known natural bottom, bed or reef.

1909 N.C. Sess. Laws ch. 871, § 3. After the survey and map were made,

> the Shellfish Commissioner shall execute to the applicant . . . a lease for the bottoms applied for. A copy of the lease, map of the survey and a description of the bottom, defining its position, shall be filed in the office of the Shellfish Commissioner.

1909 N.C. Sess. Laws ch. 871, § 4. The leases were of twenty years' duration, with renewal periods of ten years. 1909 N.C. Sess. Laws ch. 871, §§ 5, 7. Failure to pay the rental on a lease resulted in its forfeiture. 1909 N.C. Sess. Laws ch. 871, § 8. This Act repealed the Act of 1887 permitting "perpetual franchises" to be granted. 1909 N.C. Sess. Laws ch. 871, § 10. There was, therefore, a "window" period of twenty-two years (1887-1909) during which an exclusive right pursuant to a *perpetual* franchise to harvest oysters from a *cultivated, non-natural* oyster bottom could be obtained. The "window" closed with the Act of 1909, replacing the franchise system with the lease system.

The lease system has been in force since that date and the statutes relating to oyster cultivation have been updated in the intervening years. *See* N.C.G.S. §§ 113-201.1 through -208 (1987). Leases are granted in order "[t]o increase the use of suitable areas underlying coastal fishing waters for the production of shellfish." N.C.G.S. § 113-202(a) (1987). The Marine Fisheries Commission may grant the leases to North Carolina residents "when it determines [that] the public interest will benefit." *Id.* The leased area must not contain a natural shellfish bed. N.C.G.S.

§ 113-202(a)(2) (1987). Further, "[t]he Marine Fisheries Commission, in its discretion, may lease or decline to lease public bottoms in accordance with its duty to conserve the marine and estuarine resources of the State." N.C.G.S. § 113-202(h) (1987). Leases are of ten years' duration, with renewals for periods of ten years. N.C.G.S. § 113-202(i) (1987).

In 1965, in an effort to clear title to lands claimed under perpetual franchises or rights of fishery pursuant to the 1887 Act, the legislature enacted N.C.G.S. § 113-205. This statute provides in pertinent part:

> Every person claiming to any part of the bed lying under navigable waters of any coastal county of North Carolina or any right of fishery in navigable waters of any coastal county superior to that of the general public must register the grant, charter, or other authorization under which he claims with the Secretary. Such registration must be accompanied by a survey of the claimed area, meeting criteria established by the Secretary for surveys of oyster and clam leases. All rights and titles not registered in accordance with this section *on or before January 1, 1970*, are hereby declared null and void.

N.C.G.S. § 113-205(a) (1987) (emphasis added). The term "coastal county" includes Hyde County. *Id.*[3] The statute further provides:

> In the interest of conservation of the marine and estuarine resources of North Carolina, the Department of Natural Resources and Community Development may institute an action in the superior court to contest the claim of title or claimed right of fishery in any navigable waters of North Carolina registered with the Secretary. In such proceeding, the burden of showing title or right of fishery, by the preponderance of the evidence, shall be upon the claiming title or right holder.

N.C.G.S. § 113-206(d) (1987). Moreover, the statute provides that:

3. During discovery in the case *sub judice* the State acknowledged that the Marine Fisheries Commission had so far recognized five such private oyster bottoms.

> In evaluating claims registered pursuant to G.S. 113-205, the Secretary shall favor *public ownership of submerged lands and public trust rights.*

N.C.G.S. § 113-206(f) (1987) (emphasis added). The statute further mandates that a plan to resolve these claims by December 31, 1990, shall be established. *Id.*

The people of North Carolina endorsed the public policy behind these legislative actions in 1972 by adopting a constitutional amendment which is now section 5 of article XIV of this state's constitution. The section provides in part:

> It shall be the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry, and to this end it shall be a proper function of the State of North Carolina and its political subdivisions to acquire and preserve park, recreational, and scenic areas, to control and limit the pollution of our air and water, to control excessive noise, and in every other appropriate way to preserve as a part of the common heritage of this State its forests, wetlands, estuaries, beaches, historical sites, open-lands, and places of beauty.

N. C. Const. art. XIV, § 5 (amend. 1972).

Four basic points emerge from our examination of the background of the case before us. (1) Because of our recognition of the public trust doctrine, no title in fee can be granted to lands submerged beneath navigable waters. (2) The exclusive cultivation and harvesting of oysters is permitted only where no natural oyster bed exists. (3) The "perpetual franchise" system existed only for a period of twenty-two years ending in 1909. A lease system is now in force. (4) Our state constitution mandates the conservation and protection of public lands and waters for the benefit of the public.

With these points in mind, we turn to defendant's claim that he acquired his right to harvest oysters in navigable waters by prescription. "Prescription means literally 'before written.'" Hetrick, *Webster's Real Estate Law in North Carolina* § 319, at 343 (rev. ed. 1981). The claim was based on a legal fiction that a claimant's land usage and a sufficient lapse of time raised the presumption that the usage must have been based originally on a

"lost grant." *Id.; Draper v. Conner*, 187 N.C. 18, 121 S.E. 29 (1924). This is precisely the situation here. Defendant maintains that the S. S. Mann franchise application submitted under the terms of the 1887 shellfish cultivation act providing for perpetual franchises resulted in the grant of a franchise to S. S. Mann. Defendant's attorney stated on oral argument before this Court that he located the actual grant in 1969, but he apparently failed to make a copy of it, since he could not produce it for the superior court's perusal. He stated that he has been unable to relocate the grant in the State Archives. Defendant did, however, produce an affidavit from the Register of Deeds of Hyde County that two deed books are unavailable, one having been burnt in a fire and the other having disappeared approximately fifty years ago. We have no way of knowing, nor is it even alleged, that either or both of the deed books contain a grant from the State for the harvesting of oysters in the area in question. The record before us contains only a copy of the S. S. Mann franchise application. We are invited, in effect, to indulge in the legal fiction of the "lost grant" to divest the State of its title based on the proposition that defendant and his father have harvested oysters in Swan Quarter Bay since 1917. We decline to do so.

This is not a case of two private parties engaged in a dispute over land. Rather, one of the parties here is the State, which enjoys a presumption of title under N.C.G.S. § 146-79. The presumption of title in the State can only be defeated by the opposing party's showing of a "good and valid title to such lands in himself." N.C.G.S. § 146-79 (1983). Our review of the statutes relating to shellfish cultivation reveals that defendant's predecessors in title could only have obtained a perpetual franchise under Chapter 119 of the 1887 Session Laws during the twenty-two-year "window" period which closed in 1909. 1909 N.C. Sess. Laws ch. 871, § 10. The superior court specifically found that defendant admitted (1) that he could not bring his title forward from the 1889 Hayes perpetual franchise and (2) that he could not prove that the State had issued a perpetual franchise as a result of the 1891 S. S. Mann franchise application. Since defendant cannot link himself to the Hayes franchise, he is unable by that document to rebut the presumption of title in the State. Neither can he infer that a grant issued as a result of the S. S. Mann franchise application.

The public trust doctrine and N.C.G.S. § 113-206(f) also weigh against defendant. This Court has held that no exclusive right to fish in navigable streams exists. *Skinner v. Hettrick et al.*, 73 N.C. 53 (1875). The general common law rule is that "no right in natural oyster beds can be gained by prescription against the state." Gould, *A Treatise on the Law of Waters*, at 49 (3d ed. 1900). Defendant maintains that he has planted oysters on the bottom in question here. His argument appears to be that because he did so, the bottom was not a natural oyster bed. We cannot assume from this bare assertion, however, that the oyster bed to which defendant lays exclusive claim to harvest is solely the result of *cultivation*. Once again, because defendant cannot produce the S. S. Mann franchise document, we are unable to conclude that the requisite certificate from the engineer of the commissioners of shell-fisheries issued under the statute granting perpetual franchises. 1887 N.C. Sess. Laws ch. 119, § 6. The issuance of such a certificate was a condition precedent to the grant of a perpetual franchise. *Id.* Defendant cannot show that S. S. Mann, his claimed predecessor in title, ever met the condition precedent. Finally, the legislature has mandated that in evaluating claims of the type upon which defendant builds his prescription theory, the public ownership of submerged lands and public trust rights shall be favored. N.C.G.S. § 113-206(f) (1987). In the face of this mandate, the rocks of defendant's arguments are no more than shifting sands. As Chief Justice Clark wrote in *State v. Twiford*, 136 N.C. 603, 609, 48 S.E. 586, 588 (1904):

> Navigable waters are free. They cannot be sold or monopolized. They can belong to no one but the public and are reserved for free and unrestricted use by the public for all time. Whatever monopoly may obtain on land, the waters are unbridled yet.

History and the law bestow the title of these submerged lands and their oysters upon the State to hold in trust for the people so that all may enjoy their beauty and bounty. We hold that under the public trust doctrine, coupled with defendant's failure to link himself to the Hayes franchise or to produce a grant from the State to S. S. Mann for a perpetual franchise to cultivate shellfish in Swan Quarter Bay, its arms and tributaries, defendant is not entitled to a jury trial on the issue of whether he

acquired the exclusive right to harvest oysters by prescription in those waters. The decision of the Court of Appeals is therefore

Affirmed.

STATE OF NORTH CAROLINA v. CRAIG RAYMOND KNOLL

STATE OF NORTH CAROLINA v. SAMSON WARREN, JR.

STATE OF NORTH CAROLINA v. BENNIE GARLAND HICKS

Nos. 119PA87, 120PA87, 121PA87

(Filed 30 June 1988)

1. **Arrest and Bail § 7— DWI—denial of access to counsel and friends—per se prejudice rule inapplicable**

Application of a per se rule of prejudice because of a violation of defendant's statutory rights of access to counsel and friends is inappropriate in cases involving a violation of N.C.G.S. § 20-138.1(a)(2) (driving with an alcohol concentration of 0.10 or more). Rather, a defendant must make a showing that he was prejudiced in order to gain relief.

2. **Arrest and Bail § 7— DWI—failure to determine conditions of pretrial release—denial of access to counsel and friends—prejudice to defendants**

The statutory rights of access to counsel and friends of three defendants charged with DWI were substantially violated by the magistrate's failure to inform each defendant of the circumstances under which he could secure his pretrial release as required by N.C.G.S. § 15A-511(b) and failure to determine conditions of pretrial release in accordance with N.C.G.S. §§ 15A-533(b) and -534(c), and the lost opportunity in each case to secure independent proof of sobriety by having friends and family observe the defendant and form opinions as to his sobriety, and the lost chance in one case to secure a second test for blood alcohol content, constituted prejudice to the defendants which required dismissal of the DWI charges against each of them.

ON discretionary review pursuant to N.C.G.S. § 7A-31 of three unanimous decisions of the Court of Appeals reversing orders entered in the Superior Court, WAKE County, by *Farmer, J.*, on 19 February 1986 affirming the dismissal of driving while impaired charges by judges in the district court division in each of the cases and remanding each of the same for trial. *State v. Hicks*, 84 N.C. App. 237, 352 S.E. 2d 275 (1987); *State v. Knoll*, 84 N.C. App. 228, 352 S.E. 2d 463 (1987); *State v. Warren*, 84 N.C.

App. 235, 352 S.E. 2d 276 (1987). Heard in the Supreme Court 11 September 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.

Crumpler & Scherer, by Sally H. Scherer and William B. Crumpler, for defendant-appellants.

MEYER, Justice.

Defendant in each of these consolidated cases was charged with driving while impaired (DWI) in violation of N.C.G.S. § 20-138.1. Each defendant thereafter made a pretrial motion in Wake County District Court to dismiss the charge against him for violation of certain statutory and constitutional rights. The presiding judge in each case made findings of fact and conclusions of law and granted the motion to dismiss. The State appealed in all three cases to the Superior Court, Wake County, and because of the common questions of law involved, the State's appeals were consolidated for hearing.

At a hearing in Wake County Superior Court, Judge Robert L. Farmer adopted the findings and conclusions of the district court judges, made additional findings and conclusions, and affirmed the dismissals entered by the judges in the district court division. The State appealed, and the Court of Appeals reversed the judgments of the superior court and remanded all three cases for trial. We granted discretionary review in all three cases on 5 May 1987, and upon motion of the State (with consent of defendants), the cases were consolidated for briefing and oral argument. Concluding, as we do, that the Court of Appeals erred in reversing the judgments entered by the trial judge in each of the three cases, we reverse.

Before reviewing the three cases individually, we note, by way of background, the general obligations of the magistrate in such cases. Upon a defendant's arrest for DWI, the magistrate is obligated to inform him of the charges against him, of his right to communicate with counsel and friends, and of the general circumstances under which he may secure his release. N.C.G.S. § 15A-511(b) (1983). A defendant may be confined or otherwise

secured if he is so unruly as to disrupt and impede the proceedings, becomes unconscious, is grossly intoxicated, or is otherwise unable to understand the procedural rights afforded by the initial appearance before the magistrate. N.C.G.S. § 15A-511(a)(3) (1983).

The magistrate must also determine conditions for pretrial release of the defendant, N.C.G.S. § 15A-533(b) (1983), by adhering to one of the following courses: (1) release the defendant on his written promise to appear; (2) release the defendant upon his execution of an unsecured appearance bond; (3) place the defendant in the custody of a designated person or organization; or (4) require the execution of an appearance bond in a specified amount secured by a cash deposit of the full amount of the bond, by a mortgage, or by at least one solvent surety, N.C.G.S. § 15A-534(a) (1983). In determining the particular pretrial condition to impose, the magistrate must take into account the nature and circumstances of the offense charged, the weight of the evidence against the defendant, whether the defendant is intoxicated to such a degree that he would be endangered by being released without supervision, and any other evidence relevant to the issue of pretrial release. N.C.G.S. § 15A-534(c) (1983). We now proceed to review the three cases *seriatim*.

KNOLL CASE

David Knoll was stopped by Officer T. C. Dunn of the Raleigh Police Department on South Saunders Street in Raleigh at 1:15 p.m. on 17 April 1984 and charged with driving while impaired. He was taken to the Wake County Courthouse, where he was administered an intoxilyzer test at 2:31 p.m. The results of the analysis showed defendant to have an alcohol concentration of 0.30. He was taken before a magistrate who set bond at $300.00. Between 4:00 p.m. and 5:00 p.m., Knoll asked several times to be allowed to telephone his father. He was allowed to make the call at about 5:00 p.m. Defendant's father stated that the magistrate informed him over the phone that his son could not be released until 11:00 p.m. and that, as a result, he did not go to the police station immediately but, rather, posted his son's $300.00 bail later that night at 11:00 p.m.

At a hearing on defendant's Motion to Dismiss, the trial judge made, inter alia, the following findings of fact:

4. After taking the intoxilyzer test, the defendant appeared with Officer Dunn before a magistrate who formally charged the defendant with driving while impaired. The magistrate asked the defendant no questions about his family ties, employment, financial resources, length of residence in the community, record of convictions, or any other matter relating to conditions that would affect a bond in his case. . . .

. . . .

6. When the defendant was placed in jail, he let the jailer know that he would like to call his father at 4:00 P.M. when he knew his father would be home. He reasonably believed that his father would be the best person to call to come get him and to make arrangements for his bond. He made several requests of the jail staff to be allowed to call his father before and around 4:00 P.M., but it was shortly after 5:00 P.M. before he was given an opportunity to make a phone call. He did call his father and inform him of his situation, including the amount of the bond.

7. . . . Mr. Knoll introduced himself to the magistrate on the phone and specifically identified himself as the defendant's father and stated that he wanted to come get his son. The magistrate responded that he could not come and get the defendant until 11:00 P.M. Mr. Knoll made it clear that he would like to get his son out right then, that he did not want him to have to stay in jail, and that he could come right away and post his bond. The magistrate responded, "The subject is not debatable." Therefore, Mr. Knoll waited until 11:00 P.M. to secure his son's release, and he posted a cash bond for him. . . . It appeared to Mr. Knoll when he talked with his son on the phone that his son was oriented and coherent and not noticeably impaired in either his manner of speech or in the substance of what he said. He detected nothing in talking with him on the phone that would indicate that the defendant would cause any problem if he were released immediately to Mr. Knoll's custody.

8. . . . [Mr. Knoll] was an appropriate person to take custody of his son when he talked with the magistrate at approximately 5:00 P.M., and it was not reasonable for the mag-

istrate to deny him any opportunity to secure his son's release forthwith. Because the magistrate made it clear to Mr. Knoll that he could not get his son out of jail before 11:00 P.M., Mr. Knoll reasonably assumed nothing else could be done at that time. He therefore made no further efforts to obtain his sons's [sic] release before 11:00 P.M.

WARREN CASE

On Thursday, 29 March 1984, at 10:11 p.m., defendant Samson Warren, Jr., was operating his 1981 Ford truck on Dan Allen Drive near Yarboro Drive on or near the campus of North Carolina State University (NCSU). Officer Scaringelli of the NCSU Campus Police stopped the defendant and later charged him with DWI.

The defendant was taken to the Wake County Courthouse and was administered an intoxilyzer test at 11:08 p.m. The results of this test showed that defendant had an alcohol concentration of 0.25. The defendant was brought before a magistrate, and a secured bond of $500.00 was set.

A Dr. Martin, the head of the Computer Science Department at NCSU, and his son had arrived at the magistrate's office between 11:00 p.m. and 11:30 p.m. while the defendant was in the intoxilyzer room. They spoke with the defendant and observed his condition. Dr. Martin had on his person $300.00 and was willing to assume responsibility for the defendant. The magistrate informed Dr. Martin that the defendant would have to go to jail until 6:00 the following morning in order to sober up.

John Green Lewis, III, also went to the Wake County Courthouse that night to attempt to secure the defendant's release. Mr. Lewis arrived at the courthouse between 1:00 a.m. and 1:30 a.m. on Friday, 30 March 1984, and was informed that a release was not possible until 6:00 a.m. that morning. Mr. Lewis had on his person some $200.00 to post bond for the defendant. He made no further attempt to secure the defendant's release upon learning that release was not imminent and did not request to see Warren.

At approximately 2:00 a.m., the defendant was committed to the Wake County Jail. He was released at about 8:00 a.m. when Dr. Martin posted bond for him.

At the hearing on defendant's Motion to Dismiss, the trial judge made, inter alia, the following findings of fact:

> 3. Officer Scaringelli brought the defendant to the Wake County Courthouse and processed him in a routine manner, including administration of an intoxilyzer test. While the defendant and Officer Scaringelli were in the room used for administration of chemical tests in DWI cases in the basement of the Wake County Courthouse, Dr. Donald C. Martin and his nineteen year old son arrived at the magistrate's office to offer assistance to the defendant. They arrived between 11:00 P.M. and 11:30 P.M. after Dr. Martin had been notified of the defendant's arrest, and they informed the magistrate of their purpose.
>
> 4. After taking the intoxilyzer test, the defendant appeared with Officer Scaringelli before the magistrate shortly before 11:30 P.M. The magistrate formally charged the defendant with driving while impaired and transporting spirituous liquor in his vehicle. The magistrate did not advise the defendant concerning his right of communication with counsel and friends. . . .
>
> . . . .
>
> 6. Dr. Martin and his son were sober, responsible adults who were willing and able to assume responsibility for the defendant for as long as required. Further, they could have arranged his pretrial release within a short period of time if permitted by the magistrate. Dr. Martin had some $300.00 on his person, which would have been more than adequate to secure the defendant's appearance in court. The magistrate was aware of these circumstances or should have been aware of them, and he nevertheless committed the defendant to the Wake County Jail notwithstanding the ability and willingness of Dr. Martin and his son to assist the defendant in gaining pretrial release immediately. The magistrate stated that the defendant would have to remain in the jail until 6:00 o'clock the following morning. Mr. Warren was committed to the jail at approximately 11:30 P.M. Dr. Martin and his son left since the magistrate made his intention clear. Dr. Martin arranged the release of the defendant at about 8:00 o'clock the following morning.

7. Between 1:00 A.M. and 1:30 A.M. on Friday, March 30, John G. Lewis, III and a friend arrived at the Wake County Courthouse to confirm the arrest of the defendant and to try to arrange for his release on bond. They approached the magistrate and were told that Mr. Warren was in jail. When they inquired about his bond, they were told something to the effect that he could not be released until around 6:00 o'clock that morning. Mr. Lewis and his friend had about $200.00 between them to apply toward his bond and could have arranged if necessary for additional funds or for the services of a bondsman in order to obtain the release of the defendant. Mr. Lewis and his friend were sober, responsible adults and were willing and able to assume responsibility for the defendant as long as required. They left when advised by the magistrate that the defendant could not be released until 6:00 o'clock that morning.

HICKS CASE

Defendant Hicks was arrested for driving while impaired at 12:45 a.m. on 28 April 1984 in or near Knightdale by Officer Dail of the Knightdale Police Department. He was taken to the Wake County Courthouse; was given an intoxilyzer test, which indicated an alcohol concentration of 0.18; and was taken before a magistrate. Defendant was allowed to call his wife at their home in Wendell at 1:30 a.m., but she did not have a vehicle at the time and could not come to the courthouse to pick him up. When he was charged with DWI, he was not allowed to post his own $200.00 bond, though he had on his person over $2,000 in cash. Defendant remained in jail until 6:00 a.m. that morning.

At a hearing on Hicks' Motion to Dismiss, the trial judge made, inter alia, the following findings of fact:

4. After taking the intoxilyzer test, the defendant appeared with Officer Dail before a magistrate who formally charged the defendant with driving while impaired. From what the court can determine from the available records and evidence, the magistrate apparently did not inform the defendant concerning his rights about communication with counsel and friends and apparently asked neither him nor the arresting officer any questions about matters that would affect the bond in this case. . . .

5. When he advised the defendant that his bond was $200.00, the magistrate asked him if he had any money. The defendant responded that he did have enough money on him to post a $200.00 bond and showed him at least $200.00. In fact, he then had some $2,200.00 on his person. . . . [T]he magistrate committed the defendant to jail apparently based upon the inability of the defendant's wife to come pick him up at that time. The time of commitment was between 1:45 A.M. and 2:00 A.M. and the defendant remained in jail thereafter until about 6:00 A.M. the same morning.

. . . .

7. Had the defendant been released immediately upon posting bond for himself, he could have caught a taxi to go home and could have been in the presence of his wife within a short period of time, probably within 30 mintues [sic] considering the distance between Raleigh and Wendell. Too, there were others that he could have gone to see and have observe his condition had he chosen to do so, and they could have been possible witnesses for him. Moreover, he would have had the opportunity upon release to secure further chemical testing in an attempt to gather evidence in his behalf as to his alcohol concentration.

In each of the three cases, the trial judge made specific findings to the effect that the defendant created no disturbance and was cooperative and polite; that there was no clear and convincing evidence that, if he were released, he would create a threat of physical injury to himself or others or of damage to property; and that therefore the defendant should have been released.

While a magistrate may refuse to release one who is intoxicated to such a degree that he would be endangered by being released "without supervision," here it is quite clear that such was not the situation in any of the three cases. In the case of Knoll, whose intoxilyzer reading was 0.30, and in the case of Warren, whose reading was 0.25, neither would have been released "without supervision" but into the custody of appropriate people who were seeking their release. In the case of Hicks, whose reading was 0.18 and whose wife was temporarily unavailable to pick him up, he could have, by the use of a taxi, been in the presence of his wife within a short period of time.

With only insignificant variations in the three judgments, the specific finding in each case was substantially as follows:

> At no time . . . did the defendant create any disturbance. He cooperated as required during his processing and was polite. His condition was not such to suggest that he would create problems of any kind if released without commitment to jail. There was no clear and convincing evidence that any impairment of his mental or physical faculties presented a danger, if he were released, of physical injury to himself or others or damage to property, and there was no apparent reason for him not to be released forthwith in accordance with Article 26 of Chapter 15A of the General Statutes.

Also *in each of the three cases*, the trial judge found that the defendant's confinement was at a time crucial to his ability to gather evidence and have witnesses to his condition at the time. This finding in each case reads substantially as follows:

> The defendant's confinement in jail came at a crucial time when he could have gathered evidence in his behalf by having friends or others who he could have contacted observe him and form opinions as to his condition. That opportunity to gather evidence was lost because of his commitment to jail and because of his not being informed properly by the officials processing him of his various rights. The defendant has been seriously prejudiced in preparing his defense because of his commitment to jail, which was unnecessary and contrary to standards of pretrial release. . . . To assume that his lost opportunity to gather evidence in his behalf was not prejudicial is to assume that which is incapable of proof. The Court cannot assume the infallability [sic] and credibility of the State's witnesses or the certitude of their tests.

It is to be noted further that *in each of the three cases* the trial judge found that the magistrate failed to carry out his responsibilities regarding pretrial release under N.C.G.S. §§ 15A-511(b), -533(b), and -534(c). The trial judge found in each of the cases substantially as follows:

> [T]he magistrate failed to inform the defendant of the circumstances under which he could secure pretrial release as required by G.S. 15A-511(b). Further, the magistrate failed to determine conditions of pretrial release in accordance with G.S. 15A-533(b) and by [-]534(c).

It is quite clear that the magistrates involved in these particular cases were on special notice of each defendant's right to be released upon meeting certain conditions. In the findings of fact *in each of the three cases*, this finding was made:

> The Honorable James H. Pou Bailey and the Honorable George F. Bason by joint order dated January 11, 1978, have required in Wake County that "a defendant being held for public intoxication or driving under the influence must be released as soon as the defendant is able to meet a magistrate's conditions of pretrial release."

With regard to this standing order, the trial judge *in each of these three cases* made a specific finding of fact that "[t]he magistrate did not carry out the spirit and intent of this requirement adequately."

Finally, the trial judge *in each of the three cases* made the following conclusions of law:

> 1. The facts of this case demonstrate that the defendant has been deprived of certain constitutional and statutory rights as claimed in his MOTION TO DISMISS . . . . Such deprivation has prejudiced him in the preparation of his defense and has resulted in an unwarranted loss of liberty for a significant period of time. . . .
>
> 2. The only effective remedy for the violations of the defendant's rights is dismissal of the driving while impaired charge that led to his confinement.

In reversing the dismissal of the DWI charges and remanding the cases for trial, the Court of Appeals agreed with the findings of the trial judge in each case that the magistrate failed to inform defendant of the circumstances under which he could secure his pretrial release as required by N.C.G.S. § 15A-511(b)(3); that the magistrate failed to determine conditions of pretrial release in accordance with N.C.G.S. §§ 15A-533(b) and -534(c); and that, but for these statutory deprivations, each defendant could have secured his release from jail and could have had access to friends and family.

The Court of Appeals further concluded that the *per se* prejudice rule of *State v. Hill*, 277 N.C. 547, 178 S.E. 2d 462 (1971),

does not apply when a person is charged under N.C.G.S. § 20-138.1(a)(2) with driving "[a]fter having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.10 or more." *See* N.C.G.S. § 20-138.1(a)(2) (1983). The panel below further concluded in each case that the district court therefore erred in applying the *per se* prejudice rule of *Hill* and that, though each defendant had been substantially deprived of his statutory rights, the evidence in each case was insufficient to support the trial judge's finding of prejudice and was therefore inadequate to support the dismissal of the case.

[1] We agree with the Court of Appeals that application of a *per se* prejudice rule as set out in *Hill* is inappropriate in cases involving a violation of N.C.G.S. § 20-138.1(a)(2) (driving with an alcohol concentration of 0.10 or more). As the Court of Appeals correctly stated in its opinion below:

> Because of the change in North Carolina's driving while intoxicated laws, denial of access is no longer inherently prejudicial to a defendant's ability to gather evidence in support of his innocence in every driving while impaired case. While denial of access was clearly prejudicial in *Hill*, under the current 0.10 statute, a defendant's only opportunity to obtain evidence is not lost automatically when he is detained, and improperly denied access to friends and family. Prejudice may or may not occur since a chemical analysis result of 0.10 or more is sufficient, on its face, to convict.

State v. Knoll, 84 N.C. App. 228, 233, 352 S.E. 2d 463, 466. We therefore agree with the Court of Appeals that, in those cases arising under N.C.G.S. § 20-138.1(a)(2), prejudice will not be assumed to accompany a violation of defendant's statutory rights, but rather, defendant must make a showing that he was prejudiced in order to gain relief.

Having so stated, we hasten to add that, in the view of the Court, each of the defendants in these cases made a sufficient showing of a substantial statutory violation and of the prejudice arising therefrom to warrant relief. More precisely, we conclude that the findings of the district court in each case were in no way challenged, that the evidence presented in each case was adequate to support the finding of fact that the defendant was prejudiced, and that this finding in turn supports the trial judge's

conclusion that defendant was irreparably prejudiced. Accordingly, we reverse the decision below.

[2] The Court of Appeals correctly concluded that there are three statutes that are applicable to the issue of whether there was a substantial violation of defendant's statutory right of access to counsel and friends. First, N.C.G.S. § 15A-511(b) states:

> (b) Statement by the Magistrate.—The magistrate must inform the defendant of:
>
> (1) The charges against him;
>
> (2) His right to communicate with counsel and friends; and
>
> (3) The general circumstances under which he may secure release under the provisions of Article 26, Bail.

Second, N.C.G.S. § 15A-533(b) reads in applicable part as follows:

> (b) A defendant charged with a noncapital offense must have conditions of pretrial release determined, in accordance with G.S. 15A-534.

Third, N.C.G.S. § 15A-534(c) provides in pertinent part the following:

> (c) In determining which conditions of release to impose, the judicial official must, on the basis of available information, take into account the nature and circumstances of the offense charged; the weight of the evidence against the defendant; . . . whether the defendant is intoxicated to such a degree that he would be endangered by being released without supervision; . . . and any other evidence relevant to the issue of pretrial release.

The Court of Appeals also correctly concluded (1) that the trial judge properly found in each case that the magistrate failed to inform the defendant of the circumstances under which he could secure his pretrial release and failed to determine conditions of pretrial release and (2) that, but for these failures and the resulting deprivation of his statutory rights, each defendant could have secured his release from jail and could have had access to friends and family.

These findings, supported by the evidence of record, and indeed unchallenged by any evidence to the contrary, are conclusive on appeal. *Fast v. Gulley*, 271 N.C. 208, 155 S.E. 2d 507 (1967). Thus, as the Court of Appeals recognized, it is established in this case that each defendant was substantially deprived of his rights. The panel below erroneously concluded, however, that the substantial deprivation of defendants' statutory rights did not result in prejudice to them. In effect, the Court of Appeals concluded that each trial judge's findings did not support his conclusion that the substantial deprivation of each defendant's rights "prejudiced him in the preparation of his defense and has resulted in an unwarranted loss of liberty for a significant period of time" and that "[t]he only effective remedy for the violations of the defendant's rights is dismissal of the driving while impaired charge that led to his confinement." It is in this latter conclusion that the panel below erred.

We find that the trial judges' conclusions of prejudice are amply supported by the unchallenged findings, which are themselves amply supported by the evidence. The Court of Appeals itself, in its opinion below, stated that a defendant in a case such as this

> must show that "lost evidence or testimony would have been helpful to his defense, that the evidence would have been significant, and that the evidence or testimony was lost" as a result of the statutory deprivations of which he complains.

State v. Knoll, 84 N.C. App. 228, 234, 352 S.E. 2d 463, 466 (1987) (quoting *State v. Dietz*, 289 N.C. 488, 493, 223 S.E. 2d 357, 360 (1976)). Such was exactly the situation in the three cases now before us, and the several trial judges correctly so found.

Each defendant's confinement in jail indeed came during the crucial period in which he could have gathered evidence in his behalf by having friends and family observe him and form opinions as to his condition following arrest. This opportunity to gather evidence and to prepare a case in his own defense was lost to each defendant as a direct result of a lack of information during processing as to numerous important rights and because of the commitment to jail. The lost opportunities, in all three cases, to secure independent proof of sobriety, and the lost chance, in one of the cases, to secure a second test for blood alcohol content

constitute prejudice to the defendants in these cases. That the deprivations occurred through the inadvertence rather than the wrongful purpose of the magistrate renders them no less prejudicial. *State v. Graves*, 251 N.C. 550, 112 S.E. 2d 85 (1960).

Accordingly, the decision of the Court of Appeals is reversed, and the cases are remanded to the Court of Appeals for further remand to the Superior Court, Wake County, for reinstatement of the judgment of dismissal in each of the cases.

Reversed.

STATE OF NORTH CAROLINA v. THOMAS PATRICK McNICHOLAS

No. 725A86

(Filed 30 June 1988)

1. **Criminal Law § 68; Rape and Allied Offenses § 4— hair comparison testimony —relevancy**

Expert testimony that a hair found in a rape victim's pubic area was microscopically consistent with one belonging to defendant was relevant and admissible on the issue of whether the victim was sexually assaulted by defendant even though identity was not in question in this case. N.C.G.S. § 8C-1, Rule 401 (1986).

2. **Bills of Discovery § 6— hair analysis—discovery of laboratory report—failure to produce notes—testimony from notes after sanctions**

Assuming arguendo that an SBI agent's notes concerning a microscopic hair analysis he conducted were discoverable and that the State should have produced them pursuant to defendant's discovery request when it produced the laboratory report, the trial court did not err in permitting the agent to testify concerning an aspect of the hair analysis contained in his notes but not revealed in the laboratory report where the court ordered the prosecutor to allow inspection of the agent's notes, granted defendant a recess to review the additional materials, and offered defendant an additional opportunity to cross-examine the agent about the notes. N.C.G.S. § 15A-903(e) (1983); N.C.G.S. § 15A-910 (1983).

3. **Rape and Allied Offenses § 5— sufficient evidence of vaginal intercourse**

There was sufficient evidence that defendant engaged in vaginal intercourse with the victim to support his conviction of first degree rape where the victim, age 9, testified that defendant, age 31, laid her on the ground, took off her shorts and panties and "put his thing in mine," and a physician testified that there was bruising on the sides of the victim's labia and a small laceration

in the area of the fourchette and that this physical evidence was consistent with a penis having been forced through the victim's labia.

4. **Rape and Allied Offenses § 6.1— first degree rape—instruction on attempted rape not required**

Evidence in a first degree rape case that the victim told a physician that defendant "put his thing against her" did not require the trial court to instruct on the lesser included offense of attempted first degree rape where such statement, when read in context, was part of a description of a sequence of events which culminated in penetration.

5. **Constitutional Law § 34; Criminal Law § 26.5— first degree rape—indecent liberties—no double jeopardy**

Defendant's convictions of first degree rape under N.C.G.S. § 14-27.2(a)(1) and taking indecent liberties under N.C.G.S. § 14-202.1 did not violate the double jeopardy prohibitions of either the state or federal constitutions although they both arose out of the same act.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a life sentence entered by *Clark, J.*, at the 14 July 1986 Criminal Session of Superior Court, CUMBERLAND County, upon defendant's conviction of first degree rape. Defendant's petition to bypass the Court of Appeals on his appeal from a second judgment imposing a ten-year term of imprisonment upon his conviction of taking indecent liberties with children was allowed. Argued in the Supreme Court 11 November 1987.

Lacy H. Thornburg, Attorney General, by Doris J. Holton, Assistant Attorney General, for the State.

Stephen C. Freedman for defendant appellant.

EXUM, Chief Justice.

In this appeal defendant contends the trial court erred in: (1) admitting hair comparison analysis evidence; (2) denying his motion to dismiss the first degree rape charge for insufficient evidence; (3) failing to instruct the jury on the lesser-included offense of attempted first degree rape; and (4) denying his motion to arrest judgment on the indecent liberties charge. We find no error in the trial.

I.

Defendant was prosecuted for first degree rape under N.C. G.S. § 14-27.2(a)(1).* The state's evidence tended to show as follows:

On 30 July 1985 the victim, age nine, was returning to her home after visiting a friend. Defendant, age 31, bought her a drink at a nearby convenience store, led her across the street and took her into some woods where the ground was wet and sandy. Defendant then removed the victim's shorts and underpants and, according to victim's testimony, "put his thing in [hers]."

The victim left, went home and told her grandmother what had happened. Her grandmother took the victim to the Cape Fear Valley Medical Center, and on the way the victim saw the defendant and identified him as her assailant. After the victim identified defendant her father attempted to detain him until the police arrived. Before the police arrived defendant threatened the victim's father with a knife and said, "that was the best little stuff [I] ever had."

Nancy Carpenter, a registered nurse on duty at the medical center, was the first member of the medical profession to examine the victim. Nurse Carpenter collected evidence consisting of samples of the victim's vaginal fluids, saliva, blood, head hair and combings from the pubic area. She collected the victim's clothing, including panties, shorts, a shirt, socks and tennis shoes. She noted that the victim's vulva was very sandy and her anal area was red and swollen. The victim told Nurse Carpenter the defendant had "put his thing in mine. I bleed and it hurts. It got blood on his thing. It hurt." There was also sand in the victim's hair and ears and on her face and body.

Dr. Linda McAllister, an obstetrician and gynecologist, also examined the victim. The victim told Dr. McAllister a man had

* This statute defines first degree rape in pertinent part as follows:

(a) A person is guilty of rape in the first degree if the person engages in vaginal intercourse:

(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 . . . .

tried to put "his thing" against her, she was on the ground, and she had tried to scream and break away. The man put his hand over her face and he was against her, it was hurting, and there was blood. Dr. McAllister found sand and dirt in the folds of the victim's genital area. A pelvic examination revealed bruising of the sides of the labia and a tear about one centimeter long in the fourchette, which is at the bottom of the entrance to the vagina. Dr. McAllister could see the tear without opening the victim's labia, but the tear did not bleed actively except when Dr. McAllister opened the labia. Dr. McAllister testified that in her professional opinion the skin would not have torn as it did unless it had been resisting some force; and the injury could have been caused by a penis being forced past the labia. Although the victim's hymen was intact, Dr. McAllister's opinion was that a penis could have gone between the labia without causing extensive laceration and without tearing the hymen.

D. J. Spittle, forensic serologist with the State Bureau of Investigation, analyzed the victim's vaginal smear. He testified it showed no evidence of semen and no such evidence was found on any of the victim's clothes. He found sand in her panties and a trace of blood in the crotch area of the panties.

Scott Worsham, forensic hair examiner for the State Bureau of Investigation, analyzed the pubic area combings taken from the victim. Over defendant's objection he testified the combings produced a short, caucasian pubic hair which he compared to a known pubic hair of the defendant. In Agent Worsham's professional opinion, this pubic hair could have come from the defendant. Agent Worsham also testified the pubic hair had a tag of human tissue at the follicular end, indicating that rather than having simply fallen out, the hair was detached under force or pressure.

Sergeant Maynard Bathke and Deputy Art Binder of the Cumberland County Sheriff's Department transported defendant to the law enforcement center. Deputy Binder testified that during the trip, defendant declared to the two men, "I didn't do anything that bad. Haven't you ever had any real young stuff? It is not that bad; you ought to try it." Defendant also said, "I am a sorry son of a bitch. I wouldn't blame you if you took that gun and blew my g-- d--- brains out. I wish you would."

Defendant's evidence tended to show as follows:

Defendant testified in his own behalf. He admitted he had been with the victim but denied having any sexual contact with her. Defendant testified he purchased a bottle of wine from the convenience store, crossed the street, urinated in the woods and sat down on a rock. He then saw the victim with her bicycle. She asked him what he was doing and he told her he was getting drunk. She laid her bicycle down, came up to him, and started to pour out his bottle of wine. He testified he was upset and grabbed her by the side of the pants, jerked her, threw her down and pulled her pants down. He dragged her across the ground toward the creek but "caught himself," collected his bottle of wine, and left the area. He testified he never took his own pants down or took out his penis and he never had sexual contact with her or intended to do so.

Dr. Wade Williams, a clinical psychologist whose expertise includes interviewing child victims of sexual abuse to determine the cause of abuse, testified that asking child victims leading questions interferes with the accuracy of their answers and may continue to have this effect in later statements made by such victims. In his opinion the victim in this case had been asked such questions by Nurse Carpenter. On cross-examination he admitted the use of such leading questions does not necessarily mean the victim's answers are untruthful.

II.

[1] In his first assignment of error defendant argues the trial court erred in allowing Agent Worsham to testify concerning the microscopic hair analysis. Defendant asserts the testimony is not relevant and should have been excluded. We disagree.

This Court has consistently held that expert testimony regarding hair comparison analysis is admissible to establish the identity of a perpetrator. *See State v. Pratt*, 306 N.C. 673, 295 S.E. 2d 462 (1982); *State v. Green*, 305 N.C. 463, 290 S.E. 2d 625 (1982); *State v. Barber*, 278 N.C. 268, 179 S.E. 2d 404 (1971). Defendant contends these cases stand for the proposition that evidence of hair comparison analysis is relevant *only* to establish the identity of the perpetrator when identity is in question. Since,

defendant argues, identity is not in question in this case, the evidence is irrelevant. This argument is without merit.

Under our rules of evidence, relevant evidence is broadly defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1986). The weight of the evidence is an issue for the jury. *State v. Green*, 305 N.C. 463, 290 S.E. 2d 625 (1982).

The hair comparison testimony is clearly relevant on the issue of whether the victim was sexually assaulted. That a hair belonging to someone other than the victim was found in her pubic area tends to show that the person from whom the hair came could have engaged in sexual contact with the victim. That the hair is microscopically consistent with one belonging to defendant supports the victim's testimony that defendant sexually assaulted her. It is merely another link in the chain of evidence presented by the state to establish that defendant raped the victim. It was, therefore, properly presented to the jury.

III.

[2] Defendant next argues the trial court erred in allowing Agent Worsham to testify concerning an aspect of the hair analysis not revealed in the S.B.I. Laboratory Report.

Agent Worsham prepared the laboratory report and made notes concerning his observations. The notes, about which Agent Worsham was permitted to testify, referred to a tag of human tissue attached to the hair found in the pubic area of the victim. This fact was not contained in the laboratory report furnished defendant pursuant to his pretrial request for discovery. Neither the state nor defense counsel had access to Agent Worsham's notes before trial. Shortly before Agent Worsham testified, however, he told the prosecutor about the tag of skin he had observed on the hair.

On direct examination and over defendant's objection, Agent Worsham testified as follows:

> A. . . . I found a short Caucasian pubic hair present. I then mounted that and then I took the known pubic hairs from

. . . Thomas Patrick McNicholas . . . and I examined these hairs for the internal characteristics and compared them . . . . My comparison was that these two hairs . . . were microscopically consistent.

. . .

Q. Now, in examination of a hair, Mr. Worsham, can you tell whether the hair just fell out, or there was some force applied, or whether it was cut?

A. Yes, it is possible to make that determination when you examine the hair microscopically.

Q. Did you note anything about the pubic hair that you found in the pubic hair combings of [the victim] in that regard, sir?

A. Yes. . . . *I noted in my notes that his pubic hair had been exposed to a certain extent of external force* and this is noted because *on the root of the hair, there is tissue adhering to the root of the hair itself.* A hair that is in a normal growing cycle that has reached the end of the growing cycle and is ready to fall out will very gently be extracted from the skin and will take no tissue with it. However, a healthy growing hair with a bulbous root when pulled from the skin will oftentimes extract with it a piece of tissue . . . and that is what occurred in this case.

Q. Now, are you referring to a direct pull-out or the kind of force applied that might be rubbing against something else?

A. I couldn't make that determination, only that this hair was a healthy growing hair and there had been some type of force . . . applied so that it had been removed.

At the conclusion of this testimony, the trial court in the exercise of its discretion: (1) ordered the state to provide the defense with reports of all examinations or tests done by Agents Worsham and Spittle and any notes prepared by them; (2) offered defendant's attorney an opportunity to examine Agent Worsham again before the state rested its case; and (3) granted defendant a recess of one and one-half hours to afford him the opportunity to review the additional materials.

Defendant contends Agent Worsham's notes were discoverable, the prosecution acted in bad faith by not disclosing them and the only proper remedies are exclusion of this evidence or mistrial. Again we disagree.

Under N.C.G.S. § 15A-902(a) (1983) a party seeking discovery must first request in writing that the other party comply voluntarily with the discovery request. If the other party fails to comply the party seeking discovery may file a motion to compel discovery. "To the extent that discovery . . . is voluntarily made in response to a request, [it] is deemed to have been made under an order of the court . . . ." N.C.G.S. § 15A-902(b) (1983).

N.C.G.S. § 15A-904 (1983) sets forth the general rules governing what evidence is properly discoverable. Memoranda or other internal documents made by persons acting on behalf of the state in connection with an investigation or prosecution of a case are not subject to disclosure. N.C.G.S. § 15A-903(e) (1983) provides, as an exception to the general rule, that:

> Upon motion of a defendant, the court must order the prosecutor to provide a copy of or to permit the defendant to inspect . . . results or reports . . . of tests . . . or experiments made in connection with the case . . . within the possession, custody, or control of the State, the existence of which is known or by the exercise of due diligence may become known to the prosecutor . . . .

If at any time during the proceedings the court determines a party has failed to comply with this provision, it may: (1) order the party to permit the discovery or inspection; (2) grant a continuance or recess; (3) exclude the evidence; (4) declare a mistrial; (5) dismiss the charge with or without prejudice; or (6) order any other appropriate relief. N.C.G.S. § 15A-910 (1983). The various sanctions provided are both permissive and in the alternative. The choice of which sanction, if any, to impose is left to the sound discretion of the trial court. *State v. King*, 311 N.C. 603, 320 S.E. 2d 1 (1984).

In this case defendant wrote a letter, pursuant to N.C.G.S. § 15A-902(a), requesting that the district attorney voluntarily provide discovery. In response to defendant's letter the district attorney provided several items of discovery material, including a

copy of Agent Worsham's S.B.I. laboratory report. Under N.C.G.S. § 15A-902(b), this compliance with defendant's discovery request is deemed to have been made under court order.

Assuming arguendo that Agent Worsham's notes were discoverable and the state should have produced them pursuant to defendant's discovery request, the trial court cured the prosecutor's failure to comply by its generous imposition of three statutory sanctions. The trial court ordered the prosecutor to allow inspection of Agent Worsham's notes, granted defendant a recess and offered defendant an additional opportunity to cross-examine Agent Worsham about the notes.

We find no abuse of discretion in the trial court's response to the failure of the prosecutor to produce Agent Worsham's notes before trial. This assignment of error is overruled.

IV.

[3] Defendant next argues the trial court erred by denying his motion at the close of all the evidence to dismiss the first degree rape charge for insufficient evidence. Defendant contends there was insufficient evidence to prove he engaged in vaginal intercourse with the victim. Again we disagree.

For a charge of first degree rape to withstand a motion to dismiss for insufficient evidence, there must be evidence, among other things, that defendant engaged in "vaginal intercourse" with the victim. N.C.G.S. § 14-27.2 (1986). The slightest penetration of the female sex organ by the male sex organ is sufficient to constitute vaginal intercourse within the meaning of the statute. *State v. Williams*, 314 N.C. 337, 333 S.E. 2d 381 (1982).

At trial, the victim, age 9, testified defendant, age 31, laid her on the ground, took off her shorts and panties and "put his thing in mine." Dr. McAllister testified there was bruising on the sides of the victim's labia and a small laceration in the area of the fourchette. In Dr. McAllister's expert opinion, this physical evidence was consistent with a penis having been forced through the victim's labia.

In ruling on a motion to dismiss for insufficient evidence the trial court must consider the evidence in the light most favorable to the state, which is entitled to every reasonable inference which

can be drawn from that evidence. *State v. Bell*, 311 N.C. 131, 138, 316 S.E. 2d 611, 615 (1984). There must, however, be substantial evidence of each essential element of the offense charged, together with evidence that defendant was the perpetrator of the offense. *State v. Gardner*, 311 N.C. 489, 510-11, 319 S.E. 2d 591, 605 (1984).

Applying these principles to the evidence before us and taking into account the definition of vaginal intercourse previously set out, we conclude there was substantial evidence that defendant engaged in vaginal intercourse with the victim. This assignment of error is overruled.

V.

[4] Defendant next argues the trial court erred by failing to instruct the jury on the lesser-included offense of attempted first degree rape. Defendant contends the testimony of Dr. McAllister is evidence from which the jury could find that defendant committed the lesser offense. We disagree.

At trial, Dr. McAllister testified as follows:

> Q. When you saw [the victim] there at the emergency room at Cape Fear Valley Hospital, did you have any conversation with her?
>
> A. . . . I didn't go into a lot of detail as to what had happened because I knew that she had already been questioned and would have to undergo further questions. . . . Just in summary, [she said] simply that a man had tried to put his "thing" . . . against her, that she was on the ground and she had tried to scream and to break away but that he had put his hand over her face and that he was against her, it was hurting, suddenly, there was blood and he stopped . . . .

An instruction on a lesser-included offense is warranted only when evidence is presented from which the jury could find that defendant committed the lesser offense. *State v. Redfern*, 291 N.C. 319, 230 S.E. 2d 152 (1976). "However, when all the evidence tends to show that the accused committed the crime with which he is charged and there is no evidence of guilt of a lesser-included offense, the court correctly refuses to charge on the unsupported lesser offense." *Id.* at 321, 230 S.E. 2d at 153.

Defendant contends the victim's statement to Dr. McAllister that he "put his thing against her" is sufficient to show that he did not penetrate the victim but that he merely *attempted* to rape her. Defendant's argument results from an incomplete reading of the testimony. When read in its entirety the testimony shows that the victim was describing the sequence of events in the order of their occurrence. The victim told Dr. McAllister that defendant placed his penis against her, she struggled to break away, he forced her to remain on the ground, it was hurting and "suddenly there was blood," and he stopped. When read in context this testimony shows a series of events which culminated in penetration. Further, the victim's statement is entirely consistent with her previous statements to Nurse Carpenter, who testified the victim had told her defendant had "put his thing in her thing."

All the state's evidence thus shows that defendant actually penetrated the victim; defendant's evidence is that he had no sexual contact whatever with the victim. Under these circumstances, no instruction on attempted rape ought be given. *See State v. Smith*, 315 N.C. 76, 337 S.E. 2d 833 (1985); *State v. Wood*, 311 N.C. 739, 319 S.E. 2d 247 (1984); *State v. Horner*, 310 N.C. 274, 311 S.E. 2d 281 (1984).

We conclude, therefore, that the trial court correctly refused to charge on the unsupported lesser offense of attempted first-degree rape.

VI.

[5] Defendant next argues the trial court erred when it denied his motion to arrest judgment on his conviction of taking indecent liberties. Defendant contends his convictions of first-degree rape and indecent liberties, both arising out of the same act, constitute a violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, *Benton v. Maryland*, 395 U.S. 784, 23 L.Ed. 2d 707 (1969), and Art. I, § 19, of our state constitution, *see State v. Birckhead*, 256 N.C. 494, 497, 124 S.E. 2d 838, 841 (1962). We disagree.

This issue is controlled by *State v. Etheridge*, 319 N.C. 34, 352 S.E. 2d 673 (1987). In *Etheridge*, defendant was convicted of

first-degree rape under N.C.G.S. § 14-27.2(a)(1) and taking indecent liberties under N.C.G.S. § 14-202.1. In that case we concluded the two crimes, although arising out of the same act, were legally separate and distinct and defendant's convictions did not contravene state or federal constitutional prohibitions against double jeopardy. *See also State v. Weaver*, 306 N.C. 629, 295 S.E. 2d 375 (1982) (indecent liberties under N.C.G.S. § 14-202.1 not a lesser-included offense of first-degree rape under N.C.G.S. § 14-27.2(a)(1)).

Here defendant was convicted of first-degree rape under N.C.G.S. § 14-27.2(a)(1) and taking indecent liberties under N.C.G.S. § 14-202.1. Following our holding in *Etheridge*, we conclude these convictions do not violate the double jeopardy prohibitions under either our state or the federal constitution.

In defendant's trial we find

No error.

STATE OF NORTH CAROLINA v. DOUGLAS B. PARKER

No. 527A87

(Filed 30 June 1988)

1. Criminal Law § 66.2— uncertain in-court identification—admission not prejudicial

There was no prejudice in a prosecution for rape, kidnapping, and robbery from the trial court's denial of defendant's motion to suppress the victim's in-court identification of defendant where the victim was never able to positively identify her assailant; she had been unable to identify defendant's photograph in a lineup prior to trial and had specifically excluded it from consideration; although she testified in the presence of the jury that she believed defendant was the man who attacked her, she clearly stated at all times that she could not be sure; an officer testified that she had spoken with defendant on the night in question as he was standing outside of his car; she was able to get a good look at him because the street was well lighted; and she unequivocally identified defendant as the man she had seen. The Court was confident beyond any reasonable doubt that the jury relied upon the officer's testimony and the admission of the tentative in-court identification by the victim was harmless error, if error at all. N.C.G.S. § 15A-1443(b).

2. Robbery § 4.7— common law robbery—evidence insufficient

The trial court erred by denying defendant's motion to dismiss the charge of common law robbery at the close of the evidence where defendant kidnapped, raped, and took from his victim a watch given to her by her mother; the victim told defendant that she would get money from her dormitory room and give it to him in exchange for the watch as he was driving her back to her dormitory; the victim specifically testified that at that time, the defendant's gun was no longer in sight and she did not feel threatened by him; defendant agreed to the exchange; defendant told her that if she tricked him, he would come back because he knew where she lived, but the victim did not tell him that she was only staying at that dormitory for the holidays and normally resided in another building; defendant waited in his car while the victim went upstairs to get money; and the victim returned later and gave the defendant ninety dollars in exchange for her watch. The State failed to present substantial evidence that violence or fear induced the victim to part with her money and defendant was not indicted for robbery by taking the victim's watch.

APPEAL as of right by the defendant pursuant to N.C.G.S. § 7A-27(a) from judgment imposing a sentence of life imprisonment entered by *Hobgood (Robert H.), J.*, at the 27 April 1987 Criminal Session of Superior Court, ORANGE County. On 13 October 1987, the Supreme Court allowed the defendant's motion to bypass the Court of Appeals on his appeals of convictions for second-degree kidnapping and common law robbery. Heard in the Supreme Court on 13 April 1988.

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

Leland Q. Towns for the defendant-appellant.

MITCHELL, Justice.

The defendant, Douglas B. Parker, was tried upon separate bills of indictment, proper in form, charging him with first-degree rape, first-degree kidnapping and robbery with a dangerous weapon. The jury returned verdicts finding the defendant guilty of first-degree rape, second-degree kidnapping and common law robbery. Following a sentencing hearing, the trial court entered judgments sentencing the defendant to life imprisonment for first-degree rape and to terms of imprisonment of nine years for second-degree kidnapping and three years for common law robbery.

On appeal to this Court, the defendant raises two assignments of error relating to the guilt-innocence phase of the trial.

The defendant first contends that the trial court erred in denying his motion to exclude the victim's in-court identification of him. Even assuming *arguendo* that the admission of the in-court identification was error, we conclude the error was harmless beyond a reasonable doubt. Next, the defendant argues that the trial court erred in denying his motion to dismiss the robbery charge. We agree.

The State's evidence tended to show, *inter alia*, that the victim, a foreign exchange student, was walking to her dormitory room at the University of North Carolina—Chapel Hill on 27 November 1986 when the defendant abducted her at gunpoint and forced her into the back seat of his car. He made her lie down and cover her head with a coat. The defendant drove around for approximately fifteen minutes before stopping the car on a side road. He entered the back seat with the victim and asked if she had any money or valuables. She told him she had only a watch on a chain around her neck. The defendant took the watch and put it in his pocket. He then ordered the victim to undress and forced her to have sexual intercourse with him. He threatened to kill her if she did not cooperate. The defendant then allowed the victim to dress and told her he would take her back to her dormitory.

The victim testified that she talked to her assailant in an attempt to keep him calm. She told the defendant that the watch he had taken was a gift from her mother and that she would get money from her dormitory room and give it to him in exchange for the watch. They returned to the campus where the victim went to her room, got some money and returned to the parking lot. The defendant drove up beside the victim; she leaned into the car window and handed him the money in exchange for her watch. He then drove away. University police officer, Dorothy Shaner, drove up almost immediately and asked the victim if there was a problem. The victim told her she had just been raped.

The victim was taken to North Carolina Memorial Hospital where a pelvic examination was performed. The examination revealed a small laceration at the posterior of the victim's vagina. Semen found in the victim's vagina was consistent with the defendant's blood group.

During the trial, the victim gave a tentative in-court identification of the defendant. She testified that she had first recognized the defendant as he was being led from the courtroom the preceding day. She further indicated that an employee of the prosecutor's office had pointed out the defendant on the preceding day and that, as a result, she had observed the defendant during pretrial hearings and jury selection.

Officer Dorothy Shaner testified that she was on duty during the early morning hours of 27 November 1986. While on patrol near Craige Dormitory, she saw a car in the parking lot, wrote down the license plate number, and radioed it to the dispatcher. The dispatcher reported that the car was registered to the defendant, Douglas Bernard Parker, at an address in Durham. Officer Shaner then drove up beside the man who was standing outside the car and asked if he was having trouble. The man said that he was lost and needed directions to Durham. Officer Shaner gave him directions and drove away. The conversation took place in an area lighted by street lights along both sides of the street. A short time later, she noticed that the same car had stopped near the sidewalk on Bowles Drive. A woman stepped off the sidewalk and leaned into the car window. After a few minutes, the car drove away. Officer Shaner approached the woman, who said that the man in the car had raped her.

Prior to trial, Officer Shaner was asked by Sergeant Porecca to accompany him to the Durham Police Department to look at some photographs. When they arrived there, they were taken to the detectives' room. As Sergeant Porecca spoke with a detective, Shaner "happened to look down at the desk that was sort of in front of us; and [she] observed some photographs." Shaner picked up a photograph of the defendant and said "that's him." Shaner stated that the desk top was covered with papers, envelopes and other photographs and was "very messy." The photograph of the defendant was not visibly labeled with any markings that would have affected her identification. Shaner also made an unequivocal in-court identification of the defendant. When questioned about the certainty of her identification, she testified that she had no doubt that the defendant was the man she saw the night of the crime.

The defendant took the stand in his own behalf and presented alibi evidence. He denied being on the campus or committing the crimes charged. He testified that his car was sometimes used by family and friends and could be started without a key.

The defendant's girlfriend, Connie Moore, corroborated his testimony. Defense witness, Michelle Davis, testified that the defendant was at a gameroom in Durham at the time the crimes were committed.

[1] By his first assignment of error, the defendant contends that the trial court erred in denying his 29 April 1987 motion to suppress the victim's in-court identification of him. He maintains that the victim's viewing of him in the courtroom during a preliminary hearing amounted to a one-on-one show-up which violated his Sixth Amendment right to counsel and his Fourteenth Amendment right to due process of law.

Prior to trial, a *voir dire* hearing was held to determine the admissibility of the victim's in-court identification. At the hearing, the victim testified that she got glimpses of her assailant's face, but that she did not get a good look at him. She testified that her view was restricted because her head was covered with a coat during part of the ordeal, because it was dark, and because she was sitting in the back seat while he was driving. She candidly admitted that she could not be absolutely certain about her identification.

She also testified that on 5 January 1987 she stopped by the University Police Department and spoke with Officer Porecca who told her that they had arrested a man thought to be her assailant. The victim was shown photographs of five black males. Photograph number two was that of the defendant. The victim was unable to identify the defendant's photograph and, in fact, specifically excluded his photograph.

On cross-examination, the victim testified that she and the prosecutor had visited the courtroom on the Sunday preceding the trial. The prosecutor familiarized the victim with the courtroom and told her where all of the people involved in the trial would be seated. The prosecutor instructed the victim to get a good look at the defendant before testifying. The victim stated that the day before the presentation of evidence began, the de-

fendant was led into the courtroom where she was seated. An employee of the District Attorney's office directed her attention to the defendant because she did not see him enter the courtroom. The victim testified that later the same day, as the defendant was being led from the courtroom, "he turned and looked back and our eyes met." She testified that she recognized him at that moment. The victim candidly admitted that she believed he was the man who had raped her, but that she was not certain. Following the *voir dire* hearing, the trial court denied the defendant's motion to suppress the victim's in-court identification.

Assuming *arguendo* that the identification procedures complained of were improperly suggestive and that this suggestiveness affected the victim's "identification" of the defendant at trial, we conclude, nevertheless, that admission of her in-court identification was harmless beyond a reasonable doubt. *See* N.C.G.S. § 15A-1443(b) (1983). We recognize at the outset that only in the most unusual situations will an erroneously admitted in-court identification of the defendant by the victim be harmless beyond a reasonable doubt. The facts of the present case present such a situation.

In the present case, the record on appeal clearly shows that the victim was never able to positively identify her assailant. When she was questioned about her "identification," she candidly admitted that she could not be "absolutely certain," that "if I'm going to be asked if I can [identify the defendant] beyond doubt, I will say that I can't. I cannot be absolutely certain as I have testified." The victim further testified that prior to trial she had been shown a photographic line-up of five black males. She was unable to identify the defendant's photograph and specifically excluded it from consideration. Although the victim did testify in the presence of the jury that she "believed" the defendant was the man who attacked her, she clearly stated at all times during her testimony that she could not be sure.

The State also presented the testimony of Officer Dorothy Shaner. She testified that she spoke with the defendant on the night in question as he was standing outside of his car. She was able to get a good look at him because the street was well lighted. Officer Shaner unequivocally identified the defendant and stated that she had no doubts that he was the man she had seen.

When we compare the testimony of these two witnesses, we find the positive and unequivocal identifications of the defendant and his car by Officer Shaner juxtaposed against the victim's pretrial rejection of the defendant's photograph as that of her attacker and her acknowledged inability to positively identify the defendant. Given this peculiar state of the evidence, we are confident beyond any reasonable doubt that the jury relied upon Officer Shaner's testimony and that her testimony completely overshadowed the uncertain in-court identification of the victim. We therefore conclude that the admission of the tentative in-court identification of the victim was harmless error, if error at all. This assignment of error is overruled.

[2] By his last assignment of error the defendant contends that the trial court erred in denying his motion to dismiss the robbery charge at the close of the evidence. The defendant was indicted for robbery of the victim by taking "$90.00 in U.S. currency" from her. It was the taking of that money which the State was required to prove in order to convict the defendant for the robbery charged. *See State v. Sparrow*, 276 N.C. 499, 173 S.E. 2d 897 (1970) (fatal variance between allegation and proof); *see also State v. Nunley*, 224 N.C. 96, 29 S.E. 2d 17 (1944) (indictment alleging larceny of money and papers varied fatally from evidence of larceny of two suitcases). We note and emphasize that he was not indicted for robbery by taking the victim's watch. The trial court properly instructed the jury with regard to the offense of robbery by the taking of the victim's money as charged in the bill of indictment, and the jury found the defendant guilty of common law robbery.

Upon the defendant's motion to dismiss, the trial court must determine whether substantial evidence of each essential element of the offense charged has been presented. *State v. Allred*, 279 N.C. 398, 183 S.E. 2d 553 (1971). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E. 2d 164, 169 (1980). In ruling upon a defendant's motion to dismiss, "the evidence must be considered in the light most favorable to the State, giving the State every reasonable inference which may be drawn therefrom." *State v. Jerrett*, 309 N.C. 239, 263, 307 S.E. 2d 339, 352 (1983).

"Common law robbery is the felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear." *State v. Smith*, 305 N.C. 691, 700, 292 S.E. 2d 264, 270, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982). *Accord State v. Bates*, 313 N.C. 580, 330 S.E. 2d 200 (1985). Robbery has not been committed unless the victim is induced to part with the money or property as a result of such violence or fear. *See State v. Richardson*, 308 N.C. 470, 477, 302 S.E. 2d 799, 803 (1983). The defendant maintains that the State failed to present substantial evidence that violence or fear induced the victim to part with her *money* in the present case. We find merit in this assignment.

The evidence presented through the testimony of the victim tended to show that the defendant took her watch from her by violence or fear. When the defendant was driving the victim back to her dormitory, she told him that the watch had been a gift from her mother and that she would get money from her dormitory room and give it to him in exchange for her watch. The defendant agreed to the exchange. The victim specifically testified that at that time the defendant's gun was no longer in sight, and she did not feel threatened by him. After they arrived at Craige Dormitory, the defendant told her that if she tricked him, "he would come back because he knew where she lived." The victim testified that she did not tell him she was only staying at that dormitory for the holidays or that she normally resided in another building. The defendant waited in the car while the victim went upstairs to get money. She returned later and gave the defendant ninety dollars in exchange for her watch.

Taking the evidence in the light most favorable to the State as we must, we conclude that the State failed to present substantial evidence that violence or fear induced the victim to part with her *money*. Although the evidence tended to show that the defendant took the victim's money, this evidence alone was insufficient to support a conviction for common law robbery. All of the evidence unequivocally tended to show that the victim was not induced to part with her *money* as a result of violence or fear. To the contrary, she clearly testified that no weapon was in sight and she was not afraid at the time she left the defendant in his car and went to her dormitory room to get her money. Neither was there any evidence that violence or fear induced her to give

her money to the defendant when she returned. Instead, the evidence tended to show that she gave the defendant her money at that time in furtherance of her desire to have the watch her mother had given her as a present. Since the State failed to present substantial evidence that the victim was induced to part with her money as a result of violence or fear, there was no substantial evidence of an essential element of common law robbery. Therefore, the trial court erred in denying the defendant's motion to dismiss that charge at the close of the evidence. Accordingly, we hold that the judgment against the defendant for common law robbery must be and is vacated. Otherwise, we find no error in the defendant's trial.

No. 86CRS12496 (first-degree rape)—no error.

No. 86CRS12495 (second-degree kidnapping)—no error.

No. 86CRS12493 (common law robbery)—judgment vacated.

IRVIN D. BOOE, D/B/A WAUGHTOWN ELECTRIC CO. v. BILLY B. SHADRICK; BOB R. BADGETT; HOUSING PROJECTS, INC.; ELLERBE MANOR APTS., LTD.; WILKES TOWERS, LTD.; SHERATON TOWERS, LTD.; UNITED STATES FIDELITY & GUARANTY INS. CO.; HIGHLAND MORTGAGE CO.

No. 221A87

(Filed 30 June 1988)

1. **Quasi Contracts and Restitution § 2.2— construction dispute—quantum meruit—evidence of damages sufficient**

There was sufficient evidence to support an award of damages by the jury in a claim for unjust enrichment arising from a construction dispute where plaintiff's bookkeeper's testimony as to what was billed for the materials and labor and the evidence of a payment for a part of it at the billed rate was sufficient for the jury to find the reasonable value to defendants of the remaining goods and services for which bills were submitted but not paid.

2. **Rules of Civil Procedure § 50.5; Appeal and Error § 62.2— construction dispute—request for new trial on issue of unjust enrichment—denied**

The Supreme Court did not exercise its discretion to order a new trial in a construction dispute after holding that there was sufficient evidence of damages to support a jury award for unjust enrichment where defendants al-

leged that they had not presented evidence of unjust enrichment after the trial court reserved a ruling on their motion for a directed verdict at the close of plaintiff's evidence for fear of making plaintiff's case for him. N.C.G.S. § 1A-1, Rule 50(d).

Justice MEYER dissenting.

Justice MITCHELL joins in this dissenting opinion.

APPEAL by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, reported at 85 N.C. App. 230, 354 S.E. 2d 305 (1987). The Court of Appeals reversed a judgment entered by *Williams (Fred J.), J.*, at the 26 August 1987 Session of Superior Court, GUILFORD County. Heard in the Supreme Court 14 October 1987.

This is an action in which the plaintiff sought damages for breach of three separate contracts. One of the claims was settled before trial. In each of the other claims the plaintiff alleged he was an electrical contractor who had made a verbal contract with the defendants to furnish labor, material and equipment and to install the electrical system in a project for the defendants. One of the projects was known as Wilkes Towers and the other was known as Sheraton Towers. The plaintiff alleged that on each project the agreement was that the work would be done and material furnished on the basis of cost plus ten percent. The plaintiff alleged that he was owed $222,058.73 on the Wilkes Towers project of which $195,514.06 had been paid, leaving a balance due of $26,544.67. The plaintiff alleged that he was owed $362,534.90 for the Sheraton Towers project of which $314,523.00 had been paid, leaving a balance due of $48,011.88. For each claim the plaintiff alleged an alternative claim for unjust enrichment.

The defendants filed an answer and counterclaim in which they alleged that for each of the projects the parties had entered into a contract which the plaintiff had breached by failing to complete to the damage of the defendants. The defendants prayed for damages against the plaintiff.

The plaintiff's evidence showed that the plaintiff and the defendants agreed the plaintiff would furnish the materials and labor and would install the electrical systems on the two projects and would be paid on a cost plus basis. The defendants made payments totaling $195,514.06 for the Wilkes Towers project and

$314,523.02 for the Sheraton Towers project. The work was approximately 95% complete on the two projects when the defendant refused to make further payments. The plaintiff completed each project. The bookkeeper for the plaintiff testified material and labor costs on the Wilkes Towers project totaled $200,020.03 to which the plaintiff added ten percent for overhead making the total $222,058.73 of which the defendants had paid $195,514.06 leaving a balance due of $26,544.67. She testified that on the Sheraton Towers project the labor and material costs were $329,577.19 to which overhead costs of $32,957.71 had been added for a total of $362,534.90. The defendants had paid $314,523.02 of this amount, leaving a balance due of $48,011.88.

The defendants' evidence was that the plaintiff had agreed to do both projects for a fixed amount. The plaintiff had breached the contract by not completing either of the projects causing substantial damage to the defendants.

The court submitted issues to the jury as to whether there was a verbal cost plus contract and whether there was a verbal contract to do the work and furnish the materials for a fixed fee for each project. The jury answered these issues in the negative. The court also submitted issues for each project as to whether the plaintiff had furnished labor and material under such circumstances that the defendant should be required to pay for them. The jury answered these two issues in the affirmative. The jury awarded $26,000.00 in damages for the Wilkes Towers project and $40,500.00 in damages for the Sheraton Towers project.

The court granted the defendants' motion for judgment notwithstanding the verdict pursuant to N.C.G.S. § 1A-1, Rule 50(b)(1) and entered a judgment for the defendants. The plaintiff appealed to the Court of Appeals which reversed the trial court and held that there was sufficient evidence on the claim for unjust enrichment to enter a verdict for the plaintiff. The Court of Appeals held, however, that the plaintiff did not present sufficient evidence to support a judgment for damages and remanded the case for a judgment of nominal damages. Judge Phillips dissented and the plaintiff appealed to this Court.

William B. Gibson for plaintiff appellant.

Brinkley, Walser, McGirt, Miller, Smith and Coles, by Stephen W. Coles, for defendant appellees.

WEBB, Justice.

[1] No question has been raised on this appeal as to the plaintiff's having introduced sufficient evidence to establish a claim for unjust enrichment against the defendants. The sole question on this appeal is whether there is sufficient evidence to support an award of damages by the jury. We hold there was sufficient evidence and reverse the Court of Appeals.

The Restatement of Restitution § 1 lays down the general principle that "[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other." In order to establish a claim for unjust enrichment, a party must have conferred a benefit on the other party. The benefit must not have been conferred officiously, that is it must not be conferred by an interference in the affairs of the other party in a manner that is not justified in the circumstances. The benefit must not be gratuitous and it must be measurable. *See Britt v. Britt*, 320 N.C. 573, 359 S.E. 2d 467 (1987) and E. Allan Farnsworth, *Contracts* § 2.20. In *Wells v. Foreman*, 236 N.C. 351, 72 S.E. 2d 765 (1952), we said that the defendant must have consciously accepted the benefit. A claim of this type is neither in tort nor contract but is described as a claim in quasi contract or a contract implied in law. A quasi contract or a contract implied in law is not a contract. The claim is not based on a promise but is imposed by law to prevent an unjust enrichment. If there is a contract between the parties the contract governs the claim and the law will not imply a contract. *Concrete Co. v. Lumber Co.*, 256 N.C. 709, 124 S.E. 2d 905 (1962). Our cases hold that the measure of damages for unjust enrichment is the reasonable value of the goods and services to the defendant. *Johnson v. Sanders*, 260 N.C. 291, 132 S.E. 2d 582 (1963); *Environmental Landscape Design v. Shields*, 75 N.C. App. 304, 330 S.E. 2d 627 (1985); *Hood v. Faulkner*, 47 N.C. App. 611, 267 S.E. 2d 704 (1980); *Harrell v. Construction Co.*, 41 N.C. App. 593, 255 S.E. 2d 280 (1979), *affirmed*, 300 N.C. 353, 266 S.E. 2d 626 (1980).

The question posed by this appeal is whether there is sufficient evidence to support a finding by the jury that the reasonable value of the goods and services to the defendants for which the plaintiff has not been paid is $26,000.00 for the Wilkes Towers project and $40,500.00 for the Sheraton Towers project. In deter-

mining this question we take into account the finding of the jury that there was not a contract between the parties. This means the plaintiff furnished material and labor to the defendants for a substantial period without a contract and the defendants paid for it. This is some evidence of the value of the goods and labor furnished before the defendants stopped paying. The evidence was undisputed that the plaintiff furnished a substantial quantity of materials and labor after the last payment by the defendants. This was obviously of value. The plaintiff's bookkeeper testified to the total billing to the defendants and to the amount paid and unpaid by the defendants. We hold that her testimony as to what was billed for the materials and labor and the evidence of a payment for a part of it at the billed rate is evidence sufficient for the jury to find the reasonable value to the defendants of the remaining goods and services for which bills were submitted and no payment was made. This case is somewhat analogous to *Environmental Landscape Design v. Shields*, 75 N.C. App. 304, 330 S.E. 2d 627, in which our Court of Appeals held that the plaintiff's bill together with the hourly rate charged by another landscape designer who worked on the job were sufficient to establish the reasonable value of the plaintiff's services. In this case we have the plaintiff's bill and the previous payment to the plaintiff in accordance with the bill.

The Court of Appeals has held that an invoice or bill alone is not sufficient evidence to support a jury award as to the reasonable value of services. *Harrell v. Construction Co.*, 41 N.C. App. 593, 255 S.E. 2d 280. We expressly declined to rule on that question in *Harrell v. Construction*, 300 N.C. 353, 266 S.E. 2d 626. It is not necessary for us to decide this question in this case because there is more evidence than the amount billed to the defendants.

[2] In a cross assignment of error, the defendants ask that if we hold there was sufficient evidence of damages to support the jury award, that we exercise our discretion pursuant to N.C.G.S. § 1A-1, Rule 50(d) and order a new trial on the damage issue. They say that because the court reserved a ruling on their motion for directed verdict made at the close of the plaintiff's evidence, they did not offer evidence of unjust enrichment for fear of making the plaintiff's case for him. The defendants argue they should now be allowed to use this evidence. We do not believe the trial

tactics employed by the defendants is sufficient reason for us to exercise our discretion and order a new trial.

For the reasons stated in this opinion, we reverse the order of the Court of Appeals and remand the case with instructions that it be remanded to superior court for the entry of a judgment in accordance with the verdict of the jury.

Reversed and remanded.

Justice MEYER dissenting.

I cannot agree with the majority that plaintiff offered sufficient evidence of the reasonable value of the services for which he sought to hold defendants accountable on a *quantum meruit* theory.

> "Damages are never presumed. The burden is always upon the complaining party to establish by evidence such facts as will furnish a basis for their assessment, according to some definite and legal rule." [*Lieb v. Mayer*, 244 N.C. 613, 616, 94 S.E. 2d 658, 660 (1956).] The amount to be paid is not the value of the services to the recipient, nor should his financial condition be taken into consideration in determining the value of the services performed. Many factors serve to fix the market value of an article offered for sale. Supply, demand, and quality (which is synonymous with skill when the thing sold is personal services) are prime factors. The jury, when called upon to fix the value, must base its decision on evidence relating to the value of the thing sold. Without some evidence to establish that fact, it cannot answer. To do so would be to speculate.

Cline v. Cline, 258 N.C. 295, 300, 128 S.E. 2d 401, 404 (1962) (citations omitted). Plaintiff's evidence as to the value of the services performed for defendants was, quite simply, paltry. The majority concludes that the "substantial quantity of materials and labor" furnished to defendants after their last payment to plaintiff "was obviously of value." I do not quarrel with this conclusion. However, it is the value of those materials and labor, not merely their quantity, for which plaintiff must produce some evidence, as a basis for the jury's award. This he signally failed to do.

It is not sufficient, as the majority holds, to introduce a totalled bill together with evidence from plaintiff's bookkeeper as to the amounts paid and unpaid by defendants. The fact that defendants have paid invoices in the past is no evidence at all of the value of services rendered and materials furnished at a later time. Plaintiff must do more than merely allege an amount and its reasonableness. If he makes no effort to compare his figures of value in terms of the type of work done or the number of hours worked, or to correlate the value of his work and materials furnished to any community or industry standard, then he has failed to carry his burden and the evidence is inadequate to support more than an award of nominal damages. The record is devoid of documentation to support the figures plaintiff claims. The business records which allegedly formed the basis for the bookkeeper's testimony were not introduced at trial. There is no evidence concerning the plans and specifications which plaintiff's workers followed, nor is there evidence of the number of hours they worked or at what wage. The invoices for materials that plaintiff sent to defendants were not introduced at trial. In short, the underlying documentary evidence necessary to assist the jury in making a reasoned valuation of the goods and services for which plaintiff claimed was never introduced.

Plaintiff's evidence here consisted of a brief description of the work performed, the amounts he claims defendants owe him and opinions that the quality of his work is good. Once the jury had decided to award damages to plaintiff, it had nothing but an assumption—that the labor and materials for which defendants had not paid were of the same relative value as those for which they *had* paid—on which to base its award. This is pure speculation. *Cline v. Cline*, 258 N.C. 295, 128 S.E. 2d 401. Because plaintiff failed to introduce sufficient evidence to support the sums he claimed, he is entitled to no more than nominal damages. I would vote to affirm the Court of Appeals.

Justice MITCHELL joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. JERRY DALE CASHWELL

No. 605A86

(Filed 30 June 1988)

Criminal Law § 34.1— trial on murder charges—defendant in jail on another charge—irrelevancy

In a prosecution for two first degree murders, the trial court erred in permitting an inmate who was in jail with defendant and who testified as to inculpatory statements made by defendant to testify that defendant had told him that he was in jail for the attempted murder of his girlfriend and in permitting a detective to testify that defendant was in jail for assaulting his girlfriend with a deadly weapon with intent to kill, since this testimony was not necessary to show the full context of defendant's inculpatory statements or to show any confidential relationship between defendant and his fellow inmate, and the testimony was not relevant to any fact in issue concerning the murder charges other than the character of the accused. N.C.G.S. § 1A-1, Rules 401, 402 and 404.

APPEAL by defendant from judgments of consecutive terms of life imprisonment for two convictions of murder in the first degree imposed by *Brewer, J.*, at the 14 April 1986 session of Superior Court, CUMBERLAND County. Heard in the Supreme Court 14 April 1988.

Lacy H. Thornburg, Attorney General, by James J. Coman, Senior Deputy Attorney General, and William N. Farrell, Jr., Special Deputy Attorney General, for the state.

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

MARTIN, Justice.

Defendant was convicted upon two charges of murder in the first degree and, upon the jury's recommendation, was sentenced to two consecutive life sentences on 29 May 1986. Defendant presents six issues to this Court upon appeal. We conclude that defendant is entitled to a new trial for errors in the admission of evidence and, therefore, find it unnecessary to discuss the remaining issues as they are not likely to reoccur upon retrial.

In summary, the evidence shows that defendant, Lee Wayne Hunt, Kenneth Wayne West, and Gene Williford, Jr. were engaged in narcotics trafficking in Cumberland County. Roland

"Tadpole" Matthews apparently had stolen marijuana from Hunt and Hunt expressed an intention to teach Tadpole a lesson. Williford testified under a grant of immunity that on the morning of 6 March 1984 he, Hunt, West, and defendant met together to discuss the fate of Tadpole. Defendant's assignment was to go to Tadpole's place of work, wait for him, and accompany Tadpole to his home that evening. Defendant did so. Later that night Williford, with Hunt and West, drove out toward Tadpole's residence. Hunt had a 9 millimeter pistol, and West had a .38- or .357-caliber pistol and a hunting knife. On River Road, Williford let Hunt and West out. When Williford returned around thirty minutes later, Hunt, West, and defendant were running up the road to catch him. The three got into the car—West was carrying a green trash bag—and they proceeded back to the Hunt residence. All got out there, but Williford did not go inside. The green trash bag contained marijuana. Shortly afterwards, Hunt, West, and defendant left the residence wearing different clothes and carrying two green trash bags. They stated that they were going to "stash the pot" and "get rid of the clothes." Williford was told to go home and drive carefully.

On 7 March 1984, Tadpole and his wife, Lisa, were found shot and stabbed to death in their rural Cumberland County home. Their infant daughter was found unharmed in the front bedroom of the house. It was determined by the autopsy that Tadpole Matthews died as a result of being shot and stabbed. He was shot twice and stabbed several times. Lisa Matthews also died as a result of being shot and stabbed. All of the bullets that were recovered were determined to have been fired from the same gun, a .38-caliber pistol.

Samuel Thompson, an inmate in the Cumberland County Jail, testified that on 29 May 1985 he met defendant, who was also in jail. The two were in the same cell block. At that time defendant made certain statements to Thompson as to why he was in custody, and sometime during late June or early July, defendant made incriminating statements to Thompson concerning the Matthews murders. Thompson stated that defendant told him that when Hunt and West showed up at the Matthews house, defendant let them into the house. Hunt gave defendant a gun and defendant shot Matthews twice in the head, and Hunt then shot Lisa. Thereafter defendant and West stabbed and cut Lisa and Tadpole Mat-

thews. Defendant was not arrested until some fourteen months later.

Defendant contends that the trial judge erred in allowing the witness Samuel Thompson to testify, over the objection of defendant, that defendant told Thompson that he was in jail for the attempted murder of his girlfriend, Sherry. Defendant further argues that this error was compounded when the state was allowed to introduce evidence on cross-examination of defendant's witness Detective Watts which corroborated Thompson's testimony concerning this statement by defendant. The challenged portions of the testimony follow:

[Direct examination of Samuel Thompson.]

Q And when did you first have occasion to know the Defendant, Jerry Cashwell?

A It was—ah—I had met Jerry Cashwell on May the 29th, and—ah—I was out of cigarettes and I asked Mr. Cashwell if he wanted to buy my supper tray for a pack of cigarettes. He said he would and that's how I first became acquainted with Mr. Jerry Cashwell.

Q And during that period of time, did you and he become friendly while you were in F Block?

A Yes, we did.

Q And during that period of time, did you have any discussions with the Defendant as to why you were incarcerated?

A Yes, sir. I did. I told Mr. Cashwell that I was arrested for armed robbery and—ah—Jerry told me that—ah—he was in jail for attempted murder on his girl friend, Sherry.

[Cross-examination of Detective Jack Watts, Jr.]

Q And did he [Thompson] tell you what the Defendant, Cashwell, told him that he was in jail for?

. . . .

THE WITNESS: Mr. Thompson stated to me that Mr. Cashwell originally stated to him that he was in jail for assault with a deadly weapon with intent to kill against his girl friend, Sherry Keesler.

Q Did you have occasion to verify whether or not the Defendant was in fact in jail on a similar-type charge?

MS. TALLY: Objection.

COURT: Overruled.

THE WITNESS: Yes, sir. I verified that.

MS. TALLY: Move to strike.

COURT: Denied.

MR. COMAN: What was the actual charge that you verified at the time that you checked behind what Mr. Thompson had told you?

MS. TALLY: Objection.

COURT: Overruled.

THE WITNESS: The best I recall, it was assault with a deadly weapon with intent to kill. In fact, that case was worked by our office by Detective Bittle.

MS. TALLY: Move to strike.

COURT: Denied.

The state argues that Thompson's testimony and the corroborating testimony of Detective Watts were competent for the purpose of showing the relationship between Thompson and defendant that led up to defendant's inculpatory statements a month later. Defendant argues, and we agree, that this testimony constituted prejudicial error.

Rule 401 of the North Carolina Rules of Evidence defines relevant evidence to be "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." Under this definition of relevant evidence, the testimony of these two witnesses that Cashwell was in jail on a charge of attempted murder of his girlfriend is not relevant. This statement by the defendant does not go to prove the existence of any fact that is of consequence in the determination of the two charges of murder on which defendant was found guilty. Evidence that is not relevant is not admissible. N.C.R. Evid. 402. Fur-

ther, Rule 404 proscribes the admission of evidence of other wrongs or acts of a defendant to prove the character of the defendant in order to show that he acted in conformity therewith. Such evidence may be admissible for other purposes, including to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, entrapment, or accident. The challenged testimony in question is not admissible under the exceptions of Rule 404(b). Although the purposes for which evidence of other crimes, wrongs, or acts is admissible are not limited to those enumerated in the rule, we find that this testimony was not relevant to any fact or issue other than the character of the accused. *Cf. State v. Weaver*, 318 N.C. 400, 348 S.E. 2d 791 (1986) (evidence was admissible to show identity).

We find that *State v. Fowler*, 230 N.C. 470, 53 S.E. 2d 853 (1949), is instructive. In *Fowler*, the defendant was charged with murder and confessed to a sheriff, and in doing so added that he was an escapee from South Carolina, where he was serving a life sentence for murder. This Court held that the admission of the additional testimony about defendant being an escapee was reversible error because that testimony was not relevant to any material fact concerning the defendant's guilt and there is an inevitable tendency of such evidence to raise a legally spurious presumption of guilt in the minds of jurors. The principle enunciated in *Fowler* was followed by this Court in *State v. Lynch*, 279 N.C. 1, 181 S.E. 2d 561 (1971), and in *State v. Simpson*, 297 N.C. 399, 255 S.E. 2d 147 (1979).

In *Fowler* the erroneous testimony was tied in directly to the confession of the defendant, but here we have an intervening time of some thirty days between the challenged testimony and defendant's inculpatory statements to Thompson. The challenged testimony in no way was necessary to show the full context of defendant's confession, nor was it required in order to show any confidential relationship between defendant and Thompson. Thus we find this testimony to be irrelevant and immaterial to the later inculpatory statements made by defendant to Thompson.

The erroneous admission of the testimony of Thompson was compounded by the trial judge allowing Detective Watts to testify that Thompson told him about this statement by the defendant and that Detective Watts verified the fact that defendant was in

custody on the charge of assault with a deadly weapon with intent to kill his girlfriend, Sherry Keesler. The trial judge even permitted Detective Watts to testify that a handgun had been gathered and sent to the state laboratory on the Sherry Keesler charge. Thus this testimony of Detective Watts compounded the prejudice in this case by offering extrinsic evidence concerning the unrelated charge. *See State v. Stimpson*, 279 N.C. 716, 185 S.E. 2d 168 (1971) (defendant charged with murder, and using the defense of accident, was improperly impeached with evidence that he had been charged with murder in New York state); *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971) (new trial granted in an armed robbery case because defendant was impeached with evidence of armed robbery charges in other counties).

Here the challenged evidence was especially prejudicial because of its similarity to the charge at issue: murder and assault with a deadly weapon with intent to kill. When the similarity of the charges is compounded by the additional "verification" evidence of Detective Watts, we find the error to be prejudicial. The sole evidence in the case as to defendant's actually firing the lethal shots or inflicting lethal blows with the knife comes from the admission of his inculpatory statement. Further, although defendant did not testify, he produced evidence on his behalf. Gregory Weeks, assistant public defender, testified that he represented Thompson and that he was attempting to work out a plea bargain for him, but Thompson never mentioned that he had information on defendant that could be used in negotiating a plea arrangement. Further, although Thompson wrote to the authorities in August 1985 as to the inculpatory statements defendant had made to him, he did not inform the prosecutors that he would be willing to testify until 14 April 1986, the week the case came on for trial. Attorney Gerald Beaver testified that he later represented Thompson and negotiated the plea arrangement for his client. He testified that Thompson "wanted to get out of jail" and that Thompson understood that his testimony would secure his release in about three months. There was additional evidence that Gene Williford had been caught with a stolen weapon during the investigation of the murders but he had not been charged with these offenses.

We conclude that the admission of the testimony at issue over defendant's objections constituted prejudicial error and that the defendant is entitled to a new trial.

New trial.

TILDA E. BULLINS, ADMINISTRATRIX OF THE ESTATE OF MAXIE LEE BULLINS, DECEASED v. C. R. SCHMIDT, R. J. BLAKELY, JR., AND THE CITY OF GREENSBORO, NORTH CAROLINA

No. 50PA88

(Filed 30 June 1988)

Negligence § 29.1; Sheriffs and Constables § 4— high speed chase—collision not involving officer's vehicle—liability of officer

The trial court erred by not granting defendants' motion for a directed verdict in a negligence action by the estate of a driver killed during a collision with a vehicle being pursued by Greensboro Police Department officers at high speed. The policy of the State is that liability cannot attach where the officer's vehicle does not collide with another person, vehicle or object while in a chase unless the officer's conduct constituted gross or wanton negligence. There is no evidence that officers in this case violated any rules of the road; officers were not negligent in pursuing and continuing to pursue the car; the pursuit was in the early morning hours along a predominantly rural section of highway where traffic was light and the road was dry; and officers continuously used their emergency lights and sirens, kept their vehicles under proper control, and did not collide with any person, vehicle or object.

ON discretionary review prior to determination by the North Carolina Court of Appeals of defendants' appeal from the judgment entered by *Long*, J., at the 1 June 1987 session of Superior Court, GUILFORD County. Heard in the Supreme Court 9 May 1988.

Donaldson, Horsley & Greene, P.A., by William F. Horsley, and Folger & Tucker, by Ben F. Tucker, for plaintiff-appellee.

Nichols, Caffrey, Hill, Evans & Murrelle, by Charles E. Nichols, Joseph R. Beatty, and Fred T. Hamlet, for defendant-appellants.

Beskind and Rudolf, P.A., by Donald H. Beskind, for the North Carolina Academy of Trial Lawyers, amicus curiae.

Lacy H. Thornburg, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, and Linda Anne Morris, Associate Attorney General, for the State of North Carolina, amicus curiae.

MARTIN, Justice.

We hold that the trial judge erred in failing to grant defendants' motion for directed verdict at the close of all the evidence; therefore, we reverse the judgment of the superior court.

This lawsuit arose out of a high-speed chase by Greensboro police officers of an automobile being operated by Luther McMillian. The McMillian car eventually collided with an automobile being operated by Maxie Lee Bullins. Both drivers were killed in the collision.

At about 1:03 a.m., 20 January 1985, Officer Blakely of the Greensboro Police Department observed an automobile with a Florida license plate occupying two lanes of traffic on U.S. 220 in the city of Greensboro. The car was being driven by McMillian and the officer observed it weaving from left to right between the two lanes. Officer Blakely attempted to stop the automobile, and when it did not stop in response to the blue light and siren, the officer began to follow the vehicle, which was traveling at a low rate of speed at that time. Blakely radioed his observations to the Greensboro Police Department. Police Sergeant Schmidt approached the area in a motor vehicle and put his car in front of the McMillian car in an attempt to make a moving roadblock and thereby stop the McMillian vehicle. However, McMillian evaded the roadblock by driving around Schmidt's patrol car and continuing north on U.S. 220 at an accelerated rate of speed. This pursuit lasted for some fourteen minutes and covered a distance of about eighteen miles, extending into the adjoining county of Rockingham. During this entire time the Greensboro police officers were in continuous radio contact with various police, sheriff, and Highway Patrol departments.

Lieutenant Stewart, who was in charge of all patrol officers on duty in Greensboro at the time, authorized Sergeant Schmidt

and Officer Blakely by radio transmission to continue the pursuit in their discretion. The pursuit was continued at various speeds up to 100 m.p.h. Several cars going south on U.S. 220 had to pull off the side of the road in order to avoid a collision. At times the McMillian car had its headlights off. While in a no-passing zone, McMillian pulled into the southbound lane to pass a northbound car in front of him and collided head-on with the Bullins automobile, killing both drivers. At this location, U.S. 220 was a two-lane highway. At the time of the impact, the McMillian vehicle apparently had on only its parking lights. Neither police car was struck in the collision. The Schmidt police car was some 100 to 125 yards behind McMillian's car, with Blakely following Schmidt. The police officers had reduced their speed and increased the distance between their vehicles and the McMillian vehicle upon seeing the northbound vehicles in front of McMillian.

The trial judge denied defendants' motion for directed verdict at the close of all the evidence. We find this to be error. The General Assembly has established the public policy of North Carolina with respect to the operation of police vehicles in the chase or apprehension of violators of the law in N.C.G.S. § 20-145 (Supp. 1987):

> The speed limitations set forth in this Article shall not apply to vehicles when operated with due regard for safety under the direction of the police in the chase or apprehension of violators of the law or of persons charged with or suspected of any such violation . . . . *This exemption shall not, however, protect the driver of any such vehicle from the consequence of a reckless disregard of the safety of others.*

(Emphasis added.)

This Court has established the standard of care where the conduct of an officer in the chase or apprehension of a law violator results in the *officer's* vehicle colliding with another person, vehicle, or object. The officer is held to the standard of care that a reasonably prudent person would exercise in the discharge of official duties of a like nature under like circumstances. If the officer complies with this standard under these circumstances, he is exempt from the statutory speed laws. *Goddard v. Williams*, 251 N.C. 128, 110 S.E. 2d 820 (1959); *Glosson v. Trollinger*, 227 N.C. 84,

40 S.E. 2d 606 (1946); *Collins v. Christenberry*, 6 N.C. App. 504, 170 S.E. 2d 515 (1969).

This Court faces for the first time the determination of the proper standard of care where the injuries complained of do *not* result from the officer's vehicle colliding with another person, vehicle, or object in the chase or apprehension of a law violator. Under these circumstances, we conclude that the applicable standard is whether the officer's conduct constitutes gross negligence. The last sentence of the above-quoted statute establishes as the public policy of North Carolina that if an officer's conduct under the facts of this case is determined to be grossly negligent, then the statute does not protect him and he may be liable for damages proximately resulting from such gross negligence.

Gross negligence is wanton conduct done with conscious or reckless disregard for the rights and safety of others. *Hinson v. Dawson*, 244 N.C. 23, 92 S.E. 2d 393 (1956); *Wagoner v. R.R.*, 238 N.C. 162, 77 S.E. 2d 701 (1953); *Jarvis v. Sanders*, 34 N.C. App. 283, 237 S.E. 2d 865 (1977). We hold that this standard is imposed by N.C.G.S. § 20-145 in determining the public policy of the state. *See generally* Note, *Torts—Speed Exemption Statute—Standard of Care in Operation of Police Vehicles—Liability of City, County, or State for Negligence of Police Officers*, 39 N.C.L. Rev. 460 (1961). Officers are required at times to chase and apprehend law violators. Where the officer's vehicle does not collide with another person, vehicle, or object under these conditions, the policy of the state is that liability cannot attach unless the officer's conduct constitutes gross or wanton negligence.

We recognize that other jurisdictions are divided in the various standards of care applied under these conditions. *See* Annotation, *Government Liability—Police Chase*, 4 A.L.R. 4th 865 (1981). However, in view of the language of our statute that upon a showing of the reckless disregard of the safety of others the officer loses the benefit of the statute, we conclude that standard to be appropriate under these circumstances.

We turn now to the task of determining whether plaintiff's evidence was sufficient to survive defendants' motion for directed verdict. The test is whether plaintiff's evidence, viewed in the light most favorable to plaintiff and giving her every reasonable inference therefrom, is sufficient to support a verdict in plaintiff's

favor. *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971). Plaintiff alleged that defendants' conduct was grossly or wantonly negligent and in reckless disregard of the rights and safety of others in that the officers operated their vehicles carelessly and recklessly, at excessive speeds, without keeping a proper lookout, by engaging in a high-speed pursuit of a suspected misdemeanant, and without proper training in a high-speed pursuit.

Plaintiff's evidence fails to support her allegations. The trial judge determined in the charge conference that the only contentions of negligence to be submitted to the jury were (1) whether the officers failed to use reasonable care in pursuing and continuing to pursue the McMillian car in a high-speed nighttime chase over a long distance while the driver of the McMillian vehicle was engaged in careless and reckless driving, and (2) whether Lieutenant Stewart failed to use reasonable care when he authorized the chase of the vehicle to continue. The trial judge so instructed the jury. He also charged that the officers would not be liable merely because they failed to observe the motor vehicle laws, and applied the standard enunciated by this Court in *Goddard*, 251 N.C. 128, 110 S.E. 2d 820, to the above contentions of negligence.

There is no evidence in this case that the officers violated any of the rules of the road. Further, the officers were not negligent in pursuing and continuing to pursue the McMillian car. Public policy requires officers in North Carolina to pursue and attempt to apprehend violators of the law. Under the facts of this case, officers will be held liable only if they are grossly or wantonly negligent in deciding to pursue or continue to pursue the law violator. Here, there is no showing that the officers were negligent under the standard applied by the trial judge, much less grossly negligent. The pursued vehicle had out-of-state tags. The driver was unknown to the officers and was acting as if he was under the influence of alcohol. With approximately fifty thousand persons killed on the nation's public highways each year (1640 in North Carolina), drunken drivers are a deadly menace to innocent persons. Officers have a duty to remove them from the highways. *DeWald v. State*, 719 P. 2d 643 (Wyo. 1986). The pursuit was in the early morning hours along a predominantly rural section of U.S. 220 where traffic was light and the road was dry. The officers continuously used their emergency lights and sirens, kept

their vehicles under proper control, and did not collide with any person, vehicle, or object.

Roberson v. Griffeth, 57 N.C. App. 227, 291 S.E. 2d 347, *disc. rev. denied*, 306 N.C. 558, 294 S.E. 2d 224 (1982) (pursued car collided with plaintiff's intestate), relied upon by plaintiff, is no longer authoritative in view of the standard of gross negligence this Court adopts today.

The denial of defendants' motion for directed verdict is reversed and the cause is remanded to the Superior Court, Guilford County, for the entry of an order directing a verdict for defendants and dismissing the action.

Reversed and remanded.

STATE OF NORTH CAROLINA v. CHARLIE JAMES JONES

No. 113A87

(Filed 30 June 1988)

Criminal Law § 34.8— rape and indecent liberties—prior sexual assaults against another—common plan or scheme—inadmissibility because of remoteness

In a prosecution of defendant upon two counts of first degree rape and three counts of taking indecent liberties with his stepdaughter, the trial court erred in permitting a witness to testify for the purpose of showing a common plan or scheme that she was sexually assaulted by defendant on numerous occasions some seven to twelve years earlier in much the same manner as the prosecutrix since the prior acts were too remote in time to be admissible. N.C.G.S. § 8C-1, Rule 404(b) (1986).

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing concurrent life sentences upon his conviction of two counts of first degree rape, imposed by *Lewis, Jr. (John B.), J.*, at the 27 October 1986 Criminal Session of Superior Court, PITT County. Defendant was also convicted of three counts of taking indecent liberties with a child for which he received a sentence of five years for each offense, to run consecutively, but concurrently with the life sentences. Defendant's motion to bypass the Court of Appeals on the lesser offenses was allowed by the Supreme Court on 11 November 1987. Heard in the Supreme Court 9 May 1988.

Lacy H. Thornburg, Attorney General, by Martha K. Walston, Associate Attorney General, for the State.

Lawrence D. Graham for defendant-appellant.

FRYE, Justice.

We find one issue dispositive in this case. Defendant argues that the admission into evidence of past acts of sexual misconduct by defendant, though arguably similar to those of the case *sub judice*, was improper under the North Carolina Rules of Evidence because the prior acts were so remote in time that their probative effect was outweighed by the prejudice visited upon him. We agree and accordingly order a new trial.

An exhaustive recitation of the circumstances surrounding this appeal is unnecessary to its disposition. In short, defendant was indicted and convicted of two counts of first degree rape and three counts of taking indecent liberties with a child. The State's evidence tended to show that the crimes occurred over a period of time commencing December, 1982 through October, 1985. The victim in each of the assaults was defendant's stepdaughter who was twelve years old when the assaultive episodes began. The evidence tended to show that defendant assaulted the child while she was left in his custody and while the child's mother was out of the home working. At times, the sexual assaults were perpetrated by the defendant after threatening the young victim with a gun.

During the State's presentation of evidence, Ms. Verona Ellis testified, over the objection of defendant, that she was sexually assaulted by defendant on numerous occasions some seven years before in much the same manner as the victim in the case *sub judice*. Subsequent *voir dire* examination disclosed that the alleged prior offenses began in 1970, when Ellis was eleven years old and living with her adult sister. Defendant apparently lived in the same household. Ellis further testified that at age fourteen she bore defendant's child.

Based upon this evidence the trial court made the following findings of fact:

1. That the State has introduced evidence tending to show that the defendant, Charlie James Jones, was living in the

same home as [the victim] during the relevant periods . . . . That the defendant during previous periods lived in the home with Verona Ellis.

2. That while the defendant was living in the home with [the victim] she was 12, 13 and 14-years-old. While he lived in the home with Verona Ellis she was 11, 12, and 13-years-old.

3. That in both homes the defendant was an adult male in a position of authority when the girls . . . were 11, 12, and 13.

4. That the defendant had vaginal intercourse with both [the victim] and Verona Ellis in the afternoons and at night.

5. That in both instances the defendant was throughout those periods having normal sexual relations with adult women—during the episode with [the victim], with his wife, Brenda; and during the episode with Verona Ellis, with her sister . . . .

6. That in both cases the defendant used hand guns to physically threaten the girls to force submission to his sexual advances.

The trial court concluded "that the evidence of sexual relations with Verona Ellis tended to establish a state of mind or intent, a common scheme or plan, [and] a desire on the part of the defendant for vaginal intercourse with young girls and an unnatural lust on his part." The trial judge therefore found the evidence admissible. His decision apparently was premised upon Rule 404(b) of the North Carolina Rules of Evidence. The trial judge made no findings concerning the seven year lapse of time between the prior assault against Ms. Ellis and the assault on the victim.

Defendant argues that the testimony of Verona Ellis concerning prior sexual assaults upon her by defendant was improperly admitted by the trial judge because the prior episode occurred some seven years before the assault for which defendant is now charged. Because of this lapse in time, defendant contends that the prior acts are so remote in time that the probative nature of the evidence is outweighed by its likely prejudicial effect. We find this contention meritorious.

Rule 404(b) provides:

> (b) Other crimes, wrongs, or acts—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show he acted in conformity therewith. It may however be admissible for other purposes such as: proof of motive, opportunity, intent, preparation, identity or absence of mistake, entrapment or accident.

N.C.G.S. § 8C-1, Rule 404(b) (1986).

Accordingly, this Court has held that evidence of prior sex acts may have some relevance to the question of a 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. Boyd*, 321 N.C. 574, 364 S.E. 2d 118 (1988); *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). Such evidence is not offensive to the general prohibition against character evidence because it is admitted not to prove defendant acted in conformity with conduct on another occasion but rather as circumstantial proof of defendant's state of mind. *See State v. Weaver*, 318 N.C. 400, 348 S.E. 2d 791 (1986). Indeed, in interpreting Rule 404(b), we have stated that "evidence of other offenses is admissible so long as it is relevant to any fact or issue other than the character of the accused." *Id.* at 403, 348 S.E. 2d at 793, *quoting* 1 Brandis on North Carolina Evidence § 91 (1982).

The trial judge concluded that the Ellis testimony was admissible to show a "common plan or scheme." *See State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954); N.C.G.S. § 8C-1, Rule 404(b) (1986). This exception to the general rule rests on the proposition that there may be some logical connection between two acts from which it can be said that proof of the one tends to establish the other. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364. Nonetheless, the admissibility of evidence of a prior crime must be closely scrutinized since this type of evidence may put before the jury crimes or bad acts allegedly committed by the defendant for which he has neither been indicted nor convicted.

In assessing this particular type of evidence, this Court has noted:

> [p]roof that a defendant has been guilty of another crime equally heinous prompts to a ready acceptance of and belief in the prosecution's theory that he is guilty of the crime charged. Its effect is to predispose the mind of the juror to believe the prisoner is guilty, and thus effectually to strip him of the presumption of innocence.

Id. at 174, 81 S.E. 2d at 366. Moreover, evidence of other crimes may distract the fact finders and confuse their consideration of the issues at trial. *Id.* With these considerations bearing great weight, this Court has required that evidence of prior bad acts, admitted to show a common plan under Rule 404(b), be "sufficiently similar and not so remote in time" before they can be admitted against a defendant. *State v. Boyd*, 321 N.C. at 577, 364 S.E. 2d at 119.

The State's own evidence tended to show that the alleged assaults against Ellis occurred between the years 1970 and 1975. The crimes for which defendant was indicted occurred between the years 1982 and 1985. Thus, there was a twelve-year lapse of time between the start of the alleged assaultive conduct against Ellis by defendant and the start of assaultive behavior against the victim in this case. Furthermore, the time differential between the commencement of the assault against the prosecutrix was seven years after the last of the alleged assaultive episodes against Verona Ellis. Such an extreme time lapse raises serious concerns about the probative nature of such evidence.

In *State v. Shane*, 304 N.C. 643, 285 S.E. 2d 813 (1982), this Court held it was error for the trial court to permit a witness to testify to evidence of prior crimes committed by the defendant because the period of time separating the crimes, a period of seven months, lessened the probative force of that evidence.[1] The Court in *Shane* stated that "it is evident that the period of time elapsing between the separate sexual events plays an important part in the balancing process, especially when the State offers the evidence of like misconduct to show the existence of a common

1. This Court held the passage of time sufficient for preclusion when viewed against other dissimilarities between the criminal act charged and the prior act. *Cf. State v. Boyd*, 321 N.C. 574, 364 S.E. 2d 118 (prior sexual acts occurring within a twelve-month period found not to be too remote where the crime charged showed striking similarities with the prior crime).

plan or design for defendant's perpetration of this sort of crime." *Id.* at 654, 285 S.E. 2d at 820.

Similarly, the time period between the alleged prior acts of defendant and the acts upon which this appeal is based is of such a span that any similarity between the two acts is severely attenuated. The period of seven years "substantially negate[s] the plausibility of the existence of an ongoing and continuous plan to engage persistently in such deviant activities." *Id.* at 656, 285 S.E. 2d at 821. As such, the reasoning that gave birth to Rule 404(b) exceptions is lost. *See State v. Scott*, 318 N.C. 237, 347 S.E. 2d 414 (1986) (nine-year period held to be too remote to be probative or relevant).

Evidence of other crimes must be connected by point of time and circumstance. Through this commonality, proof of one act may reasonably prove a second. However, the passage of time between the commission of the two acts slowly erodes the commonality between them. The probability of an ongoing plan or scheme then becomes tenuous. Admission of other crimes at that point allows the jury to convict defendant because of the kind of person he is, rather than because the evidence discloses, beyond a reasonable doubt, that he committed the offense charged.

The State argues that remoteness of time should go to the weight and credibility to be given this type of evidence and not to its admissibility. The State directs this Court to *Cooper v. State*, 173 Ga. App. 254, 325 S.E. 2d 877 (1985), where a Georgia court held that the lapse of time between prior occurrences and the offenses charged goes only to the weight and credibility of such testimony and would not prevent its admissibility. Our cases, however, are to the contrary, and we support their reasoned conclusion that the passage of time must play an integral part in the balancing process to determine admissibility of such evidence. *See State v. Boyd*, 321 N.C. 574, 364 S.E. 2d 118; *State v. Cotton*, 318 N.C. 663, 351 S.E. 2d 277 (1987); *State v. Weaver*, 318 N.C. 400, 348 S.E. 2d 791 (1986).

It seems incongruous that such testimony should be allowed into evidence when its probative impact has been so attenuated by time that it has become little more than character evidence illustrating the predisposition of the accused. Such is proscribed by Rules 403 and 404 of our rules of evidence. We think that a proc-

ess that allows for the passage of time to be weighed in a court's initial decision to admit such evidence is the better reasoned approach and one that ensures that an accused is tried only for the acts for which he has been indicted. We therefore decline to follow *Cooper v. State*, 173 Ga. App. 254, 325 S.E. 2d 877.

We hold that the admission of the testimony relating to the alleged assaultive conduct against Verona Ellis was prejudicial to the defendant's fundamental right to a fair trial on the charges for which he was indicted because the prior acts were too remote in time. Accordingly, defendant is entitled to a

New trial.

STATE OF NORTH CAROLINA v. ROBERT R. GARDNER

No. 458A87

(Filed 30 June 1988)

1. **Criminal Law § 101.4— bailiff's conversation with juror—after verdict reached and recorded—no prejudice**

The trial court did not err by denying a mistrial in a prosecution for rape and burglary where a conversation took place between the bailiff and the jury foreman after the verdict was reached but before it was announced in open court. The bailiff's words could not possibly have affected the foreman's view of the evidence presented at trial, nor could the conversation have resulted in harm to defendant.

2. **Criminal Law § 91.7— continuance for absence of witnesses denied—no prejudice**

There was no prejudice and defendant was not denied his right to have a fair opportunity to present a defense under Art. I, § 23 of the North Carolina Constitution where his oral motion for a continuance until two witnesses for the defense could be present was denied. The proposed testimony was tangential to the central issue of whether defendant raped the victim, was not material to any substantive issue in the case, and evidence on the issue of defendant's guilt was overwhelming.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from judgment imposing a life sentence entered by *Phillips, J.*, at the 23 March 1987 Criminal Session of Superior Court, ONSLOW County, upon defendant's convictions of first degree rape and first

degree burglary. Defendant's motion to bypass the Court of Appeals for review of his sentence of a term of years imposed upon conviction of first degree burglary was allowed. Heard in the Supreme Court 10 May 1988.

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

L. Robert Coxe and Charles R. Briggs for defendant appellant.

EXUM, Chief Justice.

In this appeal defendant contends the trial court erred: (1) by denying his motion for a new trial based on alleged misconduct of the jury foreman; and (2) by denying his motion to continue so that he could call additional witnesses. We conclude defendant received a fair trial free from reversible error.

I.

At trial the prosecutrix testified that defendant woke her in the early morning hours of 26 November 1983. He held a knife to her throat, tied her hands behind her, removed her underwear and engaged in vaginal intercourse with her against her will. After raping her, defendant forced the victim to give him her car keys and a check for two hundred dollars. He then retied her hands and placed some tape over her mouth.

Defendant then left the victim's bedroom and allowed his wife, Lisa Kilgore, to enter the house. Defendant's wife walked to the bedroom, slapped the victim, and demanded to know what she was doing with her husband. When Ms. Kilgore realized the victim was tied and gagged, she asked defendant, her husband, what he was doing. After some conversation Ms. Kilgore and defendant decided to steal the victim's car and credit cards, but they could not agree whether to take the victim with them. They forced the victim to get in the trunk of her car while they continued to argue. Eventually they took her out of the car, retied her to the bed and drove away without her.

After escaping her bonds, the victim went to a neighbor's apartment and called the police. When the police searched the victim's apartment they found defendant's wallet, which contained

his military identification, photographs, and his driver's license. The victim identified defendant as her attacker from the photographs in his wallet.

Lisa Kilgore testified for the state. At the time of the trial, she and defendant were divorced. She testified that on the night of the incident defendant told her he was going to walk to the store. After he had been gone for forty minutes, she went to look for him. She looked through a window in the victim's house, saw her husband and the victim and forced her husband to open the door. Ms. Kilgore testified that after she and defendant left the victim's apartment, defendant realized he had lost his wallet. They returned to the victim's apartment but were unable to find the wallet. Ms. Kilgore and defendant drove to Prattville, Alabama.

Defendant testified in his own behalf. He said he had been playing cards elsewhere at the time of the incident and denied ever having sexual intercourse with the victim. He admitted he had gone to Alabama but denied going there with Lisa Kilgore. He testified he arrived in Alabama with a friend, Norman Perry.

II.

[1] In his first assignment of error defendant contends the trial court erred by denying his motion for a mistrial based upon a colloquy that took place between the bailiff and the jury foreman after the verdict was reached but before it was announced in open court. We find no merit in this argument.

Generally a motion for mistrial is a matter addressed to the sound discretion of the judge, and absent a showing of abuse of discretion the ruling will not be disturbed on appeal. *State v. Craig*, 308 N.C. 446, 454, 302 S.E. 2d 740, 745 (1983), *cert. denied*, 464 U.S. 908, 78 L.Ed. 2d 247 (1983); *State v. Johnson*, 295 N.C. 227, 244 S.E. 2d 391 (1978). This is so even when the basis of the motion for mistrial is misconduct affecting the jury. *State v. Sneeden*, 274 N.C. 498, 504, 164 S.E. 2d 190, 194 (1968). A new trial will be granted only where a conversation between a third person and a juror *"is of such a character as is calculated to impress the case upon the mind of the juror in a different aspect than was presented by the evidence in the courtroom, or is of such a nature as is calculated to result in harm to a party on*

trial." State v. Johnson, 295 N.C. 227, 234, 244 S.E. 2d 391, 396 (1978) (emphasis in original). Finally, a trial court is held to have abused its discretion only when "its ruling [is] so arbitrary that it could not have been the result of a reasoned decision." *State v. Thompson*, 314 N.C. 618, 626, 336 S.E. 2d 78, 82 (1985).

In this case the jury had reached its verdicts, the foreman had signed the verdict sheets, and the verdicts had been recorded before the conversation between the bailiff and the foreman took place. All that remained was the announcement of the verdict in open court and the recordation of the verdict in the minutes. The verdicts having already been reached and recorded on the verdict sheet, the bailiff's words could not possibly have affected the foreman's view of the evidence presented at trial, nor could the conversation have resulted in harm to the defendant. This assignment of error is overruled.

III.

[2] Defendant next contends the trial court erred by denying his oral motion for a continuance until two witnesses for the defense could be present. Defendant argues this ruling violated his right to have a fair opportunity to present a defense under Article I, § 23 of the North Carolina Constitution. This argument is without merit.

A motion for continuance is within the sound discretion of the trial court and reviewable upon appeal only for abuse of discretion. *State v. Smith*, 310 N.C. 108, 111, 310 S.E. 2d 320, 323 (1984). However, when a motion to continue is based on a constitutional right, the trial court's ruling becomes a question of law and, upon appeal, it is subject to review by examination of the particular circumstances as presented by the record. *State v. Kuplen*, 316 N.C. 387, 402, 343 S.E. 2d 793, 801 (1986). The denial of a motion to continue, regardless of its nature, is grounds for a new trial only upon a showing by defendant that the denial was erroneous and that his case was prejudiced as a result of the error. *State v. Branch*, 306 N.C. 101, 104-105, 291 S.E. 2d 653, 656 (1985). If the error amounts to a constitutional violation, as is here contended, there is prejudice requiring a new trial unless the state satisfies this Court that the error is harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1983).

Assuming without deciding that the error complained of is of constitutional dimension, we are satisfied that the error was harmless beyond a reasonable doubt.

After defendant's testimony he moved for a continuance due to the absence of two defense witnesses. According to defense counsel two unsubpoenaed witnesses, defendant's brothers, were en route to North Carolina from Alabama. Counsel informed the court that the witnesses' testimony would show that defendant had arrived in Alabama on 27 November 1983, the day after the crime, with a friend in the friend's car. Thus, this testimony would impeach Ms. Kilgore's testimony that she and defendant drove to Alabama in the victim's stolen car. It would also corroborate defendant's testimony that he drove to Alabama with a friend in his friend's car and not with his then wife in the victim's car.

Clearly the proposed testimony is not material to any substantive issue in the case. In no way does it contradict the victim's testimony that defendant raped her on the morning of 26 November 1983. Neither does it corroborate defendant's testimony that he did not rape the victim. It contradicts the state's evidence and corroborates defendant's evidence only on the issues of the car in which and the person with whom defendant traveled to Alabama after the crime was committed. These points are tangential to the central issue of whether defendant raped the victim.

Evidence on the issue of defendant's guilt was overwhelming. It included not only the victim's unshaken testimony but also considerable circumstantial evidence, i.e., defendant's photos and other belongings left at the victim's premises, together with incriminating forensic testimony, all of which pointed unerringly to defendant's guilt.

We are confident beyond a reasonable doubt that had the continuance been allowed and the two unsubpoenaed witnesses been permitted to testify, the result would have been the same.

In defendant's trial we find

No error.

STATE OF NORTH CAROLINA v. JIMMY DEAN RIOS

No. 8A87

(Filed 30 June 1988)

1. **Criminal Law § 138.23— aggravating factor—armed with deadly weapon**

The evidence supported the trial court's finding in aggravation that defendant was armed with a deadly weapon at the time he broke or entered the victim's dwelling house where testimony showed that defendant acquired a revolver when he shot a highway patrolman and still had it with him when he was captured, and a codefendant's testimony from his own sentencing hearing provided direct evidence that defendant had the patrolman's revolver at the time he entered the victim's house. Furthermore, this factor was properly found even though defendant made no use of the deadly weapon. N.C.G.S. § 15A-1340.4(a)(1)i (1983).

2. **Criminal Law § 138.24— aggravating factor—age of breaking or entering victim**

The trial court properly found as an aggravating factor that the victim of a breaking or entering was very old even though the victim was not at home at the time of the crime where the evidence showed that the victim was seventy-five years old and that defendant saw the victim and was aware that she was an older woman living in an isolated area before he decided to break and enter her residence, since the trial court could reasonably infer that defendant chose the victim as a target knowing that if she returned while he was in the house she would, by reason of age, be unlikely to effectively intervene or defend herself.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from judgment imposing a life sentence entered by *Pope, J.*, at the 4 August 1986 Special Session of Superior Court, HENDERSON County, where defendant was convicted by a jury of first degree murder, robbery with a firearm, breaking or entering, and larceny after breaking. We allowed defendant's motion to bypass the Court of Appeals for review of his convictions for robbery with a firearm, breaking or entering, and larceny after breaking. 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.

Arthur E. Jacobson for defendant appellant.

EXUM, Chief Justice.

Defendant's assignments of error pertain to the trial judge's application of the Fair Sentencing Act, N.C.G.S. § 15A-1340.4. Defendant contends that the trial judge erred in finding in aggravation that (1) defendant was armed with a deadly weapon at the time he broke or entered the victim's dwelling house, N.C.G.S. § 15A-1340.4(a)(1)i, and (2) the victim of the breaking or entering was very old, N.C.G.S. § 15A-1340.4(a)(1)j. We find no error in the proceedings leading to defendant's sentence.*

At trial the state's evidence showed that on 26 August 1985 defendant and his cellmate, William Bray, escaped from the Franklin County Jail in Ozark, Arkansas, and fled to North Carolina. On 14 September 1985 in Madison County, North Carolina, in an attempt to avoid capture, defendant and Bray shot and killed Trooper Bobby Lee Coggins. Coggins was shot twice with a .25 caliber automatic pistol. He was also shot once in the head with his own .357 magnum revolver. On 16 September 1985 defendant and Bray broke and entered the home of Mrs. Rachel Gillespie. Mrs. Gillespie, a seventy-five year old widow, testified that on that night around 7:30 p.m. she decided to leave her home because "the Lord impressed upon her" to leave. Before she left she locked the doors and placed a stick between the top of her bedroom window and the window casing so that the window could not be raised. When Mrs. Gillespie returned to her home the following morning a rifle, blankets, food, and other small items were missing. The stick that had been placed between the top of her bedroom window and the window casing had been broken.

Following the report of the break-in, several police officers went to Mrs. Gillespie's house and searched the woods behind it. A short distance away they found a blanket and other small items taken from the house. They also found the rifle that had been stolen.

On 17 September 1985 defendant and Bray were arrested. Before they were captured, defendant dropped Coggins' .357 magnum revolver and kicked it away. When searched, Bray had the

* This case arises from the same set of facts reported in *State v. Bray*, 321 N.C. 663, 365 S.E. 2d 571 (1988). Only the facts pertinent to defendant's assignments of error will be discussed here.

.25 caliber automatic pistol used in the shooting of Trooper Coggins.

[1] Under his first assignment of error defendant, while admitting that he broke and entered the Gillespie home, contends the trial court erred in finding as an aggravating factor that he was armed with a deadly weapon at the time of the breaking. Defendant makes two arguments to support this contention. First, defendant argues the evidence presented at trial does not support the finding that he was armed with a weapon when he broke into the Gillespie home. We find no merit in this argument.

The state bears the burden of proving the existence of aggravating factors. *State v. Parker*, 315 N.C. 249, 337 S.E. 2d 497 (1985). The existence of such factors must be proved by a preponderance of the evidence. N.C.G.S. § 15A-1340.4(a) (1983).

At trial the state's evidence tended to show defendant removed Coggins' service revolver from the trooper's holster, shot him once in the head and took the revolver from the patrol car. The state also introduced William Bray's sworn testimony from his own sentencing hearing to this effect:

> Q. Mrs. Gillespie was gone and you did go into the house did you not?
>
> A. Yes, I did. . . .
>
> Q. You, of course, knew that Rios had Patrolman Coggins' gun, did you not?
>
> A. At the time, yes.

Further testimony showed that when defendant was captured he was seen to drop the .357 magnum revolver and kick it away.

This evidence tends to show defendant first acquired the revolver when he shot Trooper Coggins and had it with him when he was captured. Bray's testimony provides direct evidence defendant had Coggins' revolver at the time he entered Mrs. Gillespie's house. Considering all the evidence, circumstantial and direct, we conclude there was sufficient evidence from which the trial judge could find by a preponderance of the evidence that defendant was armed with a deadly weapon at the time he broke into Mrs. Gillespie's home. *See State v. Thompson*, 318 N.C. 395,

348 S.E. 2d 798 (1986) (holding evidence sufficient to support aggravating factors of old age and infirmity); *State v. Barts*, 316 N.C. 666, 343 S.E. 2d 828 (1986) (holding evidence sufficient to support aggravating factor of old age); *State v. Chatman*, 308 N.C. 169, 301 S.E. 2d 70 (1983) (holding evidence sufficient to support trial court's finding in aggravation that the offense was planned).

Second, defendant argues that even if the evidence supports the finding that he was armed at the time of the breaking, the use of this factor is misdirected since he made no use of the deadly weapon. We disagree.

The sentencing judge may find as a factor in aggravation that "[t]he defendant was armed with or used a deadly weapon at the time of the crime." N.C.G.S. § 15A-1340.4(a)(1)i (1983). As the statute makes clear this aggravating factor can be found if a defendant either uses a deadly weapon *or* is merely armed with one at the time of the crime. There is ample evidence here to prove the latter circumstance. Accordingly this assignment of error is overruled.

[2] Defendant next argues the sentencing judge improperly found as an aggravating factor that the victim was very old. N.C.G.S. § 15A-1340.4(a)(1)j (1983). He contends that since the victim was not at home, her age is irrelevant. Again we disagree.

Under the Fair Sentencing Act the trial court may find as an aggravating factor that "[t]he 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 policy underlying this aggravating factor is to deter criminals from taking advantage of a victim's age or mental or physical infirmity. *State v. Thompson*, 318 N.C. 395, 348 S.E. 2d 798 (1986); *State v. Barts*, 316 N.C. 666, 343 S.E. 2d 828 (1986).

> 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.

State v. Thompson, 318 N.C. at 398, 348 S.E. 2d at 800.

At trial defendant testified he and Bray spent the night in a barn on Mrs. Gillespie's land. The next morning, defendant awoke and saw Bray standing in the door of the barn looking toward the Gillespie house. He testified that Bray, upon seeing Mrs. Gillespie, spoke of taking her hostage. He also testified he and Bray watched Mrs. Gillespie leave.

There is no dispute Mrs. Gillespie was seventy-five years old at the time of the crime. Further, there is no dispute defendant saw Mrs. Gillespie and that before he decided to break and enter her residence, he was aware she was an older woman living in an isolated area. The trial court could reasonably infer defendant chose Mrs. Gillespie as a target knowing if she returned while he was in the house she would, by reason of age, be unlikely to effectively intervene or defend herself. We conclude, therefore, the trial judge properly found as an aggravating factor that the victim was very old.

In defendant's trial we find

No error.

STATE OF NORTH CAROLINA v. ROBERT RUDOLPH PRUITT

No. 381A87

(Filed 30 June 1988)

Constitutional Law § 45— dismissal of appointed counsel—pro se representation—failure to make statutory inquiry

The trial court erred in permitting defendant to discharge his appointed counsel and represent himself at trial where the court had a bench conference with counsel but failed to make any inquiry of defendant as required by N.C.G.S. § 15A-1242 concerning whether he understood and appreciated the dangers and disadvantages of self-representation or whether he understood the nature of the charges and proceedings and the range of permissible punishments he faced.

APPEAL by defendant from judgments entered by *Hyatt, J.*, at the 13 April 1987 Criminal Session of Superior Court, GASTON County. Heard in the Supreme Court 13 April 1988.

Lacy H. Thornburg, Attorney General, by David F. Hoke, Associate Attorney General, for the State.

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

FRYE, Justice.

Defendant was indicted on 2 March 1987 on two counts of first degree rape, one count of first degree kidnapping, and two counts of taking indecent liberties with a child. He was tried at the 13 April 1987 Criminal Session of Superior Court, Gaston County. The jury found defendant guilty of all charged offenses. He received life sentences on the rape convictions, a twenty year prison term on the kidnapping conviction, and five year prison terms on each of the taking indecent liberties convictions, all sentences to run consecutively. Pursuant to N.C.G.S. § 7A-27(a), defendant appealed as of right the life sentences. Defendant's motion to bypass the Court of Appeals on the lesser offenses was allowed by this Court on 22 October 1987.

Defendant contends on this appeal that the trial court committed several prejudicial errors which entitle him to a new trial. In one of these assignments of error defendant contends that the trial court failed to comply with the statutory mandates of N.C.G.S. § 15A-1242 before permitting defendant to discharge his appointed counsel and represent himself at trial. We agree with defendant that the trial court erred and that the error was prejudicial. Accordingly, defendant is entitled to a new trial.

Because we dispose of this case on one assignment of error and because the other assigned errors may not arise at retrial, we need not address them. Furthermore, the assignment of error that we do address has no relation to the facts surrounding the crimes with which defendant is charged, thus an exhaustive recitation of these facts is unnecessary.

Prior to trial it was determined that defendant was indigent. The trial court appointed an attorney from the Public Defender's Office for the Twenty-Seven-A Judicial District to represent defendant. A conflict arose, however, which made it improper for this attorney to further represent defendant. The trial court, therefore, appointed a private attorney to represent defendant.

During pretrial hearings, defendant indicated, through his appointed counsel, that he wished to represent himself. Initially, the trial court denied this request and ordered defendant to proceed with the counsel provided. Further into the proceedings, however, defendant, through defense counsel, renewed his request and informed the trial court that he intended to represent himself at trial. The trial court granted this request and ordered the appointed counsel to assist defendant if needed.

On appeal, defendant argues that the trial court committed reversible error by failing to conduct a thorough inquiry, as mandated by N.C.G.S. § 15A-1242, prior to granting defendant's request to have his court appointed counsel removed and to represent himself at trial.

The sixth amendment of the United States Constitution, as applied to the states through the fourteenth amendment, guarantees persons accused of serious crimes the right to counsel. *Gideon v. Wainwright*, 372 U.S. 335, 9 L.Ed. 2d 799 (1963). Implicit in this guaranteed right to counsel is the right of a defendant to refuse counsel and to conduct his or her own defense. *Faretta v. California*, 422 U.S. 806, 45 L.Ed. 2d 562 (1975). Moreover, when an accused relinquishes the benefit of counsel, the decision must be knowingly and intelligently made, i.e., the accused "knows what he is doing and his choice is made with eyes open." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279, 87 L.Ed. 269, 275 (1942).

The applicable North Carolina statute provides as follows:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel *only after the trial judge makes thorough inquiry and is satisfied* that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C.G.S. § 15A-1242 (1983) (emphasis added).

The inquiry to be made by the trial court under N.C.G.S. § 15A-1242 is mandatory and failure to conduct such an inquiry is prejudicial error. *State v. Bullock*, 316 N.C. 180, 340 S.E. 2d 106 (1986). Furthermore, "neither the statutory responsibilities of standby counsel, N.C.G.S. § 15A-1243, nor the actual participation of standby counsel . . . is a satisfactory substitute for the right to counsel in the absence of a knowing and voluntary waiver." *State v. Dunlap*, 318 N.C. 384, 389, 348 S.E. 2d 801, 805 (1986).

In the case *sub judice*, during the pretrial hearing, the trial court initially denied defendant's request:

> MR. FUNDERBURK (defense counsel): Your Honor, [defendant] has indicated that he wishes to represent himself in this matter.
>
> THE COURT: You have had counsel to represent you, Mr. Pruitt, and you are proceeding with those counsel . . . .

Later during this pretrial hearing the defendant, through defense counsel, renewed his request:

> MR. FUNDERBURK: I did talk with the Defendant further about whether or not he wished to represent himself. He informed me Friday in the jail that he did intend to represent himself if this came to trial. I know he told you earlier that he did. I have informed him that I guess he has a right to represent himself if he so desires. I have informed him that I do not think it would be in his best interest to attempt to represent himself, but he has indicated to me that he does wish to do that. I told him I would tell you that, and he wants to begin to represent himself at the point of jury. I told him that, once the jury trial began, I was sure he would not be able to switch back and forth, and he told me that he does want to represent himself beginning with the jury trial.
>
> THE COURT: Would counsel approach the bench, please?
>
> (Conference at the bench between counsel)
>
> MR. FUNDERBURK: Your Honor, Mr. Pruitt would ask that a continuance be granted on the grounds that he needs time to get his witnesses here that he listed in this motion . . . . On

the grounds that he says that he discovered last Wednesday that he was coming for trial today.

THE COURT: Mr. Pruitt has known longer than last Wednesday that he was coming up for trial today.

MR. FUNDERBURK: Your Honor, he has indicated that he does wish to represent himself.

THE COURT: Motion to continue DENIED. Okay, Mr. Pruitt, you may step over to the seat that Mr. Funderburk has been sitting in. I request that [appointed counsel] remain in court in order to assist the Defendant if he should desire your assistance.

The foregoing reveals the trial court failed to make any inquiry of defendant concerning whether he understood and appreciated the dangers and disadvantages of self-representation or whether he understood the nature of the charges, proceedings, and the range of permissible punishments he faced. The State contends that the record reveals that defendant was aware of the seriousness of his decision since defense counsel had so advised defendant. The State contends as well that the record further shows that defendant knowingly and voluntarily gave up his right to appointed counsel since defendant had extensive interviews with different attorneys regarding this case.

We disagree with the State's contention that the record reveals that defendant was fully advised of the seriousness of his decision. While the record does reveal that defendant was aware of his right to counsel, there is nothing in the record which shows that defendant understood and appreciated the consequences of proceeding *pro se* nor is there anything in the record which shows that defendant understood the "nature of the charges and proceedings and the range of permissible punishments." N.C.G.S. § 15A-1242 (1983). It is the trial court's duty to conduct the inquiry of defendant to ensure that defendant understands the consequences of his decision. *State v. Bullock*, 316 N.C. 180, 340 S.E. 2d 106. Having a bench conference with counsel is insufficient to satisfy the mandate of the statute. Because the trial court failed to follow the dictates of N.C.G.S. § 15A-1242, defendant is entitled to a new trial. *State v. Dunlap*, 318 N.C. 384, 348 S.E. 2d 801; *State v. Bullock*, 316 N.C. 180, 340 S.E. 2d 106; *State v. McCrowre*, 312 N.C. 478, 322 S.E. 2d 775 (1984).

New trial.

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

BROWN v. ALLENTON REALTY

No. 227P88.

Case below: 89 N.C. App. 356.

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 30 June 1988.

COCHRAN v. KELLER

No. 200P88.

Case below: 89 N.C. App. 496.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 30 June 1988.

DELK v. HILL

No. 170P88.

Case below: 89 N.C. App. 83.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 30 June 1988.

EVANS v. WILLIAMS

No. 176P88.

Case below: 89 N.C. App. 356.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 30 June 1988.

EVANS TREE v. DUCKWORTH

No. 224P88.

Case below: 89 N.C. App. 723.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 30 June 1988.

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

FEDERAL LAND BANK v. LIEBEN

No. 201PA88.

Case below: 89 N.C. App. 395.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 30 June 1988.

HARLOW v. GRANT & HASTINGS

No. 174P88.

Case below: 89 N.C. App. 356.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 30 June 1988.

IN RE GUESS

No. 232PA88.

Case below: 89 N.C. App. 711.

Petition by Board of Medical Examiners for discretionary review pursuant to G.S. 7A-31 allowed 30 June 1988.

JOHNSON v. RUARK OBSTETRICS

No. 177PA88.

Case below: 89 N.C. App. 154.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 30 June 1988.

LICKO v. LICKO

No. 272P88.

Case below: 90 N.C. App. 274.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 28 June 1988.

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

MORGAN v. N.C. GRANGE MUT. INS. CO.

No. 148P88.

Case below: 89 N.C. App. 153.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 30 June 1988.

MOSLEY & MOSLEY BUILDERS v. LANDIN LTD.

No. 283P88.

Case below: 87 N.C. App. 438.

Petition by defendants for writ of certiorari to the North Carolina Court of Appeals dismissed 11 July 1988.

POLLARD v. SMITH

No. 311P88.

Case below: 90 N.C. App. 585.

Petition by N.C. Dept. of Crime Control and Public Safety for temporary stay allowed 8 June 1988 pending receipt and consideration of petitioner's petition for discretionary review.

RAMSEY v. INTERSTATE INSURORS, INC.

No. 145P88.

Case below: 89 N.C. App. 98.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 30 June 1988.

SARANT v. SARANT

No. 113P88.

Case below: 88 N.C. App. 764.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 30 June 1988.

STATE v. BAKER

No. 202P88.

Case below: 89 N.C. App. 723.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 30 June 1988.

STATE v. COLVIN

No. 267P88.

Case below: 90 N.C. App. 50.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 30 June 1988.

STATE v. CRAWFORD

No. 158P88.

Case below: 83 N.C. App. 542.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 30 June 1988.

STATE v. GREEN

No. 247P88.

Case below: 89 N.C. App. 724.

Motion by Attorney General to dismiss appeal for failure to show a substantial constitutional question allowed 30 June 1988. Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 30 June 1988.

STATE v. HILL

No. 178P88.

Case below: 89 N.C. App. 357.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 30 June 1988.

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

STATE v. McCRIMMON

No. 216P88.

Case below: 89 N.C. App. 525.

Motion by the State to dismiss appeal for lack of substantial constitutional question allowed 30 June 1988. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 30 June 1988.

STATE v. NEWTON

No. 155P88.

Case below: 89 N.C. App. 153.

Motion by the State to dismiss appeal for lack of substantial constitutional question allowed 30 June 1988. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 30 June 1988.

STATE v. RHODES

No. 221P88.

Case below: 89 N.C. App. 724.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 30 June 1988.

TRADEWINDS CAMPGROUND, INC. v.
TOWN OF ATLANTIC BEACH

No. 314P88.

Case below: 90 N.C. App. 601.

Petition by plaintiff for temporary stay allowed 8 June 1988 pending receipt and consideration of plaintiff's petition for discretionary review.

TURLINGTON v. McLEOD

No. 206PA88.

Case below: 89 N.C. App. 515.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 30 June 1988.

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

WENTZ v. UNIFI, INC.

No. 160P88.

Case below: 89 N.C. App. 33.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 30 June 1988.

PETITION TO REHEAR

LEMONS v. OLD HICKORY COUNCIL

No. 438PA87.

Case below: 322 N.C. 271.

Petition by defendant to rehear denied 30 June 1988.

WILLIAM DOUGLAS CHRISMON AND WIFE, EVELYN B. CHRISMON v. GUILFORD COUNTY; FORREST E. CAMPBELL, PAUL W. CLAPP, OGDEN DEAL, DOROTHY KEARNS, FRED L. PREYER, MEMBERS OF THE BOARD OF COMMISSIONERS OF GUILFORD COUNTY; AND BRUCE CLAPP

No. 232PA87

(Filed 28 July 1988)

1. **Counties § 5; Municipal Corporations § 30.6— conditional use zoning—approved practice**

The practice of conditional use zoning is an approved practice in North Carolina so long as the action of the local zoning authority in accomplishing the zoning is reasonable, neither arbitrary nor unduly discriminatory, and in the public interest.

2. **Counties § 5.1; Municipal Corporations § 30.6— conditional use rezoning—availability for all uses not required**

It is not necessary that property rezoned to a conditional use district be available for all of the uses allowed under the corresponding general use district.

3. **Municipal Corporations § 30.9— spot zoning—questions presented**

In any spot zoning case in the North Carolina courts, two questions must be addressed by the finder of facts: (1) did the zoning activity in the case constitute spot zoning as our courts have defined that term; and (2) if so, did the zoning authority make a clear showing of a reasonable basis for the zoning.

4. **Municipal Corporations § 30.9— spot zoning—reasonable basis—factors considered**

Among the factors relevant to a judicial determination as to the existence of a sufficient reasonable basis for spot zoning are the size of the tract in question; the compatibility of the disputed action with an existing comprehensive zoning plan; the benefits and detriments resulting from the zoning for the owner of the newly zoned property, his neighbors, and the surrounding community; and the relationship between the uses envisioned under the new zoning and the uses currently present in adjacent tracts.

5. **Municipal Corporations § 30.9— conditional use rezoning—reasonable basis—legal spot zoning**

The rezoning of two tracts consisting of 8.24 acres from A-1 Agricultural to Conditional Use Industrial, which permitted the owner to store and sell agricultural chemicals on the tracts, constituted legal spot zoning where there was a clear showing of a reasonable basis for the spot zoning in that substantial benefits were created for the surrounding community by the rezoning and there was a close relationship between the proposed uses of the rezoned property and the uses already present in the surrounding A-1 Agricultural areas.

6. **Municipal Corporations § 30.9— differences between conditional use and illegal contract zoning**

The principal differences between valid conditional use zoning and illegal contract zoning are: (1) valid conditional use zoning features merely a unilateral promise from the landowner to the local zoning authority as to the landowner's use of the land in question, while illegal contract zoning anticipates a bilateral contract in which the landowner and the zoning authority make reciprocal promises, and (2) in conditional use zoning, the local zoning authority maintains its independent decision-making authority, while in contract zoning, it abandons that authority by binding itself contractually with the landowner seeking a zoning amendment.

7. **Counties § 5.1; Municipal Corporations § 30.9— rezoning to conditional use district—no illegal contract zoning**

The rezoning by a board of county commissioners of two tracts consisting of 8.24 acres from A-1 Agricultural to Conditional Use Industrial did not constitute illegal contract zoning, but was valid conditional use zoning, where the record reveals only a unilateral promise by the owner in his conditional use permit application concerning his proposed use of the tracts, and where the record also shows that the board did not abandon its role as an independent decision-maker but made its final decision only after a thorough consideration of the merits of the owner's applications for rezoning and for a conditional use permit as well as the various alternatives to granting those applications.

Justice MITCHELL dissenting.

Justice WEBB joins in this dissenting opinion.

Justice WEBB dissenting.

Justice MITCHELL joins in this dissenting opinion.

ON defendants' petition for discretionary review pursuant to N.C.G.S. § 7A-31 (1986) of a decision of the Court of Appeals, 85 N.C. App. 211, 354 S.E. 2d 309 (1987), reversing the order entered by *Seay, J.*, at the 24 February 1986 Civil Session of Superior Court, GUILFORD County (entered out of term and out of county by consent of the parties on 14 April 1986), denying plaintiffs' action for declaratory judgment. Heard in the Supreme Court 10 December 1987.

Gunn & Messick, by Paul S. Messick, Jr., for plaintiff-appellees.

Samuel Moore for defendant-appellants Guilford County and Members of the Board of Commissioners of Guilford County; and Ralph A. Walker and Osteen, Adams & Tilley, by William L. Osteen, for defendant-appellant Bruce Clapp.

Thomas A. McCormick, Jr., City Attorney, City of Raleigh, by Ira J. Botvinick, Deputy City Attorney; and Jesse L. Warren, City Attorney, City of Greensboro, and Henry W. Underhill, Jr., City Attorney, City of Charlotte, amici curiae.

MEYER, Justice.

This was an action by plaintiffs for a declaratory judgment with regard to an amendment to the Guilford County, North Carolina, zoning ordinance. Specifically, plaintiffs sought a judgment declaring that the amendment to the ordinance adopted 20 December 1982 rezoning defendant Bruce Clapp's 8.57 acres of land was unlawful and therefore void. The principal issue presented on this appeal is whether the trial court committed reversible error in affirming the validity of the rezoning in question. The Court of Appeals reversed, holding, first, that the rezoning in question constituted illegal "spot zoning" and, second, that it also constituted illegal "contract zoning." We hold that the Court of Appeals erred in both of these conclusions, and accordingly, we reverse.

The facts underlying the case are undisputed. Defendant Bruce Clapp (who is not related to defendant Paul Clapp, a member of the Guilford County Board of Commissioners) had been operating a business on a 3.18-acre tract of property adjacent to his residence in Rock Creek Township, Guilford County, since 1948. Mr. Clapp's business consisted, first, of buying, drying, storing, and selling grain and, second, of selling and distributing lime, fertilizer, pesticides, and other agricultural chemicals. The distinction between these two principal elements of Mr. Clapp's business is important to the disposition of this case.

In 1964, Guilford County adopted a comprehensive zoning ordinance. The ordinance zoned Mr. Clapp's 3.18-acre tract, as well as an extensive area surrounding his tract, as "A-1 Agricultural" (hereinafter "A-1"). Under this particular zoning classification, one

element of the business—namely, the grain drying and storing operation—constituted a permitted use. Significantly, however, the sale and distribution of the lime, fertilizer, pesticides, and other agricultural chemicals were not uses permitted by the A-1 classification. However, because this latter activity pre-existed the ordinance, Mr. Clapp was allowed to continue to sell agricultural chemicals on the 3.18-acre tract adjacent to his own home. Under the ordinance, though such sales constituted a nonconforming use, the sales could be carried on, so long as they were not expanded.

In 1969, plaintiffs William and Evelyn Chrismon bought a tract of land from Mr. Clapp and built a home there. Plaintiffs' lot is located at the south side of the intersection of North Carolina Highway 61 and Gun Shop Road. Highway 61 runs north and south, while Gun Shop Road, a small, unpaved road, begins at Highway 61 and runs east. Mr. Clapp's residence is located on the north side of the intersection, directly across Gun Shop Road from plaintiffs' residence. Adjacent to plaintiffs' lot is an additional 5.06-acre tract, also owned by Mr. Clapp. Prior to 1980, that tract had been used by its owner for the growing of tobacco.

Beginning in 1980, however, Mr. Clapp moved some portion of his business operation from the 3.18-acre tract north of Gun Shop Road to the 5.06-acre tract south of Gun Shop Road, directly adjacent to plaintiffs' lot. Subsequently, Mr. Clapp constructed some new buildings on this larger tract, erected several grain bins, and generally enlarged his operation. Concerned by the increased noise, dust, and traffic caused by Mr. Clapp's expansion, plaintiffs filed a complaint with the Guilford County Inspections Department. The Inspections Department subsequently notified Mr. Clapp, by letter dated 22 July 1982, that the expansion of the *agricultural chemical operation* to the larger tract adjacent to plaintiffs' lot constituted an impermissible expansion of a nonconforming use. The same letter informed Mr. Clapp further that, though his activity was impermissible under the ordinance, should he so desire, he could request a rezoning of the property.

Shortly thereafter, Mr. Clapp applied to have both of the tracts in question, the 3.18-acre tract north of Gun Shop Road and the 5.06-acre tract south of Gun Shop Road, rezoned from A-1 to

"Conditional Use Industrial District" (hereinafter CU-M-2).[1] He also applied for a conditional use permit, specifying in the application that he would use the property as it was then being used and listing those improvements he would like to make in the next five years. Under the CU-M-2 classification, Clapp's agricultural chemical operation would become a permitted use upon the issuance of the conditional use permit. The Guilford County Planning Board met on 8 September 1982 and voted to approve the recommendation of the Planning Division that the property be rezoned consistent with Mr. Clapp's request.

On 20 December 1982, pursuant to appropriate notice, the Guilford County Board of Commissioners held a public hearing concerning Mr. Clapp's rezoning application. Members of the Board heard statements from Mr. Clapp, from plaintiffs, and, also, from plaintiffs' attorney. Several additional persons had previously spoken in favor of Mr. Clapp's rezoning request at earlier Board meetings, stating that Mr. Clapp's business provided a service to the farmers in the immediate vicinity. The Board had also been presented with a petition signed by eighty-eight persons favoring the rezoning. Having considered the matter, the Board members voted to rezone the tracts in question from A-1 to CU-M-2, and as a part of the same resolution, they also voted to approve the conditional use permit application.

Pursuant to this decision by the County to rezone the property in question, plaintiffs brought this action seeking to have both the zoning amendment and the conditional use permit declared invalid. After a trial without a jury, the trial court found, among other things, that the sale and distribution of the agricultural chemicals were uses compatible with the agricultural needs of the surrounding area. The trial court concluded further that the rezoning was neither "spot zoning" nor "contract zoning" and also that the County had not acted arbitrarily in making its decision. The trial court made neither findings of fact nor conclusions of law with regard to the issuance of the conditional use permit.

1. The 3.18-acre tract and the 5.06-acre tract, taken together, do not correspond precisely to the 8.57-acre total indicated in Mr. Clapp's rezoning request. The record reveals that the additional .33 acre in question corresponds to land adjacent to one of the tracts for which Mr. Clapp had an option to buy. We make this explanation for the sake of clarity only; it is not relevant to the disposition of the case.

As indicated above, the Court of Appeals reversed the decision of the trial court. It held, first, that the rezoning at issue in this case—namely, the rezoning of Mr. Clapp's 8.57 acres from A-1 to CU-M-2—constituted an illegal form of "spot zoning" and was therefore void. It so held for three principal reasons: (1) the rezoning was not called for by any change of conditions on the land; (2) the rezoning was not called for by the character of the district and the particular characteristics of the area being rezoned; and (3) the rezoning was not called for by the classification and use of nearby land. The Court of Appeals further held that the mere fact that the uses actually authorized were not, in and of themselves, incompatible with the general area was not sufficient to support the trial court's finding of no illegal spot zoning on these facts.

The Court of Appeals held, second, that the rezoning in question also constituted illegal "contract zoning" and was therefore also void for that alternative reason. Here, stated the Court of Appeals, the rezoning was accomplished upon the assurance that Mr. Clapp would submit an application for a conditional use permit specifying that he would use the property only in a certain manner. The Court of Appeals concluded that, in essence, the rezoning here was accomplished through a bargain between the applicant and the Board rather than through a proper and valid exercise of Guilford County's legislative discretion. According to the Court of Appeals, this activity constituted illegal "contract zoning" and was therefore void.

Pursuant to N.C.G.S. § 7A-31, and because this Court was convinced that this cause involves legal principles of major significance to the jurisprudence of this State, we allowed defendants' petition for discretionary review of the Court of Appeals' decision. The questions plainly before us are these: first, did the rezoning of defendant Clapp's tract from A-1 to CU-M-2 by the Guilford County Board of Commissioners constitute illegal spot zoning; and second, did the same rezoning constitute illegal contract zoning. The Court of Appeals answered each question in the affirmative. We conclude that the correct answer to both questions is "no."

I.

[1] As we stated above, in its decision in this case, the Court of Appeals voided the rezoning of the land in question on the dual

grounds that the rezoning constituted both illegal spot zoning and illegal contract zoning. Later in this opinion, we will address, and reject, the analysis employed by the Court of Appeals in reaching its alternative specific conclusions as to the illegality of the rezoning here. As an initial matter, however, because this Court has not previously been called upon to address the legal concept of conditional use zoning, and because the decision of the Court of Appeals virtually outlaws that practice, we pause now to address its place in the jurisprudence of this state. Specifically, we hold today that the practice of conditional use zoning is an approved practice in North Carolina, so long as the action of the local zoning authority in accomplishing the zoning is reasonable, neither arbitrary nor unduly discriminatory, and in the public interest.

We note first that, as a general matter, the power to zone real property is vested in the General Assembly by article II, section 1, of the North Carolina Constitution. *Keiger v. Winston-Salem Board of Adjustment*, 278 N.C. 17, 178 S.E. 2d 616 (1971). This zoning power may be and has been conferred by the General Assembly upon various local governments by legislative enactment. *See Jackson v. Guilford County Bd. of Adjustment*, 275 N.C. 155, 166 S.E. 2d 78 (1969). This Court has held that zoning power, irrespective of who wields it, is subject to both a standard of reasonableness and a constitutional limitation on arbitrary and unduly discriminatory interference with the rights of North Carolina property owners. *In re Ellis*, 277 N.C. 419, 178 S.E. 2d 77 (1970).

Zoning, as a definitional matter, is the regulation by a local governmental entity of the use of land within a given community, and of the buildings and structures which may be located thereon, in accordance with a general plan. 1 A. Rathkopf & D. Rathkopf, *The Law of Zoning and Planning* § 1.01 (4th ed. 1987). Most zoning ordinances—including that under which Guilford County acted in this case—undertake to provide some area, usually in the form of districts, for all lawful uses within a given area while seeking simultaneously to separate uses which are incompatible. 2 R. Anderson, *American Law of Zoning* § 9.16 (3d ed. 1986). Comprehensive zoning systems, though effective in preserving the character of ongoing uses, are often criticized for not allowing for the degree of flexibility needed to allow local officials to respond appropriately to "constantly shifting conditions and public needs."

Brough, *Flexibility Without Arbitrariness In The Zoning System: Observations On North Carolina Special Exception And Zoning Amendment Cases*, 53 N.C.L. Rev. 925, 925 (1975).

The practice of conditional use zoning—like that used by Guilford County in this case—is one of several vehicles by which greater zoning flexibility can be and has been acquired by zoning authorities. Conditional use zoning anticipates that when the rezoning of certain property within the general zoning framework described above would constitute an unacceptably drastic change, such a rezoning could still be accomplished through the addition of certain conditions or use limitations. Specifically, conditional use zoning occurs when a governmental body, without committing its own authority, secures a given property owner's agreement to limit the use of his property to a particular use or to subject his tract to certain restrictions as a precondition to any rezoning. D. Hagman & J. Juergensmeyer, *Urban Planning and Land Development Control Law* § 5.5 (2d ed. 1986); Shapiro, *The Case For Conditional Zoning*, 41 Temp. L.Q. 267 (1968).

It is indeed generally agreed among commentators that, because it permits a given local authority greater flexibility in balancing conflicting demands, the practice of conditional use zoning is exceedingly valuable. 1 A. Rathkopf & D. Rathkopf, *The Law of Zoning and Planning* § 27.05 (4th ed. 1987); 2 R. Anderson, *American Law of Zoning* §§ 9.17, 9.20 (3d ed. 1986). One of the early leading scholars in the area of conditional use zoning, Ronald M. Shapiro, addressed the importance of this increased flexibility in a 1968 law review article as follows:

> Conditional zoning is an outgrowth of the need for compromise between the interests of the developer seeking appropriate zoning changes for his tract, and the neighboring landowner whose property interests would suffer if the most intensive use permitted by the new classification were instituted. In an attempt to reconcile these conflicting pressures, the municipality will authorize the proposed change but minimize its adverse effects by imposing conditions.

Shapiro, *The Case For Conditional Zoning*, 41 Temp. L.Q. 267, 280 (1968).

Steven E. Davenport and Philip P. Green, Jr., of our own Institute of Government, in the context of the approach employed by zoning authorities in Greensboro, North Carolina, echoed Shapiro's observations concerning the benefits of conditional use zoning:

> The City of Greensboro's conditional-use approach to rezoning arose from the theory that of the hundreds of pieces of property in the city, many—because of particular physical or locational attributes—did not fit well into any of the classes of general zoning districts available at that time. For example, perhaps a lot zoned "residential" adjoining a "commercial area" should not reasonably be "residential," but rezoning it commercial (with all legal uses permitted) would only aggravate the land-use problem. But if the rezoning was accompanied by certain conditions or use limitations, or both, a rezoning could perhaps not only offer a reasonable use for the property but also solve a land-use relationship problem.

Davenport & Green, *Special Use and Conditional Use Districts: A Way to Impose More Specific Zoning Controls* at 13 (Institute of Government, The University of North Carolina at Chapel Hill, 1980).

Without pausing at this juncture specifically to address the propriety of the zoning action in this case, we note that the action here is consistent with the observations of Shapiro and of Davenport and Green. Before the now-disputed zoning occurred, the tracts of land in question, and all of the surrounding land for some miles, were classified under the comprehensive zoning plan as A-1. While the A-1 classification allowed Mr. Clapp to engage in the storage and sale of grain, it did not allow him to store and sell agricultural chemicals, which was his desire. While the rezoning of the two tracts to M-2 Industrial would clearly allow the desired agricultural chemical operation, it would also clearly allow for activities substantially inconsistent with the surrounding A-1 areas.[2] Herein lies the usefulness of conditional use zoning. By rezoning these tracts CU-M-2, the desired activity becomes a con-

2. For example, permitted uses in a district zoned under the M-2 Industrial classification would include, among other things, manufacturing facilities of virtually any kind, fuel oil dealerships, waste recycling facilities, and public utility storage depots.

forming use, but by virtue of the attendant conditions, uses undesirable under these circumstances can be limited or avoided altogether.

Notwithstanding the manifest benefits of conditional use zoning, there has, over the course of time, been some divergence of opinion amongst courts and commentators alike as to the legal status of the practice. In fact, the initial judicial response to conditional use zoning was to condemn the practice as invalid per se. *See, e.g., Hartnett v. Austin*, 93 So. 2d 86 (Fla. 1956); *V. F. Zahodiakin Eng'r Corp. v. Zoning Board of Adjustment*, 8 N.J. 386, 86 A. 2d 127 (1952). Those courts falling into this category have objected to conditional use zoning on the several grounds that it constitutes illegal spot zoning; that it is not, on the specific facts, authorized by the state's zoning enabling legislation; and that it results in an improper and illegal abandonment of the local government's police powers. 2 A. Rathkopf & D. Rathkopf, *The Law of Zoning and Planning* § 27.05 (4th ed. 1987).

The benefits of the additional zoning and planning flexibility inherent in conditional use zoning have apparently not escaped the attention of jurisdictions which have addressed the issue more recently. Many jurisdictions now approve of the practice of conditional use zoning, so long as the action of the local zoning authority in accomplishing the zoning is reasonable, neither arbitrary nor unduly discriminatory, and in the public interest.[3]

3. *See, e.g., Haas v. City of Mobile*, 289 Ala. 16, 265 So. 2d 564 (1972); *Transamerica Title Insurance Co. v. City of Tucson*, 23 Ariz. App. 385, 533 P. 2d 693 (1975); *J-Marion Co. v. County of Sacramento*, 76 Cal. App. 3d 517, 142 Cal. Rptr. 723 (1977); *City of Colorado Springs v. Smartt*, 620 P. 2d 1060 (Colo. 1980); *Warshaw v. City of Atlanta*, 250 Ga. 535, 299 S.E. 2d 552 (1983); *Goffinet v. County of Christian*, 65 Ill. 2d 40, 357 N.E. 2d 442 (1976); *Sylvania Electric Products, Inc. v. Newton*, 344 Mass. 428, 183 N.E. 2d 118 (1962); *Housing & Redevelopment Authority v. Jorgensen*, 328 N.W. 2d 740 (Minn. 1983); *Bucholz v. City of Omaha*, 174 Neb. 862, 120 N.W. 2d 270 (1963); *Collard v. Vil of Flower Hill*, 52 N.Y. 2d 594, 421 N.E. 2d 818, 439 N.Y.S. 2d 326 (1981); *Sweetman v. Town of Cumberland*, 117 R.I. 134, 364 A. 2d 1277 (1976); *City of Redmond v. Kezner*, 10 Wash. App. 332, 517 P. 2d 625 (1973); *Howard v. Elm Grove*, 80 Wis. 2d 33, 257 N.W. 2d 850 (1977); 1982 Me. Laws ch. 598 (statute permits a municipality to include in its comprehensive plan provisions for conditional and contract rezoning); Va. Code § 15.1-491 (1988) (statute permits a municipality to impose reasonable conditions "as part of an amendment to the zoning map . . . in addition to the regulations provided for the zoning district by the ordinance, when such conditions have been proffered in writing, in advance of the public hearing before the governing body . . . by the owner of the [subject] property").

These jurisdictions, which comprise a growing trend, have concluded, among other things, that zoning legislation provides ample authority for the practice; that the use under the practice of carefully tailored restraints advanced, rather than injured, the interests of adjacent landowners; and that the practice is an appropriate means of harmonizing private interests in land and thus of benefitting the public interest. Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C.L. Rev. 957, 983-84 (1987).

Today, we join this growing trend of jurisdictions in recognizing the validity of properly employed conditional use zoning. We note that, though not specifically in effect when this case initially arose, our General Statutes now explicitly enable our local jurisdictions to employ conditional use zoning. The relevant statute provides, in pertinent part, as follows:

> A *county* may divide its territorial jurisdiction into districts of any number, shape, and area that it may consider best suited to carry out the purposes of this Part. Within these districts a county may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land. Such districts may include, but shall not be limited to, general use districts, in which a variety of uses are permissible in accordance with general standards; overlay districts, in which additional requirements are imposed on certain properties within one or more underlying general or special use districts; and *special use districts or conditional use districts*, in which uses are permitted only upon the issuance of a special use permit or a conditional use permit.

N.C.G.S. § 153A-342 (1987) (emphasis added). *See also* N.C.G.S. § 160A-382 (1987) (providing identical authority to cities and towns).

Although not mentioning conditional use zoning by name, the predecessor statute to that excerpted above—specifically, N.C.G.S. § 153A-340 (1981)—authorized local governments, among other things, to regulate and *restrict* the use of land and to issue conditional use permits. It was on the basis of this predecessor statute that Guilford County enacted the zoning ordinance pur-

suant to which the conditional use zoning at issue in this case occurred. The absence of any explicit mention of the practice of conditional use zoning in the predecessor statute is, in and of itself, not an indication of a lack of authority in local jurisdictions to engage in the practice. *See Collard v. Incorporated Village*, 52 N.Y. 2d 594, 421 N.E. 2d 818, 439 N.Y.S. 2d 326 (1981). With regard to the County's authority to so act, two leading commentators stated as follows:

> The authors believe that the general zoning enabling act contains ample authority to support this type of zoning system. It was first put into effect in the city of Greensboro and subsequently in Guilford County and Statesville with no further statutory support.

Davenport & Green, *Special Use and Conditional Use Districts: A Way to Impose More Specific Zoning Controls* at 9 (Institute of Government, The University of North Carolina at Chapel Hill, 1980).

Consistent with the above, this Court holds today that conditional use zoning, when carried out properly, is an approved practice in North Carolina. Like the jurisdictions we expressly join today, we are persuaded that the practice, when properly implemented, will add a valuable and desirable flexibility to the planning efforts of local authorities throughout our state. In our view, the "all or nothing" approach of traditional zoning techniques is insufficient in today's world of rapid industrial expansion and pressing urban and rural social and economic problems. *See Bartram v. Zoning Commission*, 136 Conn. 89, 68 A. 2d 308 (1949); Shapiro, *The Case For Conditional Zoning*, 41 Temp. L.Q. 267 (1968).

Having so stated, we hasten to add that, just as this type of zoning can provide much-needed and valuable flexibility to the planning efforts of local zoning authorities, it could also be as easily abused. We recognize that critics of the practice are to a limited extent justified in their concern that the unrestricted use of conditional use zoning could lead to private or public abuse of governmental power. We have said, however, that, in order to be legal and proper, conditional use zoning, like any type of zoning, must be reasonable, neither arbitrary nor unduly discriminatory, and in the public interest. *In re Ellis*, 277 N.C. 419, 178 S.E. 2d 77.

It goes without saying that it also cannot constitute illegal spot zoning or illegal contract zoning as those two concepts are developed in the pages which follow. The benefits of the flexibility of conditional use zoning can be fairly achieved only when these limiting standards are consistently and carefully applied.

Before moving to the discussion of spot zoning and contract zoning, we pause a final time to address, and to expressly reject, one conclusion made by the Court of Appeals with regard to the concept of conditional use zoning. Specifically, in its opinion below in this case, the Court of Appeals stated as follows:

> Rezoning, however, may be done only if the location and surrounding circumstances are such that the property should be made available for *all* uses permitted by the zoning classification to which the property is rezoned. *Allred v. City of Raleigh*, 277 N.C. 530, 178 S.E. 2d 432 (1971). The fact that the property is rezoned to a conditional use district does not change that rule. Undoubtedly, the establishment of conditional use districts is a means to achieve greater flexibility in zoning. By definition, the county's zoning ordinance deems a conditional use district to be inappropriate for all the uses permitted in its corresponding district absent the imposition of "special conditions." It is the imposition of special conditions, through the issuance of the conditional use permit, which will make the use appropriate for the affected area. *Nevertheless, in order to properly rezone the area to a conditional use district, the zoning authority initially must determine that the property, under the new zoning classification, is suitable for all the uses permitted in its corresponding district.*

Chrismon v. Guilford County, 85 N.C. App. 211, 218, 354 S.E. 2d 309, 314 (emphasis added).

Translating the above-excerpted conclusion of the Court of Appeals to the facts of the case before us makes clear its import for the law of conditional use zoning. Specifically, the implication of the Court of Appeals' conclusion is that, in order for the rezoning of this property to CU-M-2 to be legal and proper, it must not only be true that the limited uses prescribed by the conditional use permit be suitable uses, but it must also be true that *any* use permitted under the general M-2 classification be a suitable use

on the facts of this case. In the opinion of this Court, this is not and should not be the law in this State.

First, the Court of Appeals improperly relied upon our decision in *Allred*, a general and not a conditional use zoning case, for support of its conclusion. In *Allred*, the facts revealed that, pursuant to a comprehensive zoning ordinance, the City of Raleigh, North Carolina, was divided into thirteen classes of districts or zones, inclusive of five residential districts or zones designated R-4, R-6, R-10, R-20, and R-30. *Allred v. City of Raleigh*, 277 N.C. 530, 178 S.E. 2d 432 (1971). The complained-of rezoning was that from one general district or zone, R-4, to another general district or zone, R-10. *Id.* This Court held that the property in question could be rezoned "only if and when its location and the surrounding circumstances are such that the property should be made available for all uses permitted in an R-10 district." *Id.* at 545, 178 S.E. 2d at 440-41. While this is an accurate statement of North Carolina law with regard to rezoning from one general district to another general district, it is not authority in cases such as this involving rezoning from a general district to a conditional use district.

Second, the Court of Appeals' extension of the *Allred* "available for all uses" restriction to rezonings like that in the case at bar is completely at odds with the concept of conditional use zoning and all of its attendant benefits. As discussed above, the practice of conditional use zoning is a vehicle by which local zoning authorities can acquire greater flexibility in land use planning. Turning to the facts at hand for purposes of illustration, rezoning Mr. Clapp's two tracts to a conditional use zone—specifically, CU-M-2—allows a desired use—here, the storage and sale of certain agricultural chemicals—which is not drastically at odds with other uses in the predecessor zone. However, such rezoning would not allow uses perhaps allowable under the general M-2 Industrial zone which are more clearly inconsistent with ongoing uses under the predecessor zone.

Under the reasoning employed by the Court of Appeals, in order for the desired rezoning here to CU-M-2 to be legal and proper, Mr. Clapp's two tracts of land must be suitable for all uses possible, not pursuant to the conditions set out in the conditional use permit, but under the general M-2 Industrial zone. As

the City of Greensboro and the City of Charlotte correctly point out in their joint *amicus curiae* brief, if a given tract of land is suited to all uses allowed in the corresponding general use district—here, M-2 Industrial—the purposes served, and the benefits provided by, conditional use districts would be negated entirely.

[2] Accordingly, we hold today that, contrary to the conclusion reached by the Court of Appeals below, it is not necessary that property rezoned to a conditional use district be available for all of the uses allowed under the corresponding general use district. In so holding, we join several other jurisdictions which have reached the same conclusion. *See Bucholz v. City of Omaha*, 174 Neb. 862, 120 N.W. 2d 270 (1963); *Zupancic v. Schimenz*, 46 Wis. 2d 22, 174 N.W. 2d 533 (1970).

II.

We turn now to the question of spot zoning. As we noted above, in its opinion below, the Court of Appeals held that the rezoning at issue here—namely, the rezoning of Mr. Clapp's two tracts from A-1 to CU-M-2—constituted an illegal form of "spot zoning" and was therefore void. In arriving at its holding, the Court of Appeals concluded that Guilford County had "failed to show a reasonable basis" for the rezoning in question and cited three principal reasons for its conclusion: (1) the rezoning was not called for by any change of conditions on the land; (2) the rezoning was not called for by the character of the district and the particular characteristics of the area being rezoned; and (3) the rezoning was not called for by the classification and use of nearby land.

While this Court agrees with some portions of the analysis employed by the Court of Appeals, we must disagree with that court's final conclusion. In our firmly held view, the rezoning accomplished in this case, while admittedly constituting a form of spot zoning, constituted a legal, and *not* an illegal form of spot zoning. Notwithstanding the Court of Appeals' conclusion to the contrary, we find that, on the facts of this case, the county did show a reasonable basis for the rezoning at issue. Moreover, while this is a case of first impression in that it involves the practice of conditional use zoning, we find our result to be consistent with related zoning cases from other jurisdictions. Accordingly, the Court of Appeals is reversed on this question.

We note as an initial matter that there is substantial disagreement amongst jurisdictions across the nation as to both the proper definition of and the legal significance of the term "spot zoning." Jurisdictions have essentially divided into two distinct camps. One group, the majority of jurisdictions, regards the term "spot zoning" as a legal term of art referring to a practice which is per se invalid. *See* 2 A. Rathkopf & D. Rathkopf, *The Law of Zoning and Planning* § 28.01 (4th ed. 1987); 1 R. Anderson, *American Law of Zoning* § 5.12 (3d ed. 1986); 2 E. Yokley, *Zoning Law and Practice* § 13-3 (4th ed. 1978). In such jurisdictions, a judicial determination that a given rezoning action constitutes spot zoning is, ipso facto, a determination that the rezoning action is void.

The position of this first group has been described by one commentator as follows:

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

2 E. Yokley, *Zoning Law and Practice* § 13-3 at 207 (4th ed. 1978) (emphasis added).

A somewhat smaller group of jurisdictions, including our own, has taken a different approach. In these jurisdictions, it has been stated that "spot zoning" is a descriptive term merely, rather than a legal term of art, and that spot zoning practices may be valid or invalid depending upon the facts of the specific case. *See* 2 E. Yokley, *Zoning Law and Practice* § 13-5 (4th ed. 1978); 2 A. Rathkopf & D. Rathkopf, *The Law of Zoning and Planning* § 28.01 n.1 (4th ed. 1987). *See also Tennison v. Shomette*, 38 Md. App. 1, 379 A. 2d 187 (1977); *Save Our Rural Environment v. Snohomish County*, 99 Wash. 2d 363, 662 P. 2d 816 (1983) (holding that the practice of spot zoning is not invalid per se). Unlike in the majority of jurisdictions, in these jurisdictions, a spot zoning case

poses, not merely the lone question of whether what occurred on the facts constituted spot zoning. It also poses the additional question of whether the zoning action, if spot zoning, was of the legal or illegal variety.

We are firmly amongst this latter group of jurisdictions which has held that spot zoning is not invalid per se. For example, in this Court's opinion in *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E. 2d 35 (1972), we defined "spot zoning" as follows:

> A zoning ordinance, or amendment, which singles out and reclassifies a relatively small tract owned by a single person and surrounded by a much larger area uniformly zoned, so as to impose upon the small tract greater restrictions than those imposed upon the larger area, or so as to relieve the small tract from restrictions to which the rest of the area is subjected, is called "spot zoning."

Id. at 549, 187 S.E. 2d at 45. However, having so defined the practice, we hastened to add that the practice is not invalid per se but, rather, that it is beyond the authority of the municipality or county and therefore void *only* "in the absence of a clear showing of a reasonable basis" therefor. *Id.*

[3] Accordingly, in this case, and indeed in any spot zoning case in North Carolina courts, two questions must be addressed by the finder of fact: (1) did the zoning activity in the case constitute spot zoning as our courts have defined that term; and (2) if so, did the zoning authority make a clear showing of a reasonable basis for the zoning. In the case at bar, since the action by the Board was so clearly spot zoning under the *Blades* definition, this two-part inquiry can quickly be narrowed to the lone question of whether there is a clear showing of a reasonable basis. As the Court of Appeals quite correctly stated in its opinion below in this case:

> The rezoning amendment here clearly constitutes spot zoning. The rezoned area was only 8.57 acres and was uniformly surrounded by property zoned A-1. *The remaining question then is whether there was a reasonable basis for the county's action in spot zoning the 8.57 acre tract.*

Chrismon v. Guilford County, 85 N.C. App. 211, 215, 354 S.E. 2d 309, 312 (emphasis added).

It is at this point, however, that we differ with the decision of the Court of Appeals. As we stated above, in its opinion, the Court of Appeals concluded, after considering several different factors, that the Board of County Commissioners had failed to clearly demonstrate a reasonable basis for its zoning action and, further, that the action was therefore void. With due respect, we find the analysis employed by the Court of Appeals to be flawed. In the view of this Court, the Board did in fact clearly show a reasonable basis for its rezoning of Mr. Clapp's two tracts from A-1 to CU-M-2. We are particularly persuaded, first, by the degree of public benefit created by the zoning action here and, second, by the similarity of the proposed use of the tracts under the new conditional use zone to the uses in the surrounding A-1 areas.

[4] At the outset, we note that a judicial determination as to the existence or nonexistence of a sufficient reasonable basis in the context of spot zoning is, and must be, the "product of a complex of factors." 1 R. Anderson, *American Law of Zoning* § 5.13 at 364 (3d ed. 1986). The possible "factors" are numerous and flexible, and they exist to provide guidelines for a judicial balancing of interests. 2 A. Rathkopf & D. Rathkopf, *The Law of Zoning and Planning* § 28.01 (4th ed. 1987). Among the factors relevant to this judicial balancing are the size of the tract in question; the compatibility of the disputed zoning action with an existing comprehensive zoning plan; the benefits and detriments resulting from the zoning action for the owner of the newly zoned property, his neighbors, and the surrounding community; and the relationship between the uses envisioned under the new zoning and the uses currently present in adjacent tracts. *See id.*; 1 R. Anderson, *American Law of Zoning* § 5.13 (3d ed. 1986). Once again, the criteria are flexible, and the specific analysis used depends on the facts and circumstances of a particular case. 2 A. Rathkopf & D. Rathkopf, *The Law of Planning and Zoning* § 28.01 (4th ed. 1987).

[5] Turning our attention to the case before us, we find the latter two of the above-mentioned factors to argue forcefully for the proposition that the rezoning activity here was supported by a reasonable basis. First, the relative benefits and detriments accruing to Mr. Clapp, Mr. Chrismon, and the surrounding area as a result of the rezoning are instructive. It has been stated that the true vice of illegal spot zoning is in its inevitable effect of granting a discriminatory benefit to one landowner and a correspond-

ing detriment to the neighbors or the community without adequate public advantage or justification. 2 E. Yokley, *Zoning Law and Practice* § 13-3 (4th ed. 1978); *see Smith v. Skagit County*, 75 Wash. 2d 715, 453 P. 2d 832 (1969). Accordingly, while spot zoning which creates a great benefit for the owner of the rezoned property with only an accompanying detriment and no accompanying benefit to the community or to the public interest may well be illegal, spot zoning which provides a service needed in the community in addition to benefitting the landowner may be proper. *See* 2 E. Yokley, *Zoning Law and Practice* § 13-3 (4th ed. 1978).

Courts from other jurisdictions have held, for example, that the mere fact that an area is rezoned at the request of a single owner and is of greater benefit to him than to others does not make out a case of illegal spot zoning *if there is a public need for it. See, e.g., Jaffe v. City of Davenport*, 179 N.W. 2d 554 (Iowa 1970); *Sweeney v. City of Dover*, 108 N.H. 307, 234 A. 2d 521 (1967). The Supreme Court of New Jersey long ago announced a standard for properly weighing the various benefits and detriments created by disputed zoning activity. In a statement with which this Court agrees, that court stated as follows:

> The standard is not the advantage or detriment to particular neighboring landowners, but rather the effect upon the entire community as a social, economic and political unit. *That which makes for the exclusive and preferential benefit of such particular landowner, with no relation to the community as a whole, is not a valid exercise of this sovereign power.*

Mansfield & Swett, Inc. v. West Orange, 120 N.J.L. 145, 150, 198 A. 225, 233 (1938) (emphasis added).

Turning to the facts of the case at bar, it is manifest that Mr. Clapp, the owner of the tracts rezoned in this case, has reaped a benefit by the Board's action. Specifically, by virtue of the Board's decision to rezone the tracts from A-1 to CU-M-2, Mr. Clapp will be able to carry on the otherwise illegal storage and sale of agricultural chemicals on both of his two tracts along Gun Shop Road in rural Guilford County. It is also beyond question that the plaintiffs in this case, the Chrismons, have simultaneously sustained a detriment. They, of course, would prefer that Mr. Clapp carry on his agricultural chemical operation somewhere other than next door to their home. Notwithstanding this, and

consistent with the authority excerpted above, it is important, in our view, to consider this in the added context of both the benefits of the rezoning for the surrounding community and for the public interest.

As the Court of Appeals quite correctly conceded in its opinion below, "[t]he evidence clearly shows that Mr. Clapp's operation is beneficial to area farmers." *Chrismon v. Guilford County*, 85 N.C. App. 211, 218, 354 S.E. 2d 309, 313-14. The record reveals that members of the farming community surrounding the disputed land spoke in favor of the rezoning action during a meeting of the Guilford County Board of Commissioners prior to the ultimate meeting of 20 December 1982. Moreover, the record also reveals that, at one of the Board's meetings concerning the proposed rezoning, the Board was presented with a petition signed by some eighty-eight area residents favoring the action. While this Court understands that it was the Chrismons alone who lived next door to the operation, we do note that it was the Chrismons, *and no one else*, who spoke up against the rezoning.

In addition to this record evidence of substantial community support for Mr. Clapp's proposed use, there is additional and more objective evidence that the operation constitutes a use valuable to the surrounding community. The area in the vicinity of Mr. Clapp's operation is zoned for some miles as exclusively A-1 and is used by many for farming activities. Quite independent of the indications from members of the community that they have a subjective need for Mr. Clapp's services, it cannot be gainsaid that services of this type—namely, the storage and sale of pesticides, lime, and fertilizer—are valuable in a farming community such as that here. It has been held elsewhere that community-wide need for commercial or industrial facilities usually takes precedence over the objections of several adjacent property owners. *See Citizens Ass'n of Georgetown, Inc. v. D.C. Zoning Comm'n*, 402 A. 2d 36 (D.C. App. 1979). We believe that to be the case here.

A second factor that we find important in the determination of a reasonable basis for the spot zoning here is the similarity between the proposed use of the tracts under the new conditional use zone and the uses already present in surrounding areas. In its opinion in this case, the Court of Appeals stated as follows:

> The only finding of fact which would arguably allow the trial court to conclude that the rezoning was supported by a reasonable basis is that *the uses actually authorized were not incompatible with the general area. . . .* We cannot agree.

Chrismon v. Guilford County, 85 N.C. App. 211, 218, 354 S.E. 2d 309, 313-14 (emphasis added). We disagree strongly with the Court of Appeals on this point. In our view, even in the wake of the rezoning of Mr. Clapp's tracts to CU-M-2, the uses present in the rezoned area and the surrounding A-1 area will remain, by virtue of the restrictions inherent in conditional use zoning, quite similar. At the very least, the differences in the uses will certainly not be vast, as is often the situation in a case of illegal spot zoning.

The compatibility of the uses envisioned in the rezoned tract with the uses already present in surrounding areas is considered an important factor in determining the validity of a spot zoning action. 2 A. Rathkopf & D. Rathkopf, *The Law of Zoning and Planning* § 28.04 (4th ed. 1987); 1 R. Anderson, *American Law of Zoning* § 5.16 (3d ed. 1986). One commentator addressed this factor as follows:

> In determining whether a zoning amendment constitutes spot zoning, the courts will consider the character of the area which surrounds the parcel reclassified by the amendment. *Most likely to be found invalid is an amendment which reclassifies land in a manner inconsistent with the surrounding neighborhood.*

1 R. Anderson, *American Law of Zoning* § 5.16 at 383 (3d ed. 1986) (emphasis added). One court has described the evil to be avoided as "an attempt to *wrench* a single small lot from its environment and give it a new rating *which disturbs the tenor of the neighborhood.*" *Magnin v. Zoning Commission*, 145 Conn. 26, 28, 138 A. 2d 522, 523 (1958) (emphasis added). We see no such disturbance on the facts before us.

While significant disturbances such as the rezoning of a parcel in an old and well-established residential district to a commercial or industrial district would clearly be objectionable, *see, e.g., Mraz v. County Comm'rs of Cecil County*, 291 Md. 81, 433 A. 2d 771 (1981), this is clearly not such a case. We note first that, in

actuality, the rezoning of the tracts in question from A-1 to CU-M-2, with all of the attendant restrictions and conditions, really represents very little change. The A-1 classification, as we stated earlier in our review of the facts of this case, allows all of Mr. Clapp's current operation except for the storage and sale of *agricultural chemicals*. The most noticeable activity, and the activity we suspect the plaintiffs would most like to be rid of—namely, the storage and sale of grain—is a conforming use under the A-1 classification and can legally continue irrespective of any zoning change. In addition, the conditions accompanying the disputed rezoning in the form of the conditional use permit essentially restrict Mr. Clapp to the very activities in which he is currently engaging—the storage and sale of agricultural chemicals—and nothing more.

Second, this is simply not a situation like that alluded to above in which a radically different land use, by virtue of a zoning action, appears in the midst of a uniform and drastically distinct area. No parcel has been "wrenched" out of the Guilford County landscape and rezoned in a manner that "disturbs the tenor of the neighborhood." As we have noted on several occasions, the area surrounding the tracts in question is uniformly zoned as A-1 agricultural. The A-1 district, a general use district in the Guilford County comprehensive zoning scheme, provides for a wide variety of uses. Conforming uses under the A-1 district include such disparate uses as single family dwellings, sawmills, fish or fowl hatcheries, farms, hospitals, and grain mills like the one Mr. Clapp was in fact operating here. In our view, the use of the newly rezoned tracts, pursuant to a CU-M-2 assignment, to store and sell agricultural chemicals is simply not the sort of drastic change from possible surrounding uses which constitutes illegal spot zoning.

Our research has revealed a case from another jurisdiction, *Earle v. McCarthy*, 28 Or. App. 539, 560 P. 2d 665 (1977), which is strikingly similar on the facts to that before us today. While the court was not specifically called upon there to address a spot zoning challenge, it upheld the issuance of a conditional use permit.

In *Earle*, the Marion County Board of Commissioners granted defendant a conditional use permit for the construction of a hop warehouse. The warehouse was to store a rather large volume of

crops from many local hop growers and was, in addition, to store and sell string and burlap used in hop production. The proposed site of the warehouse was in an area of land designated pursuant to the local zoning ordinance as an EFU (Exclusive Farm Use) zone, the purpose of which was as follows:

> "The purpose and intent of the Exclusive Farm Use zone is to provide areas for the continued practice of agriculture and permit the establishment of *only those new uses which are compatible to agricultural activities.*"

Earle v. McCarthy, 28 Or. App. 539, 542, 560 P. 2d 665, 666 (quoting local ordinance) (emphasis added).

Owners of land near the proposed site of the warehouse challenged the action of the local board. In the view of the court, the warehouse constituted, pursuant to the relevant ordinance, a commercial activity in conjunction with farm use and was therefore a proper use even within an exclusive farm use zone. In our opinion, the parallels between the Oregon case and that before us are striking. The relationship between the hop warehouse and the surrounding EFU zone in the Oregon case, in our view, mirrors the relationship between Mr. Clapp's agricultural chemical operation and the adjacent A-1 district in this case. Here, as there, the local authority's activity was proper.

As we noted earlier in this section, cases involving a challenge to a rezoning action on the basis of possible illegal spot zoning are very fact specific; their resolution turns very heavily on the particular facts and circumstances of the case. This spot zoning case, in which the disputed action changed a general district zone to a *conditional use zone*, is, for that reason, a case of first impression. While this Court has addressed the issue of spot zoning in North Carolina cases involving rezoning from one general district to another, the facts of these cases are not analogous to this case and are therefore not helpful.

In sum then, while we agree with the Court of Appeals that the rezoning of Mr. Clapp's two tracts constituted a form of spot zoning under the *Blades* definition, we find, contrary to its conclusion, that this activity was of the legal and not illegal variety. More precisely, we find that, because of the quite substantial benefits created for the surrounding community by the rezoning

and because of the close relationship between the likely uses of the rezoned property and the uses already present in the surrounding tracts, there was a clear showing of a reasonable basis for the spot zoning in this instance. It is therefore not void, and the Court of Appeals is reversed as to this point.

III.

We turn finally to the question of contract zoning. As we stated above, in its opinion below, the Court of Appeals also held that the rezoning in question constituted illegal "contract zoning" and was therefore invalid and void for that alternative reason. Relying for support primarily on this Court's decision in *Allred v. City of Raleigh*, 277 N.C. 530, 178 S.E. 2d 432, the Court of Appeals stated, in relevant part, as follows:

> [T]he county's action here also constitutes "contract zoning." Rezoning lacks a permissible basis where it is done "on consideration of assurances that a particular tract or parcel will be developed in accordance with restricted approval plans." [*Allred*, 277 N.C.] at 545, 178 S.E. 2d at 441.
>
> . . . In effect, the rezoning was done on the assurance that Mr. Clapp would submit an application for a conditional use permit specifying that he would use the property only in that manner. The rezoning here was accomplished as a direct consequence of the conditions agreed to by the applicant rather than as a valid exercise of the county's legislative discretion.

Chrismon v. Guilford County, 85 N.C. App. 211, 219, 354 S.E. 2d 309, 314 (citations omitted).

We must disagree with the Court of Appeals. In the view of this Court, the Court of Appeals, in its approach to the question of whether the rezoning at issue in this case constituted illegal contract zoning, improperly considered as equals two very different concepts—namely, valid conditional use zoning and illegal contract zoning. By virtue of this treatment of the two quite distinguishable concepts, the Court of Appeals has, for all intents and purposes, outlawed conditional use zoning in North Carolina by equating this beneficial land planning tool with a practice universally considered illegal. In fact, for the reasons we will develop below, the two concepts are not to be considered synony-

mous. Moreover, we hold that the rezoning at issue in this case—namely, the rezoning of Mr. Clapp's two tracts of land from A-1 to CU-M-2—was, in truth, valid conditional use zoning and *not* illegal contract zoning.

Illegal contract zoning properly connotes a transaction wherein both the landowner who is seeking a certain zoning action and the zoning authority itself undertake reciprocal obligations in the context of a *bilateral* contract. Shapiro, *The Case for Conditional Zoning*, 41 Temp. L.Q. 267 (1968); D. Mandelker, *Land Use Law* § 6.59 (1982). One commentator provides as illustration the following example:

> A Council enters into an agreement with the landowner and then enacts a zoning amendment. *The agreement, however, includes not merely the promise of the owner to subject his property to deed restrictions; the Council also binds itself to enact the amendment and not to alter the zoning change for a specified period of time.* Most courts will conclude that by agreeing to curtail its legislative power, the Council acted ultra vires. Such contract zoning is illegal and the rezoning is therefore a nullity.

Shapiro, *The Case for Conditional Zoning*, 41 Temp. L.Q. 267, 269 (1968) (emphasis added). As the excerpted illustration suggests, contract zoning of this type is objectionable primarily because it represents an abandonment on the part of the zoning authority of its duty to exercise independent judgment in making zoning decisions. *See id.; see generally* Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Governmental Land Use Deals*, 65 N.C.L. Rev. 957 (1987).

As we indicated in Part I above, valid conditional use zoning, on the other hand, is an entirely different matter. Conditional use zoning, to repeat, is an outgrowth of the need for a compromise between the interests of the developer who is seeking appropriate rezoning for his tract and the community on the one hand and the interests of the neighboring landowners who will suffer if the most intensive use permitted by the new classification is instituted. One commentator has described its mechanics as follows:

> An orthodox conditional zoning situation occurs when a zoning authority, *without committing its own power*, secures a property owner's agreement to subject his tract to certain restrictions as a prerequisite to rezoning. These restrictions may require that the rezoned property be limited to just one of the uses permitted in the new classification; or particular physical improvements and maintenance requirements may be imposed.

Shapiro, *The Case For Conditional Zoning*, 41 Temp. L.Q. 267, 270-71 (1968) (emphasis added).

[6] In our view, therefore, the principal differences between valid conditional use zoning and illegal contract zoning are related and are essentially two in number. First, valid conditional use zoning features merely a unilateral promise from the landowner to the local zoning authority as to the landowner's intended use of the land in question, while illegal contract zoning anticipates a bilateral contract in which the landowner and the zoning authority make reciprocal promises. Second, in the context of conditional use zoning, the local zoning authority maintains its independent decision-making authority, while in the contract zoning scenario, it abandons that authority by binding itself contractually with the landowner seeking a zoning amendment.

[7] The Court of Appeals, in its opinion in this case, determined that "[t]he rezoning here was accomplished as a direct consequence of the conditions agreed to by the applicant rather than as a valid exercise of the county's legislative discretion." *Chrismon v. Guilford County*, 85 N.C. App. 211, 219, 354 S.E. 2d 309, 314. In so doing, it concluded, in essence, that the zoning authority here —namely, the Guilford County Board of Commissioners—entered into a bilateral agreement, thereby abandoning its proper role as an independent decision-maker and rendering this rezoning action void as illegal contract zoning. This Court disagrees. We conclude that the zoning authority neither entered into a bilateral contract nor abandoned its position as an independent decision-maker. Therefore, we find what occurred in the case before us to constitute valid conditional use zoning and *not* illegal contract zoning.

First, having carefully reviewed the record in the case, we find no evidence that the local zoning authority—here, the Guilford County Board of Commissioners—entered into anything ap-

proaching a bilateral contract with the landowner—here, Mr. Clapp. The facts of the case reveal that, pursuant to a filed complaint from the Chrismons, the Guilford County Inspections Department, by a letter dated 22 July 1982, notified Mr. Clapp that his expansion of the agricultural chemical operation to the tract adjacent to plaintiffs' lot constituted an impermissible expansion of a nonconforming use. More important for purposes of this issue, the letter informed Mr. Clapp of his various options in the following manner:

> Mr. Clapp, there are several courses of action available to you in an effort to resolve your Zoning Ordinance violations:
>
> . . . .
>
> 2. You may request rezoning of that portion of your land involved in the violations. *This is not a guaranteed option.*

Shortly after receiving this letter, Mr. Clapp applied to have both of his tracts of land—the 3.18-acre tract north of Gun Shop Road and the 5.06-acre tract south of Gun Shop Road—rezoned from A-1 to CU-M-2. He also filed written application for a conditional use permit, specifying in the application that he would continue to use the property as it was then being used and, in addition, listing those changes he would like to make in the succeeding five years. While these applications were ultimately approved by the Guilford County Board of Commissioners after a substantial period of deliberation which we highlight below, we are quite satisfied that the only promises made in this case were unilateral —specifically, those from Mr. Clapp to the Board in the form of the substance of his conditional use permit application. As the letter excerpted above makes clear, no promises whatever were made by the Board in exchange, and this rezoning does not therefore fall into the category of illegal contract zoning.

Second, and perhaps more important, the Board did not, by virtue of its actions in this case, abandon its position as an independent decision-maker. The Court of Appeals concluded that, rather than from a "valid exercise of the county's legislative discretion," the Board's decision in this zoning matter in fact resulted from an illegal bargain between the Board and the landowner, Mr. Clapp. This conclusion by the Court of Appeals is, in

our view, at odds with the facts developed in the record. On the contrary, we find that the Board made its decision in this matter only after a lengthy deliberation completely consistent with both the procedure called for by the relevant zoning ordinance and the rules prohibiting illegal contract zoning.

The Guilford County Zoning Ordinance provides appropriate procedures to be used by landowners wishing to apply for rezonings to a conditional use district and for conditional use permits. Pursuant to the ordinance, a landowner must apply separately for rezoning to the appropriate conditional use district and for the conditional use permit. This second petition—that for the conditional use permit—must provide specific details of the applicant's proposed use of the land affected by the potential permit. Petitions are directed to the Guilford County Board of Commissioners and are filed initially in the office of the Planning Department. The Planning Director submits the petition and the Planning Department's recommendation to the Planning Board. The Planning Board subsequently makes advisory recommendations to the Board of County Commissioners, which, following a public hearing held pursuant to proper notice, makes the final decision as to whether the rezoning application and the permit will be approved or disapproved.

It is undisputed, and plaintiffs conceded as much upon oral argument before this Court, that all procedural requirements were observed in this case. As we indicated above, shortly after the Guilford County Inspections Department notified Mr. Clapp of his violation, he submitted an application for a rezoning of the tracts in question. Simultaneously, he applied for a conditional use permit, specifying how the property was then being used and, in addition, listing those improvements he would like to make in the future. The Planning Division recommended that the property be rezoned accordingly, and the Guilford County Planning Board voted to approve that recommendation at their meeting of 8 September 1982.

Pursuant to proper notice, the Guilford County Board of Commissioners held a public meeting on 20 December 1982 regarding both applications and heard numerous statements from all of the concerned parties. During at least one previous meeting, members of the community had spoken in favor of Mr. Clapp's re-

zoning request, numerous ideas had been introduced concerning use of the property, and the Board was presented with a petition signed by eighty-eight persons favoring the rezoning request. While the Court of Appeals' opinion seems to suggest that the ultimate result of the 20 December 1982 meeting was a foregone conclusion, the record simply does not reveal as much. Instead, the record reveals that the Board made its final decision only after what appears to have been a thorough consideration of the merits of Mr. Clapp's applications for rezoning and for a conditional use permit, as well as of the various alternatives to granting those applications.[4]

While the Court of Appeals concluded that the decision at issue here by the Guilford County Board of Commissioners was not the result of "a valid exercise of the county's legislative discretion," we find just the opposite. The record in the case, in our view, while it reveals a unilateral promise from Mr. Clapp to the Board concerning his proposed use of the tracts, does not demonstrate the reciprocity featured in cases of illegal contract zoning. Moreover, the record also demonstrates, we think quite clearly, that the Board did not abandon its role as an independent decision-maker. Rather, after deliberating over information gathered from a large number of sources and after weighing both the desired rezoning and permit as well as various alternatives, the Board rendered a decision. In short, then, we find that the Board engaged here, *not* in illegal contract zoning, but in valid conditional use zoning. Accordingly, the Court of Appeals is reversed as to this issue as well.

IV.

In conclusion, this Court has carefully reviewed the record in its entirety and all of the contentions of the parties to this action. Consistent with the above, we hold as follows: (1) the practice of conditional use zoning, insofar as it is reasonable, neither ar-

4. The official minutes of the 20 December 1982 Board of Commissioners meeting reveal discussion of "attempts [that] had been made to resolve differences between the owner and his neighbors." These attempts to resolve the problem short of rezoning the property apparently included the removal of one grain dryer from the property, the planting of trees along the property line, the placement of canvas covers over the grain bins, and discussions with the Environmental Protection Agency concerning other ways of reducing dust and noise.

bitrary nor unduly discriminatory, and in the public interest and, subject to our discussions of spot zoning and contract zoning above, is an approved practice in this state; (2) the rezoning in this case, while clearly spot zoning, was not *illegal* spot zoning in that it was done pursuant to a clear showing of a reasonable basis; and (3) the rezoning in this case, because the Board neither entered into a bilateral agreement nor abandoned its place as the independent decision-maker, was not illegal contract zoning.

Accordingly, the decision of the Court of Appeals is hereby reversed. The case is remanded to that court for further remand to the Superior Court, Guilford County, for reinstatement of the original judgment denying plaintiffs' action for a declaratory judgment and affirming the zoning action of the Guilford County Board of Commissioners.

Reversed.

Justice MITCHELL dissenting.

The zoning amendment and conditional use permit in this case amounted to written *acceptance* by Guilford County of Clapp's *offer*—by written application—to use his property only in certain ways. Thus, for reasons fully discussed in the opinion of the Court of Appeals, 85 N.C. App. 211, 354 S.E. 2d 309 (1987), Guilford County's actions in the present case also amounted to illegal "contract zoning." *See Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E. 2d 35 (1972); *Allred v. City of Raleigh*, 277 N.C. 530, 178 S.E. 2d 432 (1971).

I believe that Guilford County was without authority to engage in any conditional use zoning whatsoever in 1982, the time it did so in the present case. Effective 4 July 1985, the General Assembly amended N.C.G.S. § 153A-342 and N.C.G.S. § 160A-382 to allow cities and counties to establish conditional use districts. 1985 N.C. Sess. Laws ch. 607. Although the act was entitled an act to "make clear" the authority of local governments to establish such districts, I do not believe that the title controls in this case. Courts need refer to the title in construing an act only when the meaning of the act is in doubt. *Finance Corp. v. Scheidt, Comr. of Motor Vehicles*, 249 N.C. 334, 106 S.E. 2d 555 (1959). Here, the 1985 act expressly authorizes units of local government

to establish conditional use districts upon a petition by the owners of all the property to be included. Prior to that enactment, units of local government did not have such authority. *See generally Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E. 2d 35; *Allred v. City of Raleigh*, 277 N.C. 530, 178 S.E. 2d 432. Therefore, the action of the General Assembly is fully consistent with the ordinary presumption that, by amending an existing statute, the legislature intended a departure from the old law. *See Childers v. Parker's, Inc.*, 274 N.C. 256, 162 S.E. 2d 481 (1968).

The majority cites numerous scholarly authorities in support of its very thorough discussion of social policy arguments in favor of conditional use zoning. Boiled down to their essence, these arguments simply amount to an expression of the majority's view that the authority to engage in conditional use zoning will give planners and local governing authorities greater flexibility and that such flexibility is very valuable. Beyond question, conditional use zoning authority will give them greater flexibility. Because I believe that the General Assembly had not authorized conditional use zoning at the time in question here, I find it unnecessary to consider whether conditional use zoning gives so much "flexibility" to local planners and governing bodies that they are left free to allow or disapprove specific uses of property in an unconstitutionally arbitrary and unpredictable manner.

For the foregoing reasons, I dissent.

Justice WEBB joins in this dissenting opinion.

Justice WEBB dissenting.

I join in the dissent of Justice Mitchell and I add a few comments. It appears to me the majority has overruled *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E. 2d 35 (1972) and *Allred v. City of Raleigh*, 277 N.C. 530, 178 S.E. 2d 432 (1971). In an attempt to distinguish *Blades* and *Allred* from this case the majority goes to some length in explaining the difference between what it says is valid conditional use zoning and illegal contract zoning. The difficulty for me with the majority opinion is that the definitions it uses for conditional use zoning and contract zoning are contrary to the holdings of *Blades* and *Allred*.

The majority says:

> In our view, therefore, the principal differences between valid conditional use zoning and illegal contract zoning are related and are essentially two in number. First, valid conditional use zoning features merely a unilateral promise from the landowner to the local zoning authority as to the landowner's intended use of the land in question, while illegal contract zoning anticipates a bilateral contract in which the landowner and the zoning authority make reciprocal promises. Second, in the context of conditional use zoning, the local zoning authority maintains its independent decision-making authority, while in the contract zoning scenario, it abandons that authority by binding itself contractually with the landowner seeking a zoning amendment.

This definition simply does not square with *Blades* and *Allred*. The facts in each of those two cases were that a landowner petitioned the City of Raleigh for a change in the zoning ordinance. In each case the landowner submitted plans for the buildings he would construct if the change was made. The City Council in each case rezoned the property as requested by the landowner. This Court in each case held this was illegal contract zoning. There was no more evidence in either case that there was a bilateral contract or any reciprocal promises than there is in this case. There was no more evidence in those cases than there is in this case that the zoning board abandoned its independent decision making authority. In my opinion *Blades* and *Allred* are indistinguishable from this case.

I believe that prior to today the rule was that if a person requested a zoning change and submitted plans of the type building he would construct if the change were granted, and the zoning authority made the change based on the promise to construct such a building, that would be contract zoning. We have held contrary to this and in doing so have overruled *Blades* and *Allred*.

I vote to affirm the Court of Appeals.

Justice MITCHELL joins in this dissenting opinion.

UNITED LABORATORIES, INC., A DELAWARE CORPORATION v. WILLIAM DOUGLAS KUYKENDALL, AND SHARE CORPORATION, A WISCONSIN CORPORATION

No. 598A87

(Filed 28 July 1988)

1. **Master and Servant § 11.1; Contracts § 7.1— sales representative—noncompetition agreement—valid and enforceable**

A noncompetition clause in a sales representative agreement was valid and enforceable where the sales representative testified that at the time he joined defendant Share Corporation he was familiar with the products plaintiff had and the prices at which they sold; that when he called upon his former accounts, he knew the requirements of that customer, who was buying what product and who liked the different types of products; and that he made efforts to determine which Share Products were comparable to United Products and then told his United accounts that the Share products were comparable to the products which they had been purchasing through him from United.

2. **Master and Servant § 11.1; Contracts § 7.1— sales representative—covenant not to compete—Illinois law**

Plaintiff had a legitimate business interest in need of protection under Illinois law based on plaintiff's near permanent relationship with its customers and defendant Kuykendall's acquisition of confidential information concerning plaintiff's customers' buying habits that, but for his employment, he would not have had.

3. **Master and Servant § 11.1; Contracts § 7.1— noncompetition agreement—salesman—territorial and time restrictions—reasonable**

A territorial restriction in a noncompetition clause was reasonable under Illinois law where defendant had been a sales manager for plaintiff and had thus gained knowledge concerning customer service by other sales representatives working in the same territory and of plaintiff's business operations. An eighteen-month time restriction was also reasonable under Illinois law despite plaintiff's policy allowing its other sales representatives to contact the exclusive customers of sales representatives who failed to make a sale to those customers within nine months, because defendant was no longer an employee of plaintiff and was not in a position to enjoy the same advantages as plaintiff's employees; moreover, the agreement was entered into willingly with the expectations of reaping the benefits of a profit-sharing fund.

4. **Contracts § 34— tortious interference with contract—directed verdict for plaintiff improper**

The trial court erred by granting plaintiff's motion for a directed verdict on a tortious interference with contract claim, and the Court of Appeals erred by remanding the case for entry of directed verdict in defendants' favor, where, while the jury could reasonably infer from the evidence presented that defendant Share intentionally induced Kuykendall to breach non-competition

covenants for a purpose other than as a reasonable and bona fide attempt to protect the interests of Share, it likewise could infer that defendant Kuykendall breached the covenants without any encouragement or direction from defendant Share.

5. **Unfair Competition § 1— non-competition agreement—unfair trade practices—remanded for new trial**

An unfair trade practices claim based on violations of the covenant not to compete and other actions was remanded for trial where the record was inadequate to determine whether plaintiff's evidence was sufficient concerning defendants' acts unrelated to the covenants not to compete and the unfair trade practices issue concerning the covenants not to compete was not submitted to the jury. Furthermore, the contention was rejected that N.C.G.S. § 75-1.1 should be limited to actions involving consumers or businesses involved in fraudulent advertising or a buyer-seller relationship.

APPEAL by plaintiff 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. 296, 361 S.E. 2d 292 (1987), reversing judgments entered by *Fountain, J.*, on 25 June 1986, in Superior Court, BUNCOMBE County. Heard in the Supreme Court 11 April 1988.

Petree, Stockton & Robinson, by Jackson N. Steele; and Simon & Welnhofer, by Paul G. Simon, for plaintiff-appellant.

Fox, Carpenter, O'Neill & Shannon, S.C., by Bruce C. O'Neill; and Brock & Drye, P.A., by Michael W. Drye, for defendants-appellees.

FRYE, Justice.

This appeal involves issues concerning non-competition clauses, tortious interference with contract, and unfair trade practices. These issues are before us on the basis of a dissenting opinion filed in the Court of Appeals. N.C.R. App. P., Rule 16(b) (1988).

Plaintiff, United Laboratories, Inc. (United), is in the business of manufacturing and selling specialty chemical products through a nationwide system of sales representatives. Its home office is in Addison, Illinois. Sales representatives are assigned to a specific geographical territory either on an exclusive or open basis. If a sales representative has been assigned a county on an exclusive basis, no other sales representative of United may call upon customers located in that particular county. The "open" counties designation is typically reserved for counties containing larger

cities and industrial output where more sales representatives are needed to penetrate the account potential. However, in these "open" counties, once an account has been opened and a commission paid to a particular sales representative, that account is registered to that particular sales representative and no other sales representative of United may call upon that particular customer.

Defendant Kuykendall first started as a sales representative with United in 1971 in North Carolina. United provided start-up training for Kuykendall and also provided continuing supplemental training in technical support and customer services to develop his ability to secure and maintain long-standing personal relationships with customers of United. In 1979, Kuykendall terminated his employment with United and went to work as a sales representative for one of United's competitors, working the same territory he had covered for United. However, after being advised by United that he was breaching a non-competition clause by working the same territory for his new employer that he had worked while employed with United, Kuykendall rejoined United in 1979 as a sales manager.

In 1982, Kuykendall transferred from this managerial position to once again become a sales representative for United. Upon returning to sales, Kuykendall signed the standard United Sales Representative Agreement, which contained a non-competition clause. This agreement specifically precluded Kuykendall, for eighteen months following the termination of his employment with United, from calling upon accounts which he serviced while employed by United. The parties agreed that this agreement was to be governed by North Carolina law.

In 1983, Kuykendall enrolled in United's voluntary profit-sharing pension plan and signed a Supplementary Compensation Agreement under which he gained rights to additional revenues based upon the profits of United. This agreement contained a non-competition clause similar to the 1982 agreement, but the restrictions were more broad. The 1983 agreement contained a territory restriction that precluded Kuykendall from calling upon any actual or potential United customers located within the same territory to which he was assigned at the time he terminated his employment with United. As in the 1982 agreement, the time re-

straint was for the eighteen-month period following Kuykendall's employment termination with United. This 1983 agreement was to be governed by Illinois law.

During September, 1985, Kuykendall resigned from United and went to work as a sales representative for defendant Share Corporation (Share), a competitor of United. When Kuykendall resigned from United, the vice-president of sales for United sent Kuykendall a letter reminding him of the restrictions in the Sales Representative Agreement. As a sales representative for Share, defendant Kuykendall called upon the same customers he had called upon while employed at United. Upon discovering that Kuykendall was servicing the same customers he had serviced while employed by United, United's general counsel notified both Kuykendall and Share that this was a breach of Kuykendall's Sales Representative Agreement.

Because defendants continued servicing plaintiff's accounts, plaintiff filed suit on 26 November 1985 in the Superior Court for Buncombe County. Plaintiff sought preliminary and permanent injunctive relief, together with monetary damages, on the basis that defendant Kuykendall breached both the 1982 Sales Representative Agreement and the 1983 Supplementary Compensation Agreement. Plaintiff sought also injunctive and monetary relief against Share, alleging that Share tortiously interfered with the 1982 and 1983 agreements and other business relationships of United, and also violated the North Carolina Unfair Trade Practices Act.

A hearing was held on 11 December 1985 and Judge Charles Lamm, Jr., entered a preliminary injunction on 31 December 1985, enjoining Kuykendall from contacting any United customers he had solicited while employed by United. On 19 May 1986, Judge Forrest Ferrell denied defendants' motion to dissolve the preliminary injunction.

The case was tried before a jury 23 June through 25 June 1986. At the conclusion of all the evidence, the trial court first determined that the 1982 Sales Representative Agreement was superseded by the 1983 Supplementary Compensation Agreement. The court then granted plaintiff's motions for directed verdicts against defendants on matters of liability for breach of the 1983 agreement, for tortious interference with contract, and for

violations of the North Carolina Unfair Trade Practices Act. The court then submitted the question of damages to the jury and a verdict was returned for $77,477.77. The jury also made a finding that plaintiff had incurred attorneys' fees and costs in the amount of $47,522.23. The court, believing that the jury erroneously assessed damages for an eighteen-month period rather than for the nine-month period that had elapsed between the time of the breach and the time of the trial, reduced the actual damages from $77,477.77 to $38,738.89. This amount was trebled as a result of the court's finding of liability pursuant to the North Carolina Unfair Trade Practices Act. Judgment was also entered in the amount of $47,522.23 for attorneys' fees and costs. The court then entered a permanent injunction against defendant Kuykendall enjoining him from selling Share products for the remaining portion of the eighteen-month time restriction within the territory in which he was formerly assigned while employed by United. Furthermore, Kuykendall was enjoined from disclosing, and Share was enjoined from utilizing, any confidential information concerning United's business practices and United's customers.

Defendants appealed the trial court's decision to the Court of Appeals. The Court of Appeals first held that the trial court erred in finding that the 1982 agreement was superseded by the 1983 agreement. It then reversed the directed verdict for plaintiff and ordered a directed verdict in favor of defendants, holding that the restrictions contained in the 1982 Sales Representative Agreement and the 1983 Supplementary Compensation Agreement were unenforceable under North Carolina and Illinois law, respectively. The Court of Appeals also found that without enforceable restrictions in the employment contracts, the contracts were terminable at will and Share could not be liable for tortious interference with contract. The Court of Appeals then reversed the trial court's entry of directed verdict for plaintiff concerning the alleged violations by Kuykendall and Share of the North Carolina Unfair Trade Practices Act. The case was remanded for a new trial on this issue.

In his dissent to the majority opinion of the Court of Appeals, Judge Phillips agreed with the majority that the trial court erred in finding that the 1983 Supplementary Compensation Agreement superseded the 1982 Sales Representative Agreement. On the remaining issues, however, Judge Phillips stated

that he would hold the 1982 and the 1983 agreements to be valid and enforceable. Moreover, Judge Phillips stated that the trial court's judgment should be upheld as to the claim of tortious interference with contract by Share with the contractual relations between Kuykendall and United, and would find also that the actions of defendants violated the North Carolina Unfair Trade Practices Act.

On the basis of Judge Phillips' dissent, plaintiff appealed to this Court.[1]

Enforceability of 1982 Sales Representative Agreement

[1] Plaintiff first contends that the Court of Appeals erred in holding that the non-competition clause in the 1982 Sales Representative Agreement is unenforceable under North Carolina law. We agree with plaintiff and reverse the Court of Appeals.

At common law, non-competition clauses generally were not upheld because such agreements were held to be in restraint of trade and thus against public policy. *See Mar-Hof Co. v. Rosenbacker*, 176 N.C. 330, 97 S.E. 169 (1918). However, this position was modified and it became generally recognized that, while non-competition clauses were in partial restraint of trade, they would nevertheless be upheld if the covenants were supported by valuable consideration, reasonably necessary to protect the interests of the covenantee, and not against public policy. *Hill v. Davenport*, 195 N.C. 271, 141 S.E. 752 (1928). Prior to 1929, the parties to these contracts were usually a buyer and seller of a business. *See Sea Food Co. v. Way*, 169 N.C. 767, 86 S.E. 603 (1915) (defendant enjoined from engaging in fish dealer business); *Anders v. Gardner*, 151 N.C. 581, 66 S.E. 665 (1910) (defendant restrained from engaging in livery stable business); *King v. Fountain*, 126 N.C. 114, 35 S.E. 427 (1900) (defendant precluded from owning a livery stable business); *Cowan v. Fairbrother*, 118 N.C. 253, 24 S.E. 212

1. In their brief filed with this Court, defendants contend that the Court of Appeals erred in holding that the trial court erroneously found that the 1983 agreement superseded the 1982 agreement. However, the majority and the dissenting opinions of the Court of Appeals are in agreement that the trial court did err. Because of this unanimity and because defendants have not filed a petition for discretionary review in this Court, we do not address defendants' contention concerning this issue.

(1896) (defendant enjoined from owning a newspaper business); *Baumgarten v. Broadway*, 77 N.C. 22 (1877) (defendant precluded from engaging in photography business). As long as the time limit and territory restrictions were reasonable, these covenants, designed for the reasonable protection of the vendee, were generally upheld. *See Faust v. Rohr*, 166 N.C. 187, 81 S.E. 1096 (1914).

The same principle underlying this Court's sustaining the enforceability of restrictive covenants that preclude a seller of a business from competing with the new owner was subsequently extended to the employer-employee situation. *See Scott v. Gillis*, 197 N.C. 223, 148 S.E. 315 (1929). Whether the covenantor is a former owner or a former employee, intimate knowledge of the business operations or personal association with customers provides an opportunity to either the former employee or the former owner to injure the business of the covenantee. *Moskin Bros. v. Swartzberg*, 199 N.C. 539, 155 S.E. 154 (1930). A non-competition agreement, therefore, is a device used by the covenantee to prevent the covenantor from utilizing this opportunity to do injury. *Id.*

Moreover, a further consideration by this Court, in recognizing the validity of these covenants, is that at the time of entering these contracts containing covenants not to compete both parties apparently regarded the restrictions as reasonable and desirable. *Sonotone Corp. v. Baldwin*, 227 N.C. 387, 42 S.E. 2d 352 (1947). Essentially, "by enforcing the restrictions [a] court is only requiring the defendants to do what they agreed to do." *Asheville Associates v. Miller and Asheville Associates v. Berman*, 255 N.C. 400, 404, 121 S.E. 2d 593, 595 (1981). "While the law frowns upon unreasonable restrictions, it favors the enforcement of contracts intended to protect legitimate interests. It is as much a matter of public concern to see that valid [covenants] are observed as it is to frustrate oppressive ones." *Sonotone Corp. v. Baldwin*, 227 N.C. 387, 390, 42 S.E. 2d 352, 355.

Today, in North Carolina, restrictive covenants between an employer and employee are valid and enforceable if they are (1) in writing; (2) made part of a contract of employment; (3) based on valuable consideration; (4) reasonable both as to time and ter-

ritory; and (5) not against public policy. *See A.E.P. Industries v. McClure*, 308 N.C. 393, 302 S.E. 2d 754 (1983).

Defendants contend that the 1982 agreement is not designed to protect a legitimate business interest and for that reason is against public policy. In holding that the restrictions in the 1982 agreement were unenforceable, the Court of Appeals promulgated the following rule:

> Before a covenant can be found reasonably necessary for the protection of a legitimate business interest, we hold that it is first necessary to find the employee, as a result of his employment, acquired intimate knowledge of the nature and character of the business which was not otherwise generally available to the public.

United Laboratories, Inc. v. Kuykendall, 87 N.C. App. 296, 306, 361 S.E. 2d 292, 298.

While this is an accurate statement of the law, as far as it is stated, the opinion of the Court of Appeals is subject to the interpretation that the information obtained must be of a confidential nature and that this is the only basis for finding a legitimate protectable interest. However, there are two separate and distinct legitimate bases for enforcing restrictive covenants in the employer-employee relationship:

> The general rule with respect to enforceable restrictions is stated in 9 A.L.R. 1468: "It is clear that if the nature of the employment is such as will bring the employee in personal contact with patrons or customers of the employer, *or* enable him to acquire valuable information as to the nature and character of the business and the names and requirements of the patrons or customers, enabling him by engaging in a competing business in his own behalf, or for another, to take advantage of such knowledge of or acquaintance with the patrons and customers of his former employer, and thereby gain an unfair advantage, equity will interpose in behalf of the employer and restrain the breach . . . providing the covenant does not offend against the rule that as to time . . . or as to the territory it embraces it shall be no greater than is reasonably necessary to secure the protection of the business or good will of the employer."

A.E.P. Industries v. McClure, 308 N.C. 393, 408, 302 S.E. 2d 754, 763 (emphasis added) (quoting *Asheville Associates v. Miller and Asheville Associates v. Berman*, 255 N.C. 400, 403, 121 S.E. 2d 593, 595).

The narrow holding of the Court of Appeals effectively eliminates consideration of an employer's good will and customer relationships as a basis for enforcement of post-termination restrictions. However, protection of customer relationships and goodwill against misappropriation by departing employees is well recognized as a legitimate protectable interest of the employer. *See* generally Annot. "Employee—Restrictive Covenant—Area," 43 A.L.R. 2d 94, § 24 (1955) and Annot. "Employee—Restrictive Covenant—Time," 41 A.L.R. 2d 15, § 14 (1955). The greater the employee's opportunity to engage in personal contact with the employer's customer, the greater the need for the employer to protect these customer relationships. Annot. "Employee—Restrictive Covenant—Time," 41 A.L.R. 2d 15, § 15. This theory, which is often referred to as the "customer contact" theory, is most applicable where the employee is the sole or primary contact between the customer and the employer. *See* Blake, *Post Employment Restraints*, 73 Harv. L. Rev. 625, 657 (1960).

Furthermore, the "customer contact" theory is well recognized under North Carolina law. *See A.E.P. Industries v. McClure*, 308 N.C. 393, 302 S.E. 2d 754; *Asheville Associates v. Miller and Asheville Associates v. Berman*, 255 N.C. 400, 121 S.E. 2d 593. Indeed, the Court of Appeals, while not labeling it as such, relied on this theory in upholding a non-competition agreement involving a janitorial supply salesman. *See Wilman, Inc. v. Corsillo*, 24 N.C. App. 271, 210 S.E. 2d 427, *cert. denied*, 286 N.C. 421, 211 S.E. 2d 802 (1975). In *Wilman*, the restrictive covenant specifically noted that the defendant salesman would, through personal contact with plaintiff's customers, "establish business good will which is a valuable asset of [plaintiff]," and that the salesman would become "familiar with the price lists, catalogs, methods of pricing, needs and requirements of customers and methods of operation of [plaintiff]," all of which would place defendant "in an unfair competitive position as to [plaintiff] in the event that [defendant's] employment should for any reason be terminated and he should go into competition with [plaintiff]." *Wilmar*, 24 N.C. App. at 274, 210 S.E. 2d at 430. The Court of Appeals held that this covenant was

valid, stating that it "seeks to protect a legitimate business interest of plaintiff and is reasonable to the parties and the public." *Id.*

In the case *sub judice*, the Court of Appeals first acknowledged that defendant Kuykendall had "knowledge about the buying habits of [plaintiff's] customers, the cyclical nature of their ordering, and the special needs of the customers." *United Laboratories v. Kuykendall*, 87 N.C. App. 296, 307, 361 S.E. 2d 292, 299. However, the Court of Appeals then stated that this information was not acquired because of Kuykendall's association with plaintiff but "rather through his own efforts on plaintiff's behalf." *Id.* Furthermore, although having conceded that defendant Kuykendall had knowledge concerning customer requirements, the Court of Appeals then stated that "Kuykendall acquired no intimate knowledge as to the nature and character of plaintiff's business which was not otherwise generally available to the public at large." *Id.*

First, we disagree with the implication that information obtained through a salesman's efforts during the course of employment belongs to the employee. An acceptance of this premise would undermine the law of agency:

> Under traditional agency concepts, any new business or improvement in customer relations attributable to [the employee] during his employment is for the sole benefit of the principal. This is what he is being paid to do. When he leaves the company he should no more be permitted to try to divert to his own benefit the product of his employment than to abscond with the company's cashbox.

Blake, *Post Employment Restraints*, 73 Harv. L. Rev. 625, 654 (1960).

When an employee, during the course of his or her employment, develops or improves customer relationships, the employee is establishing business goodwill, which is a valuable asset of the *employer*, a principle that this Court has implicitly and explicitly endorsed. *See A.E.P. Industries v. McClure*, 308 N.C. 393, 302 S.E. 2d 754; *Greene Co. v. Arnold*, 266 N.C. 85, 145 S.E. 2d 304 (1965); *Asheville Associates, Inc. v. Miller and Asheville Associates v. Berman*, 255 N.C. 400, 121 S.E. 2d 593; *Welcome Wagon*

International, Inc. v. Pender, 255 N.C. 244, 120 S.E. 2d 739 (1961); *Moskin Bros. v. Swartzberg*, 199 N.C. 539, 155 S.E. 154; *Scott v. Gillis*, 197 N.C. 223, 148 S.E. 315. Prior to the case *sub judice*, the Court of Appeals also recognized this principle. *See Robins & Weill, Inc. v. Mason*, 70 N.C. App. 537, 320 S.E. 2d 693 (1984); *Manpower, Inc. v. Hedgecock*, 42 N.C. App. 515, 257 S.E. 2d 109 (1979); *Wilmar, Inc. v. Corsillo*, 24 N.C. App. 271, 210 S.E. 2d 427.

Second, we disagree with the Court of Appeals' conclusion that defendant "Kuykendall acquired no intimate knowledge as to the nature and character of plaintiff's business which was not otherwise generally available to the public at large." *United Laboratories, Inc. v. Kuykendall*, 87 N.C. App. 296, 307, 361 S.E. 2d 292, 299. As noted by the Court of Appeals, Kuykendall had "knowledge about the buying habits of the customers, the cyclical nature of their ordering, and the special needs of the customers." *Id.* Moreover, the evidence shows that this specific information concerning particular customers of plaintiff's was not generally available to the public. Indeed, Kuykendall testified that at the time he joined Share, he was familiar with the products plaintiff had and the prices at which they sold; that when he called upon the former United accounts he knew the requirements of that customer, who was buying what product, and who liked the different types of products. Kuykendall further testified that he made efforts to determine which Share products were comparable to United products and then told his United accounts that the Share products were comparable to the products which they had been purchasing through defendant Kuykendall from United. This detailed knowledge of the buyer's needs and buying history, coupled with the close personal relationship developed between Kuykendall and the customer, naturally enabled Kuykendall to readily procure sales for defendant Share from the former customers of his previous employer. Moreover, Kuykendall's testimony reveals that although names of *potential* customers may easily be ascertained from public documents, information concerning particular customers and their specific needs and buying habits was intimate knowledge, obtainable only because of Kuykendall's employment with plaintiff.

We hold, therefore, that the 1982 contract was valid and enforceable under North Carolina law and accordingly reverse the Court of Appeals on this issue.

Enforceability of 1983 Supplementary Compensation Agreement

[2] Plaintiff next contends that the Court of Appeals erred in holding that the 1983 contract was unenforceable under Illinois law. We agree with plaintiff and reverse the Court of Appeals.

In Illinois, whether covenants not to compete are enforceable is a question of law for the courts. *See The Instrumentalist Co. v. Band, Inc.*, 134 Ill. App. 3d 884, 480 N.E. 2d 1273 (1985). Because these restrictive covenants partially restrain trade, they are scrutinized carefully by the courts to ensure that "their intended effect is not the prevention of competition *per se*." *Id.* at 891, 480 N.E. 2d at 1279. In determining whether non-competition covenants are enforceable, the courts consider whether the employee has received benefits in exchange for his agreement not to compete with his employer upon termination of employment, whether the time and territory restrictions are reasonable, and the effect these covenants have upon the parties and the public. *Id.* The question becomes "whether the covenant is reasonably necessary to protect the employer from improper or unfair competition." *Id.*

The general rule in Illinois is that an employer has no proprietary interest in his customers. *See The Packaging House, Inc. v. Hoffman*, 114 Ill. App. 3d 284, 448 N.E. 2d 947 (1983). However, there are two situations in which this general rule is inapplicable:

> (1) where the former employee acquired confidential information through his employment and subsequently attempted to use it for his own benefit, and
>
> (2) where, by nature of the business, the customer relationship is near-permanent and, but for his association with plaintiff, [the employee] would not have had contact with the customers in question.

The Instrumentalist Co. v. Band, Inc., 134 Ill. App. 3d 884, 892, 480 N.E. 2d 1273, 1279.

In the first situation, in which by the nature of his employment an employee has acquired confidential information concerning an employer's business operations or customer requirements, Illinois courts have not hesitated to find that the employer has a protectable business interest. *See Donald McElroy, Inc. v. Delan-*

ey, 72 Ill. App. 3d 285, 389 N.E. 2d 1300 (1979); *Wessel Co. v. Busa*, 28 Ill. App. 3d 686, 329 N.E. 2d 414 (1975). Illinois recognizes the fact that an employee, having such confidential information, is in a position to misappropriate and misuse this information upon employment termination to convert his former employer's business to his own—the precise situation that the employer sought to avoid when it entered into the covenant with the employee. *See Smithereen Co. v. Renfroe*, 325 Ill. App. 229, 59 N.E. 2d 545 (1945).

In the second situation, the employer has a protectable business interest in its customers if these customers were long-standing, near-permanent customers with whom the employee had, over many years of employment, developed a closeness and goodwill, and but for the employee's association with his employer, the employee would not have had contact with these customers. *Morrison Metalweld Process Corp. v. Valent*, 97 Ill. App. 3d 373, 422 N.E. 2d 1034 (1981). The Illinois courts recognize that because of this personal contact with customers who have continuously dealt with a business through an employee over a long period of time, the employee, upon employment termination, could successfully solicit his former employer's customers for his own. *See The Instrumentalist Co. v. Band, Inc.*, 134 Ill. App. 3d 884, 480 N.E. 2d 1273. Moreover, it is not necessary that an employer's customers deal with him exclusively in order for that employer to show that his customers are near-permanent. *Id.*

On appeal to the Court of Appeals, defendants contended that the trial court erred in upholding the 1983 covenant and argued that plaintiff failed to establish the existence of a legitimate business interest in need of protection by a covenant. In the alternative, even if there is a protectable business interest, defendants contended that the time and territory restrictions are not reasonable. The Court of Appeals agreed with defendants that plaintiff does not have a legitimate protectable business interest, and, therefore, did not reach the question concerning the reasonableness of the time and territory restrictions.

The Court of Appeals, in determining whether plaintiff has a legitimate business interest protectable by the agreement, recognized the two situations in which a legitimate business interest arises under Illinois law in the employer-employee relationship. It

held, however, that plaintiff failed to show a legitimate protectable business interest. First, the Court of Appeals held that the evidence showed that plaintiff did not enjoy a near-permanent relationship with its customers since these customers would buy from more than one chemical company at the same time, that the chemical industry was highly competitive, and that a sales representative for any chemical company could easily determine the names of potential customers from telephone directories. Second, the Court of Appeals held that there was no evidence that defendant Kuykendall acquired any information during his employment that would qualify as trade secrets or confidential information in need of protection since information concerning the customers was neither a trade secret nor confidential in that the customer list could easily be duplicated by reference to telephone directories or trade publications.

We disagree with the Court of Appeals' holding that under Illinois law plaintiff has failed to show a legitimate protectable business interest. Whether customers buy from more than one company is not the determining factor in deciding whether a company has a near-permanent relationship with its customers. Instead, the court must determine whether the evidence shows that the employer has had a long-term, continuous relationship with its customers. In the case *sub judice*, Kuykendall's own testimony revealed that most of the customers he serviced, after leaving plaintiff's employment, were customers who had bought from him continuously for many years. Thus, the evidence shows that these customers were not transitory, but were near-permanent customers.

In reaching its decision that plaintiff failed to show a protectable business interest in its customers, the Court of Appeals relied exclusively on *Reinhardt Printing Co. v. Feld*, 142 Ill. App. 3d 9, 490 N.E. 2d 1302 (1986), in which the court held the restrictive covenants unenforceable because plaintiff-employer failed to establish a protectable business interest in its customers. However, we find that case distinguishable on several grounds. First, the evidence in *Reinhardt* shows that defendant-employee had worked for plaintiff for only two years and the majority of customers serviced by defendant were not regular customers of plaintiff prior to that two-year period. Thus, it is apparent that plaintiff did not enjoy a long-term continuous relationship with these cus-

tomers. Second, the evidence in *Reinhardt* showed that defendant, through her former job, had prior contact and business association with many of the customers she subsequently solicited for plaintiff. Finally, because plaintiff, in its advertising brochure, named forty of its customers, the customer list was not confidential.

In the case *sub judice*, defendant worked for plaintiff for approximately fourteen years, and the evidence shows that plaintiff enjoyed a long-term, continuous relationship with its customers. Second, there is no evidence that defendant had any prior contact or business association with these customers before becoming an employee of plaintiff. Finally, there is no evidence that the names of plaintiff's customers were generally known in the industry. Thus, the instant case is not controlled by *Reinhardt*.

We also disagree with the Court of Appeals' conclusion that Kuykendall did not acquire any confidential information while employed by plaintiff. The evidence shows that through his employment, Kuykendall acquired and accumulated information concerning the historical buying habits of the customers, i.e., the requirements of each customer, the cyclical nature of their buying habits, the prices each was willing to pay, and any specialized product formulations. It is this information that was not generally available to plaintiff's competitors. Indeed, the evidence shows that it was this precise information that enabled Kuykendall to readily procure sales for defendant Share Corporation upon leaving the employment of plaintiff.

We hold, therefore, that plaintiff did have a near-permanent relationship with its customers and that defendant Kuykendall acquired confidential information concerning plaintiff's customers that, but for his employment, he would not have acquired. Thus, under Illinois law, plaintiff has a legitimate business interest in need of protection. Accordingly, we reverse the Court of Appeals on this issue.

[3] Because the Court of Appeals decided that the 1983 contract was unenforceable on the basis that plaintiff failed to show it had a protectable business interest, it was not necessary for that court to determine whether the time and territory restrictions were reasonable. On appeal to this Court, defendants press their

contentions that the time and territory restrictions were overly broad and thus unreasonable.

In Illinois, in determining whether the time and territory restrictions are reasonable, the court must measure the effect, if any, these restrictions have "on the general public, the extent of the hardship imposed thereby on the restricted party and whether they are necessary to protect a legitimate business interest of the former employer." The *Instrumentalist Co. v. Band, Inc.*, 134 Ill. App. 3d 884, 895, 480 N.E. 2d 1273, 1281. If the business of the former employer is highly competitive, i.e., there are other companies from which the public may purchase the merchandise, then the public will not be injured if the restrictions are enforced. *McRand, Inc. v. Van Beelen*, 138 Ill. App. 3d 1045, 1057, 486 N.E. 2d 1306, 1314-15 (1985). A restriction prohibiting a former employee from soliciting customers of his former employer will be upheld if it is "reasonably related to the employer's interest in protecting the customer relations that its employees developed as a direct result of the employment." *Id.* at 1057, 486 N.E. 2d at 1315.

With respect to the reasonableness of the territorial restrictions, Illinois courts look to see if the restrictive territory is one in which the employer is doing business and the "purpose of the restriction was to protect him from losing customers to a former employee who, by virtue of his employment, gained special knowledge and familiarity with the customer's requirements." The *Instrumentalist Co. v. Band, Inc.*, 134 Ill. App. 3d 884, 895, 480 N.E. 2d 1273, 1281. However, Illinois courts are hesitant in enforcing territorial restrictions that preclude former employees from servicing customers "they never solicited or had contact with" under their former employment. *Id.* Therefore, if the territorial restrictions merely preclude the former employee from soliciting customers he solicited or had contact with during the former employment, then there is no undue hardship on the employee, since he is not prohibited from practicing his trade.

With regard to the time limitation, Illinois courts have held as reasonable time restrictions of two to three years when the employee has maintained personal contact with the customers. *See The Instrumentalist Co. v. Band, Inc.*, 134 Ill. App. 3d 884,

480 N.E. 2d 1273; *Donald McElroy, Inc. v. Delaney*, 72 Ill. App. 3d 285, 389 N.E. 2d 1300.

In the case *sub judice*, the 1983 agreement contains a territory-wide restriction that precludes Kuykendall from calling upon any actual or prospective United customers within the territory he was assigned at the time his employment with plaintiff was terminated. This restriction was to last a period of eighteen months from the time he terminated his employment with plaintiff. At the end of the trial, the trial court entered a permanent injunction enjoining defendant Kuykendall from working in the assigned territory he had at the time he terminated his employment with plaintiff. However, the time span of the permanent injunction was limited to nine months from the end of the trial because half of the eighteen-month period called for in the covenant had elapsed.

On appeal to this Court, defendants contend that the time restriction of eighteen months was too long in light of plaintiff's established policy which allows its other sales representatives to solicit an exclusive customer if the assigned sales representative fails to make a sale to this customer within nine months. Concerning the territorial restriction, defendants contend it is over-broad since the evidence shows that Kuykendall serviced only 189 accounts in a territory with thousands of potential customers.

We do not find persuasive defendants' argument that because plaintiff allows its other sales representatives to contact the exclusive customers of a sales representative who has failed to make a sale to these customers within nine months, that this makes the eighteen-month time restriction unreasonable. First, defendant Kuykendall willingly entered into this supplemental agreement with expectations of reaping the benefits of a profit-sharing pension fund. Second, defendants place Kuykendall on the same level as plaintiff's employees, a position he no longer enjoys. Defendants appear to argue that Kuykendall should have the same advantage as plaintiff's employees. However, this is the very benefit Kuykendall agreed to forego upon termination of his employment. We believe that the Illinois appellate courts would find the eighteen-month restriction to be reasonable. *See The Instrumentalist Co. v. Band, Inc.*, 134 Ill. App. 3d 884, 480 N.E. 2d 1273 (two years held reasonable); *Donald McElroy, Inc. v. De-*

laney, 72 Ill. App. 3d 285, 389 N.E. 2d 1300 (three years held reasonable). We hold that the time restriction of eighteen months was reasonable.

Regarding whether the territorial restrictions are overbroad, the evidence shows that plaintiff was seeking to protect itself from losing customers to its former employee who, by virtue of his employment, had gained intimate knowledge concerning the requirements of plaintiff's customers whom he had serviced. Moreover, for a period of years Kuykendall was a sales manager for United, a position which enabled him to obtain intimate knowledge, not only of the business operations of plaintiff, but also knowledge concerning customers serviced by other sales representatives of United working in the same territory. Under these circumstances, the territory restrictions precluding Kuykendall from soliciting any customers in the territory he was assigned at the time of employment termination would be reasonable under Illinois law.

Because we find the time and territory restrictions reasonable, and because plaintiff had a legitimate business interest protectable by the restrictive covenant, we hold that the 1983 agreement was enforceable. Because the evidence is manifest that defendant Kuykendall breached the 1983 agreement we hold that the trial court properly granted plaintiff's motion for directed verdict against defendant Kuykendall on this issue.

Tortious Interference With Contract

[4] Plaintiff next contends that the Court of Appeals erred in holding that defendant Share's actions did not constitute a tortious interference with contract. Although for different reasons, we agree with the Court of Appeals that the trial court erred in granting plaintiff's motion for directed verdict on this issue. However, we also find that the Court of Appeals erred in remanding the case for entry of a directed verdict for defendant Share.

In its complaint in this cause of action, plaintiff alleged that defendant Share intentionally and maliciously interfered with the agreement between Kuykendall and plaintiff. The uncontradicted evidence at trial reveals that upon hiring Kuykendall, defendant Share was aware that a non-competition covenant existed between plaintiff and Kuykendall; that Share had agreed to pay all

legal costs, if any, Kuykendall would incur by coming to work for Share; and that Share was aware that during the time Kuykendall solicited orders for Share, he was soliciting these orders from customers of United. The evidence reveals further that once Kuykendall was ordered by the court to abide by the preliminary injunction, the vice-president of Share used information supplied by Kuykendall to continue to solicit orders from United customers. At the close of all the evidence, the trial court granted plaintiff's motion for a directed verdict on the issue of whether defendant Share tortiously interfered with the covenant not to compete between Kuykendall and United.

On appeal to the Court of Appeals, defendant Share contended that the trial court erred in directing a verdict for plaintiff. In agreeing with defendant Share, the Court of Appeals first held that violation of the non-competition covenants could not be the basis of recovery because the covenants were unenforceable. Next, the Court of Appeals held that because this was an employment-at-will situation and because the parties were engaged in a competitive business of selling cleaning chemicals, defendant Share's actions could not constitute a tortious interference with contract. The Court of Appeals then remanded the case for entry of a directed verdict for defendant Share.

The tort of interference with contract has five elements: (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff. *Childress v. Abeles*, 240 N.C. 67, 84 S.E. 2d 176 (1954).

Upon a motion for a directed verdict, pursuant to N.C.G.S. § 1A-1, Rule 50 (1983), the evidence must be considered in the light most favorable to the non-moving party, resolving all conflicts in his favor, and giving him the benefit of all reasonable inferences flowing from the evidence in his favor. *West v. Slick*, 313 N.C. 33, 326 S.E. 2d 601 (1985). The question presented by a motion for a directed verdict is whether the evidence is sufficient to entitle the non-movant to have a jury decide the issue in question. *Financial Corp. v. Harnett Transfer*, 51 N.C. App. 1, 275 S.E. 2d

243, *cert. denied*, 302 N.C. 629, 280 S.E. 2d 441 (1981). Moreover, if there is conflicting testimony that permits different inferences, one of which is favorable to the non-moving party, a directed verdict in favor of the party with the burden of proof is improper. *See Murdock v. Ratliff; Connor Homes v. Ratliff; Ratliff v. Moss*, 310 N.C. 652, 314 S.E. 2d 518 (1984).

This Court, in a recent decision, addressed the issue of tortious interference with contract and held that in some situations a competitor may hire an employer's former employees without being liable for tortious interference with contract. *Peoples Security Life Ins. Co. v. Hooks*, 322 N.C. 216, 367 S.E. 2d 647 (1988). In *Hooks*, plaintiff's employees had terminable at will contracts with plaintiff, had signed covenants not to compete, and subsequently went to work for one of plaintiff's competitors. This Court held that hiring the competitor's former employees and assigning them to the same territory they had worked in their prior employment was not a tortious interference with contract. We held in *Hooks* that a claim for tortious interference with contract would not lie where a defendant had only "offered the plaintiff's employees job opportunities which induced them to terminate their terminable at will contracts and, by locating these employees in their previously assigned territories, induced them to breach the non-competition clauses contained in their contracts with the plaintiff." 322 N.C. at 221, 367 S.E. 2d at 650. We concluded that the fact that the plaintiff and defendant were in competition was sufficient to justify the defendant "in offering the plaintiff's employees new jobs and locating them in their previously assigned territory." *Id.* In *Hooks*, however, we also emphasized that " '[t]he privilege [to interfere] is conditional or qualified; that is it is lost if exercised for a wrong purpose. In general a wrong purpose exists where the act is done other than as a reasonable and *bonafide* attempt to protect the interests of the defendant which is involved.' " *Id.* at 220, 367 S.E. 2d at 650 (quoting *Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E. 2d 282 (1976).

In the case *sub judice*, we have already determined that the covenants not to compete are valid and enforceable. The crux of plaintiff's complaint is that defendant purposely and maliciously solicited customers of plaintiff's in breach of the covenants not to compete. In the instant case, plaintiff alleged, and the evidence shows, that upon terminating his employment with plaintiff, de-

fendant Kuykendall solicited the same customers he had serviced while employed by plaintiff, a direct violation of the covenants not to compete. Moreover, the evidence shows that defendant Share knew, at the time it hired Kuykendall, that Kuykendall had signed covenants not to compete, and, in fact, agreed to pay all legal expenses, if any, Kuykendall would incur as a result of breaching the covenants. The evidence also shows that once Kuykendall was enjoined from soliciting plaintiff's customers, a vice-president of Share, with the information supplied by Kuykendall, continued to solicit plaintiff's customers. Thus, we do not have a case, such as in *Hooks*, in which a competitor is merely hiring a competitor's employees.

Defendant Share contends, however, that it was justified in interfering with the contract because it had a good faith belief that the covenants in question were unenforceable. However, if a defendant has knowledge of the facts concerning plaintiff's contractual rights, he "is subject to liability even though he is mistaken as to their legal significance and believes that there is no contract or that the contract means something other than what it is judicially held to mean." *Childress v. Abeles*, 240 N.C. 667, 674, 84 S.E. 2d 176, 182 (quoting Restatement of the Law of Torts, Sec. 766(e)). Thus, we reject defendant's argument that a good faith belief that the covenants are unenforceable automatically justifies contractual interference.

However, when the issue to be decided is the intent of a party, the general rule is that it is a question of fact to be determined by a jury. *See Little v. National Service Industries, Inc.*, 79 N.C. App. 688, 340 S.E. 2d 510 (1986). In the case *sub judice*, while the jury could reasonably infer from the evidence presented that defendant Share intentionally induced Kuykendall to breach the non-competition covenants of his contract for a purpose "other than as a reasonable and *bonafide* attempt to protect the interests of the defendant," it likewise could infer that defendant Kuykendall breached these covenants without any encouragement or direction from defendant Share. This is especially true in light of the conflicting evidence as to whether defendant Share was aware of the contents of the covenant not to compete. Because the evidence is conflicting and supports two possible opposing inferences, the trial court erred in granting plaintiff's motion for

directed verdict. *Murdock v. Ratliff; Connor Homes v. Ratliff; Ratliff v. Moss*, 310 N.C. 652, 314 S.E. 2d 518.

Therefore, while we agree with the Court of Appeals that the trial court erred in granting plaintiff's motion for directed verdict, we hold that, for the reasons stated above, the Court of Appeals erred in remanding the case for entry of directed verdict in defendants' favor. We hold that it is a jury determination as to whether defendant Share interfered with the contracts without justification.

Unfair Trade Practices Act

[5] Plaintiff next contends that the Court of Appeals erred in reversing the trial court's granting of plaintiff's motion for directed verdict against defendants on the question of whether defendants violated the North Carolina Unfair Trade Practices Act.

The Court of Appeals held that the record was inadequate to determine whether plaintiff's evidence was sufficient concerning whether the defendants' acts unrelated to the covenants not to compete constituted unfair trade practices under N.C.G.S. § 75-1.1. The Court of Appeals remanded the case for a new trial on this issue. Because the Court of Appeals held that the covenants not to compete were unenforceable, it found that the trial court's reliance on these restrictive covenants as the basis for finding a violation of N.C.G.S. § 75-1.1 was in error.

We have already held that the covenants not to compete are enforceable; therefore, we disagree with the Court of Appeals' holding that the trial court erroneously relied on these covenants in determining whether defendants' actions violated N.C.G.S. § 75-1.1. However, we agree with the Court of Appeals concerning the inadequacy of the record. The Court of Appeals found the record deficient as to whether the plaintiff's evidence concerning the allegations unrelated to the covenants not to compete make out a case under N.C.G.S. § 75-1.1. We agree. Moreover, we find the same problem concerning the covenants not to compete. Furthermore, under N.C.G.S. § 75-1.1, it is a question for the jury as to whether the defendants committed the alleged acts, and then it is a question of law for the court as to whether these proven facts constitute an unfair or deceptive trade practice. *Hardy v. Toler*, 288 N.C. 303, 218 S.E. 2d 342 (1975). In the case *sub judice*, the

only issue submitted to the jury was that of damages. This was error, and therefore, the case must be remanded for a new trial on issues relating to the Unfair Trade Practices Act.

We note, however, that while urging this Court to affirm the Court of Appeals' holding remanding the case for a new trial, defendants contend that even if the restrictive covenants are enforceable, as we have so held, N.C.G.S. § 75-1.1 is inapplicable to a covenant not to compete or to tortious interference with contract situations. Essentially, defendants contend that N.C.G.S. § 75-1.1 should be limited to actions involving consumers or, when used to protect businesses, it is limited only to areas involving fraudulent advertising or a buyer-seller relationship.

We disagree with defendant. First, we have not limited the applicability of N.C.G.S. § 75-1.1 to cases involving consumers only. *See Olivetti v. Ames Business Systems, Inc.*, 319 N.C. 534, 356 S.E. 2d 578 (1987). After all, unfair trade practices involving only businesses affect the consumer as well. Second, although the issues in the cases cited by defendant involving unfair trade practices between businesses concerned fraudulent advertising and buyer-seller relationships, there is nothing in those opinions stating that these are the only non-consumer situations in which § 75-1.1 could be applied. *See Olivetti v. Ames Business Systems, Inc.*, 319 N.C. 534, 356 S.E. 2d 578; *Harrington Mfg. Co., Inc. v. Powell Mfg. Co., Inc.*, 38 N.C. App. 393, 248 S.E. 2d 739 (1978). We reject defendants' contention that the North Carolina Unfair Trade Practices Act should be so limited.

Conclusion

In summary, we hold that the trial court, while erroneously finding that the 1982 agreement was superseded by the 1983 agreement, correctly granted plaintiff's motion for directed verdict against defendant Kuykendall for breaching the 1983 supplemental agreement containing the covenant not to compete. Because the restrictions in the 1982 agreement were encompassed in the 1983 agreement, plaintiff was not prejudiced by the trial court's finding that the 1983 agreement superseded the 1982 agreement. However, because we are unable to determine what portion of the damages was awarded to plaintiff because of defendant Kuykendall's breach of the covenant not to compete, a

new trial is ordered for a jury determination of the amount of defendant Kuykendall's liability pursuant to his breach of the 1983 covenant not to compete.

Second, because we hold that it is a jury determination as to whether defendant Share tortiously interfered with the restrictive covenants contained in both agreements, the case is remanded for a new trial concerning this issue.

Third, because of the inadequacy of the record before this Court, and because it is a jury determination as to whether defendant Share committed the alleged acts concerning N.C.G.S. § 75-1.1, the case is remanded for trial consistent with this opinion.

Before the Court of Appeals, plaintiff made other assignments of error which that court did not address because of its disposition of the case. We decline to address these additional assignments of error because they may not arise at the new trial.

The decision of the Court of Appeals is reversed in part and affirmed in part. The case is remanded for further proceedings not inconsistent with this opinion.

Affirmed in part; reversed in part; and remanded.

STATE OF NORTH CAROLINA v. JOHN ROBERT SWANN, III

No. 181A86

(Filed 28 July 1988)

1. Constitutional Law § 51— indecent liberties and sexual offense—preaccusation delay—no constitutional speedy trial violation

The defendant in a prosecution for first degree sexual offense and taking indecent liberties with a child was not denied his right to a speedy trial under the Fifth, Sixth and Fourteenth Amendments of the U. S. Constitution and Art. I, § 19 of the North Carolina Constitution where there was no contention that the prosecution deliberately delayed defendant's indictment; the Sixth Amendment speedy trial provision does not apply to the period before arrest, even though there is not a statute of limitations for the crimes with which defendant was charged; and defendant's trial commenced 167 days after he was arrested.

2. Criminal Law § 91.12— Speedy Trial Act—exclusions for pretrial motions

Defendant's right to a speedy trial in a prosecution for first degree sexual offense and taking indecent liberties with a child was not violated by the passage of 155 days between indictment and the beginning of trial where 35 days were excludable for defendant's pretrial motions, including a waiver of arraignment and a motion for a one-week extension to file motions otherwise required upon arraignment. N.C.G.S. § 15A-701(b).

3. Criminal Law § 106— motion to dismiss for insufficient evidence—incompetent evidence—properly considered

The trial court did not err in a prosecution for first degree sexual offense and taking indecent liberties with a child by considering the victim's testimony on a motion to dismiss for insufficient evidence because, even assuming the victim was not competent to testify, the court must consider all the evidence whether competent or incompetent in the light most favorable to the State.

4. Rape and Allied Offenses §§ 5 and 19— first degree sexual offense and taking indecent liberties with a child—dates of offenses—evidence sufficient

Evidence of first degree sexual offense and taking indecent liberties with a child was sufficient to be submitted to the jury where, although the victim did not testify to the exact dates of the incidents, he did testify that the first incident occurred shortly after his brother was born and that the second incident took place approximately one week later, and the victim's mother testified that her younger son was born 20 September 1984 and that the first incident took place three to four weeks later.

5. Criminal Law § 138.28— indecent liberties—aggravating factor—prior convictions

The trial court did not err by sentencing defendant to terms in excess of the presumptive term for indecent liberties convictions based upon the aggravating factor of prior convictions where defendant admitted during direct examination that he had four prior convictions, including one punishable by up to six months imprisonment and one by one year imprisonment, defendant did not raise the issue of indigency and lack of assistance of counsel on a prior conviction at trial, and defendant showed no abuse of discretion in weighing the mitigating and aggravating factors.

6. Criminal Law § 92.4— first degree sexual offense and indecent liberties with a child—consolidation of charges—no error

The trial court did not err by consolidating two counts of first degree sexual offense and two counts of taking indecent liberties with a child arising from incidents which allegedly occurred one week apart. N.C.G.S. § 15A-926(a).

7. Criminal Law § 91.7— denial of motion to continue—absence of witnesses—no abuse of discretion

The defendant in a prosecution for first degree sexual offense and taking indecent liberties with a child did not show that the trial court abused its discretion by denying his motion to continue based on the absence of two

essential witnesses where one or possibly both of the witnesses in fact testified at trial.

8. Constitutional Law § 34— sentencing for first degree sexual offense and taking indecent liberties with a child—no double jeopardy

Defendant was not twice put in jeopardy by being sentenced for both first degree sexual offense and taking indecent liberties with a child because the elements of the two crimes are different in that conviction of first degree sexual offense requires that the victim be under the age of thirteen, whereas conviction of indecent liberties requires only that the victim be under the age of sixteen; conviction of taking indecent liberties requires that the defendant be at least sixteen years old and five years older than the victim, while first degree sexual offense only requires that he be at least twelve years old and four years older than the victim; and conviction of taking indecent liberties requires that the offense be committed for the purpose of arousing or gratifying sexual desire, which is not required for conviction of first degree sexual offense. Furthermore, *State v. Summrell*, 282 N.C. 157, is expressly disapproved in this regard, and the correct rule is that where a legislature clearly expresses its intent to proscribe and punish exactly the same conduct under two separate statutes a trial court in a single trial may impose cumulative punishments under the statutes. N.C.G.S. § 14-202.1(a)(1) (1986).

9. Criminal Law § 102.6— sexual offense and indecent liberties—argument concerning God's law—no prejudice

There was no prejudice in a prosecution for first degree sexual offense and taking indecent liberties with a child where the prosecutor argued that man's law is based on God's law. The court instructed the jury to disregard the argument, and it is true that a good part of our law is based on moral rules derived from biblical principles.

10. Rape and Allied Offenses § 6.1— first degree sexual offense—failure to submit second degree sexual offense—no error

The trial court did not err in a prosecution for first degree sexual offense and indecent liberties with a child by failing to submit second degree sexual offense as a lesser-included offense of first degree sexual offense. Second degree sexual offense contains alternative elements which are not elements of first degree sexual offense in that second degree sexual offense requires that the sexual act must be committed by force and against the will of the other person, or against a person who is mentally defective, mentally incapacitated, or physically helpless, and the person performing the act knows or should know of the victim's deficiency. N.C.G.S. § 14-27.5.

11. Constitutional Law § 48— first degree sexual offense and taking indecent liberties with a child—effective assistance of counsel

Defendant in a prosecution for first degree sexual offense and taking indecent liberties with a child did not show that his trial counsel failed to render effective assistance of counsel to his prejudice where witnesses who were not interviewed would have presented cumulative evidence; pictorial evidence which was not presented would have been cumulative; there was no showing of what a chemical analysis of a mattress for blood would have shown even

though the mattress was available for analysis at the time of the hearing on effective assistance of counsel; it was not unreasonable not to pursue alibi evidence at trial where defendant testified at trial that he did not know where he was at the time of the incidents; the defendant's counsel may not be blamed for not knowing of a motive the victim's mother may have had for prosecuting the defendant where counsel asked defendant why the victim's mother would do this to the defendant and defendant did not tell his counsel of the incident; there was no prejudice from the failure to file a number of pretrial motions where the motions should have been denied if filed; there was no showing of evidence which was unavailable to defendant which could have been discovered and which would have put defendant in a better position to develop a defense; defendant's attorney was not ineffective in not requesting a recordation of voir dire during jury selection in order to show racial discrimination because *Batson v. Kentucky* was not handed down until after the trial; defendant offered no argument as to why his counsel's failure to make an opening statement would have been the only reasonable strategy in this case and the failure to make an opening statement is not per se unreasonable under prevailing professional norms; specific jury instructions which defendant's counsel did not request should not have been requested or dealt with subordinate features of the case; and there was no prejudice from trial counsel's failure to make an argument at the sentencing hearing because defendant effectively received the minimum possible sentence for his crimes.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from judgments imposing life sentences entered by *Ferrell, J.*, at the 3 February 1986 Session of Superior Court, BUNCOMBE County. The defendant's motion to bypass the Court of Appeals as to the lesser sentences was allowed pursuant to N.C.G.S. § 7A-31(b). Heard in the Supreme Court 10 March 1987.

The defendant was tried on two counts of first degree sexual offense and two counts of taking indecent liberties with a child. Evidence presented at trial tended to show that at the time of the crime the 17-year-old defendant lived in a mobile home with his grandmother, his uncle Sam Swann, his uncle's wife Ann, their infant son, and Ann's 11-year-old son by a previous marriage, who was the victim.

The victim testified that one night shortly after his little brother was born, the defendant came into the room where the victim was sleeping, had anal intercourse with him, and told him not to tell anybody or he would kill him. The victim also testified that about a week later he went hunting with the defendant and, while they were in a cow pasture, the defendant again had anal intercourse with him, and again threatened to kill him if he told

anyone. The victim testified that it was painful, and that afterwards he had to walk sideways because of the pain.

The victim's mother Ann Swann testified that she gave birth to a son on 20 September 1984. About 3 or 4 weeks after she had the baby, she saw her older son sleeping on his cot with no underwear on, and blood on the middle of his sheet. She asked him for an explanation of these things, but received no answer. Later that day, she noticed that he was limping. He told her he was hurting. When she asked where it hurt, he indicated his rectum. It looked swollen and ready to bleed. She put cream on it. Despite her questions, the victim would not tell her what had happened.

Months later, in April 1985, Ms. Swann began to tell her son, the victim, about the facts of life. When she was telling him about homosexuality, he said "that's what J. R. (the defendant) did to me." The victim then told her about both incidents.

Other evidence tended to show that the victim was mentally retarded. Although at the time of trial he was 13 years old, he was functioning at a much lower level. His teacher at a school for mentally retarded children testified that his language abilities were that of a seven-year-old, his reading was at a kindergarten level, and socially and emotionally he functioned as a four- or five-year-old. He had a poor concept of time, but remembered details accurately. He was also easily manipulated by others.

The defendant denied committing the crimes, and testified that he had no idea where he was on the dates of the crimes.

The defendant's grandmother testified that she was never aware of the victim's limping or any bloody sheet, or any other irregularity. Several people testified that the defendant and the victim's mother did not get along well.

The defendant was found guilty on all counts. He was sentenced to the mandatory life sentence for each of the first degree sexual offense convictions, and ten years for each of the indecent liberties convictions, all sentences to run concurrently. The defendant appealed.

The defendant assigned as error ineffective assistance of counsel. After oral arguments, we remanded to the superior court to conduct a hearing in the form of a motion for appropriate relief

on the issue of ineffective assistance of counsel. The hearing was held before Judge Robert D. Lewis on 18 and 19 May 1987. On 9 July 1987, Judge Lewis denied the motion. This Court granted the defendant's motion to file new briefs on that issue.

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

Stephen P. Lindsay, P.A., by Stephen P. Lindsay, for defendant appellant.

WEBB, Justice.

The defendant first assigns error to the trial court's denial of his motion to dismiss for impermissible pretrial delay. The defendant argues that this delay violated the speedy trial requirement of the Sixth Amendment to the United States Constitution, the due process requirements of the Fifth and Fourteenth Amendments to the United States Constitution, and the North Carolina Speedy Trial Act, N.C.G.S. § 15A-701. The defendant also claims that there is a separate speedy trial requirement in Article I, Section 19 of the North Carolina Constitution, and this requirement was also violated.

We first note that in his motion to dismiss at trial, the defendant only invoked the North Carolina Speedy Trial Act; defendant raises the constitutional issues for the first time on appeal. This Court will not ordinarily consider a constitutional question raised for the first time on appeal. *State v. Dorsett*, 272 N.C. 227, 158 S.E. 2d 15 (1967). Nevertheless, we may do so in the exercise of our supervisory jurisdiction. *Rice v. Rigsby*, 259 N.C. 506, 131 S.E. 2d 469 (1963).

[1] It would not help the defendant if we considered the constitutional questions he has raised pursuant to the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 19 of the Constitution of North Carolina. Although the defendant says in his assignment of error that his right to a speedy trial is based on the Constitution of North Carolina as well as the Constitution of the United States, he argues only the question of whether the United States Constitution applies. The Sixth Amendment to the United States Constitution commands that "[i]n all criminal prosecutions the accused shall en-

joy the right to a speedy and public trial." The United States Supreme Court has held in *U.S. v. Marion*, 404 U.S. 307, 30 L.Ed. 2d 468 (1971), that the speedy trial provision of the Sixth Amendment does not apply to the period before a defendant is indicted, arrested, or otherwise officially accused. We applied this rule in *State v. McCoy*, 303 N.C. 1, 277 S.E. 2d 515 (1981).

The defendant argues that the rationale of *Marion* is that there was no need for the application of the speedy trial provision in that case because the defendant was protected by a statute of limitations. There is not a statute of limitations for the crimes with which the defendant was charged in this case and the defendant contends the speedy trial provision of the Sixth Amendment should apply to the pre-accusatory period. We do not believe the Court's holding in *Marion* was based on the fact that there was a statute of limitations. Nevertheless in *U.S. v. McDonald*, 456 U.S. 1, 71 L.Ed. 2d 696 (1982), there was no statute of limitations and the Court held the speedy trial clause does not apply to the pre-accusatory period. The defendant was arrested on 22 August 1985 and his trial began on 5 February 1986. The period before his arrest is not applicable in determining the defendant's Sixth Amendment rights. The defendant's trial commenced 167 days after he was arrested. He was not deprived of a speedy trial under the Sixth Amendment to the Constitution of the United States.

The defendant is not helped by the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution. The United States Supreme Court dealt with the requirements for establishing a due process violation based on pre-accusation delay in *U.S. v. Lovasco*, 431 U.S. 783, 52 L.Ed. 2d 752 (1977). This Court summarized the *Lovasco* holding in *State v. McCoy*, 303 N.C. 1, 277 S.E. 2d 515:

> Essentially a pre-accusation delay violates due process only if the defendant can show that the delay actually prejudiced the conduct of his defense and that it was engaged in by the prosecution deliberately and unnecessarily in order to gain tactical advantage over the defendant.

Id. at 7-8, 277 S.E. 2d at 522. The defendant does not argue, nor does the record indicate, that the prosecution deliberately delayed the defendant's indictment. The delay was largely due to

the fact that the victim never mentioned the incidents to anyone until April 1985, six months after the incidents occurred. There was no due process violation because of pretrial delay.

[2] The defendant also contends it was error to deny his motion to dismiss for failure to comply with the Speedy Trial Act, N.C.G.S. § 15A-701.

The defendant at trial moved to dismiss for failure to comply with the Speedy Trial Act, N.C.G.S. § 15A-701. Under that statute, a defendant's trial must begin "[w]ithin 120 days from the date the defendant is arrested, served with criminal process, waives an indictment, or is indicted, whichever occurs last." N.C.G.S. § 15A-701(a1)(1) (1983). The statute provides that certain time periods are excluded from the computation of this 120-day period. Two are relevant to the present case:

> (1) Any period of delay resulting from other proceedings concerning the defendant, including, but not limited to, delays resulting from:
>
> . . .
>
> (d) Hearings on any pretrial motions or the granting or denial of such motions;
>
> (7) Any period of delay resulting from a continuance granted by any judge if the judge granting the continuance finds that the ends of justice served by granting the continuance outweigh the best interests of the public and the defendant in a speedy trial and sets forth in writing in the record of the case the reasons for so finding. . . .

N.C.G.S. § 15A-701(b) (1987 Cum. Supp.).

In the present case, the last of the four events specified in the statute was the defendant's indictment on 3 September 1985. The defendant's trial began on 5 February 1986, 155 days later. Within this time, the trial court granted the defendant's motion of 9 September 1985 to continue through 23 September 1985, and his motion of 23 September 1985 to continue through 7 October 1985. The time to be excluded due to these continuances is 28 days, under the rule enunciated in *State v. Harren*, 302 N.C. 142, 273 S.E. 2d 694 (1981), that in calculating a time period, the first day is excluded and the last day is included.

On 7 October 1986, the defendant waived arraignment and requested a one-week extension to file motions otherwise required upon arraignment. This seven-day period was properly excluded under N.C.G.S. § 15A-701(b)(1)d. Thus, a total of 35 days is excludable from the 155 days between indictment and trial. The remaining 120 days meets the statutory requirement.

The defendant contends that the seven-day period from 7 October 1985 should not be excluded because he was to be arraigned on 7 October 1985 and he could not have been tried that week if his motion had not been granted. The plain words of N.C.G.S. § 15A-701(b)(1)d require the exclusion of any period of delay which results from the granting of a pretrial motion. This seven-day period was properly excluded. The defendant's first assignment of error is overruled.

The defendant next assigns error to the denial of his motion to dismiss on the ground there was not sufficient evidence to convict him. He argues that this motion should have been granted for three reasons. He says (1) the victim was incompetent to testify, (2) the victim did not testify as to the dates of the offenses charged, and (3) based on these first two assertions, the defendant was "more appropriately" guilty of a sex offense against a mental defective.

[3] In passing on a motion to dismiss the court must consider all evidence, whether competent or incompetent, in the light most favorable to the State. *State v. Allen*, 279 N.C. 406, 183 S.E. 2d 680 (1971). In another part of this opinion we hold that the victim was competent to testify, but assuming he was not, his testimony was admitted by the court and it was properly considered on the motion to dismiss.

[4] As to his contention that the victim did not testify as to the dates of the offenses the defendant argues that the ages of both the defendant and the victim were essential in proving the charges. If the date of the offenses was not proved, says the defendant, essential elements of the offenses were not proved. The victim did not testify to the exact dates of the incidents but he did testify the first incident occurred shortly after his brother was born. He testified the second incident took place approximately one week later. The victim's mother testified that her youngest son was born 20 September 1984 and the first incident

took place three to four weeks later. We hold this is sufficient evidence for the jury to find the dates of the offenses. In light of the fact that we hold the evidence was sufficient to be submitted to the jury for both the charges for which the defendant was tried, we do not discuss his third contention.

[5] The defendant next contends the trial court erred in sentencing him to prison terms in excess of the presumptive term for the indecent liberties convictions, based on the aggravating factor of prior convictions. The defendant complains that (1) it was not clear whether the prior convictions the court relied on to aggravate the sentence were punishable by more than 60 days' confinement, (2) the court did not determine whether at the time of his earlier convictions the defendant had been represented by or had waived counsel, and (3) that the nature of his prior convictions did not merit the aggravation of the sentence.

The defendant's complaints have no merit. The defendant admitted during direct examination that he had four prior convictions, including one for damage to property and one for driving without a license. These two offenses are punishable by up to six months' imprisonment and one year imprisonment, respectively. N.C.G.S. § 14-160(a) (1986); N.C.G.S. § 20-28(a) (1983). On each of the findings of factors sheets, the trial judge marked the box indicating his finding that "[t]he defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days' confinement."

The burden of raising the issue of indigency and lack of assistance of counsel on a prior conviction is on the defendant. *State v. Thompson*, 309 N.C. 421, 307 S.E. 2d 156 (1983). The defendant did not raise this issue at trial, so he cannot now complain that the court did not address it.

The "weight to be given mitigating and aggravating factors is a matter solely within the trial court's discretion." *State v. Penley*, 318 N.C. 30, 52, 347 S.E. 2d 783, 796 (1986). The defendant has shown no abuse of discretion in the present case, and his assignment of error is overruled.

[6] The defendant next assigns error to the consolidation of the four charges for trial. He argues that the consolidation for trial of

offenses which allegedly occurred a week apart is not allowed under N.C.G.S. § 15A-926(a) which provides in part:

> Two or more offenses may be joined in one pleading or for trial when the offenses, whether felonies or misdemeanors or both, 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.

In *State v. Williams*, 308 N.C. 339, 302 S.E. 2d 441 (1983), the defendant was charged with kidnapping, two counts of second degree rape, first degree burglary, second degree burglary and larceny. Some of the charges grew from an incident which occurred on 3 October 1976 and the other charges grew from an incident which occurred on 29 October 1976. The evidence showed that on both occasions the defendant entered the apartment of the same woman and raped her. This Court held there was a transactional connection between all the alleged crimes and found no error in the consolidation of them for trial. In *State v. Bracey*, 303 N.C. 112, 277 S.E. 2d 390 (1981), the defendant was charged with committing three common law robberies within a period of ten days. The method of the robbery in each case was very similar to the robberies in the other two. This Court said there was a transactional connection between the alleged crimes and found no error in their joinder for trial. We hold based on the holdings of *Williams* and *Bracey* that there was no error in the consolidation of the charges for trial in this case.

[7] The defendant next assigns error to the trial court's denial of his motion to continue. The motion, filed and heard on the first day of trial, was made for the reason that two essential witnesses for the defendant were absent or unavailable. The witnesses were identified on the written motion as Connie Robinson and Jocelyn Montgomery. In court, defense counsel identified them as Connie Robinson and Joyce Lynn Montgomery. Defense counsel stated, "I'm informed that these witnesses, one of whom is the fiancee of the defendant, would testify as to his character, both generally and possibly specifically as to specific traits, and she is not in the courtroom."

A request for a continuance based on the absence of a witness is addressed to the sound discretion of the trial court; absent a showing of abuse of discretion, the court's ruling on the request

is not reviewable. *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). The defendant in the present case has shown no abuse of discretion in denying his motion to continue. Moreover, we do not believe the defendant was prejudiced by the denial of this motion. The record reveals that a Connie Robinson did in fact testify for the defendant as a character witness. Another character witness for the defendant, Judith Ann Knueppel, testified that she was the defendant's fiancee. It thus appears that one or possibly both of the "unavailable" witnesses in fact testified at trial. The defendant's assignment of error has no merit.

[8] The defendant next assigns error to the imposition of sentences for the first degree sexual offense as well as the offenses of taking of indecent liberties with a child. The defendant, relying on *Blockburger v. U.S.*, 284 U.S. 299, 76 L.Ed. 306 (1932), argues that first degree sexual offense does not have an element that is not contained in the offense of taking indecent liberties with a child. For that reason he says he has twice been put in jeopardy by being sentenced twice for the same offense. In *Blockburger* the United States Supreme Court stated:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not.

Id. at 304, 76 L.Ed. at 309. In *State v. Gardner*, 315 N.C. 444, 340 S.E. 2d 701 (1986), we held that in single prosecutions for more than one crime, such as in this case, *Blockburger* has no application. We held in *Gardner* that it is a matter of legislative intent as to whether a defendant may receive multiple punishment if he is convicted of two crimes in one prosecution. Although the elements of two crimes may be identical, we said in *Gardner*, multiple sentences may be imposed if that is the intent of the legislature. In determining the intent of the legislature, the fact that each crime for which a defendant is convicted in one trial requires proof of an element the other does not demonstrates the legislature's intent that the defendant may be punished for both crimes. *See State v. Etheridge*, 319 N.C. 34, 352 S.E. 2d 673 (1987).

We disagree with the defendant that first degree sexual offense does not have an element that is not contained in the offense of taking indecent liberties with a child. Conviction of first degree sexual offense requires that the victim be under the age of 13, whereas conviction of indecent liberties requires only that the victim be under the age of 16. Conviction of taking indecent liberties requires that the defendant be at least 16 years old and five years older than the victim, whereas first degree sexual offense only requires that he be at least 12 years old and four years older than the victim. Conviction of taking indecent liberties also requires that the offense be committed "for the purpose of arousing or gratifying sexual desire" which is not required for conviction of first degree sexual offense. N.C.G.S. § 14-202.1(a)(1) (1986). The elements of the two crimes are different.

The defendant also contends that he was subjected to double jeopardy under *State v. Summrell*, 282 N.C. 157, 192 S.E. 2d 569 (1972). In *Summrell* the defendant was convicted of resisting an officer and assaulting an officer. This Court said, "[e]ach warrant included all the elements of the offense charged in the other, and each specified only acts of violence which defendant directed at the officer's person while he was attempting to hold defendant in custody." *Id.* at 173, 192 S.E. 2d at 579. Although the defendant in *Summrell* had been convicted of two offenses in a *single prosecution*, we held that he had been placed in double jeopardy solely because he was sentenced for both crimes, each of which had all the elements of the other. In light of more recent cases, however, *Summrell* is no longer authoritative on this point and is expressly disapproved in this regard. The correct rule is that, "where a legislature clearly expresses its intent to proscribe and punish exactly the same conduct under two separate statutes a trial court *in a single trial* may impose cumulative punishments under the statutes." *State v. Gardner*, 315 N.C. at 453, 340 S.E. 2d at 708 (quoting *State v. Murray*, 310 N.C. 541, 547, 313 S.E. 2d 523, 528 (1984)).

In this case, the elements of the two crimes in question are different. Therefore, no problem of double jeopardy arises. *See State v. Etheridge*, 319 N.C. 34, 352 S.E. 2d 673. We hold the defendant was not put twice in jeopardy by being sentenced for both first degree sexual offense and taking indecent liberties with a child.

[9] The defendant next contends it was error for the court not to declare a mistrial after what the defendant contends was an improper argument to the jury by the prosecuting attorney. The prosecuting attorney made the following argument:

> I ask you to recall a question asked of Mrs. Swann on cross examination about what she did to prepare her son for Court. And if my recollection of her response differs from yours, then you take yours, but I recollect that she answered, "I told him just to tell the truth. God has the situation in hand, and if he is not found guilty, he will still have to answer to God."
>
> Well, it isn't God's law that brings us into the courtroom today. It's man's law, but man's law is based almost wholly on moral law or God's law. Our law also says, "Thou shalt not kill," and our law . . . also says, "Thou shall not steal. . . ."

Defense counsel objected to this argument and the court instructed the jury to disregard it. The defendant, relying on *State v. Moose*, 310 N.C. 482, 313 S.E. 2d 507 (1984), argues that the argument was an improper attempt to appeal to the jury's sympathy and compassion which was not curable by the court's instruction not to consider it. In *Moose* we held it was improper to argue that the police, prosecutors and judges are ordained by God as his representatives on this earth and that to resist these powers is to resist God. That is not the same as in this case in which the prosecuting attorney said our law is based on God's law. It is true that a good part of our law is based on the moral rules we derive from biblical principles. In any event the court instructed the jury to disregard this argument. We assume the jury followed the court's instructions. *State v. Woods*, 307 N.C. 213, 297 S.E. 2d 574 (1982). The defendant was not erroneously prejudiced by this argument.

[10] The defendant next says it was error not to submit to the jury second degree sexual offense as a lesser included offense of first degree sex offense. The defendant, relying on *State v. Brown*, 300 N.C. 41, 265 S.E. 2d 191 (1980), argues that there was sufficient evidence to support a finding of guilty of second degree sexual offense and it was error not to submit it to the jury. In order for an offense to be submitted as a lesser included offense not only must there be evidence of all elements of the offense but

all the elements of the offense to be submitted must be contained in the greater offense. *State v. Weaver*, 306 N.C. 629, 295 S.E. 2d 375 (1982). Second degree sexual offense has as an element that the sexual act must be committed "by force and against the will of the other person," or against a person "who is mentally defective, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know" of the victim's deficiency. N.C.G.S. § 14-27.5 (1986). Neither of these alternative elements is an element of the first degree sexual offense with which the defendant was charged. In was not error for the court not to submit second degree sexual offense as a lesser included charge.

[11] In his last assignment of error the defendant contends that because of the ineffectiveness of his counsel he was denied meaningful representation as guaranteed him by the Sixth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 19 and 23 of the Constitution of North Carolina. After hearing oral arguments we remanded the case to superior court for a hearing on this assignment of error. A hearing was held before Judge Robert D. Lewis who made findings of fact based on the evidence and concluded the defendant's counsel was not ineffective and if he were the defendant had not shown any prejudice. We hold the evidence supported the findings of fact and the findings of fact supported the conclusion.

In *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed. 2d 674 (1984), the United States Supreme Court dealt with the question of ineffective assistance of counsel. The Supreme Court said, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686, 80 L.Ed. 2d at 692-93. The Court also said, "[i]n any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Id.* at 688, 80 L.Ed. 2d at 694. The Court said a no more detailed rule should be formulated and a court should be very deferential in judging the competency of an attorney's performance. The Supreme Court also said, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 695, 80

L.Ed. 2d at 698. In *State v. Braswell*, 312 N.C. 553, 324 S.E. 2d 241 (1985), this Court expressly adopted the *Strickland* test as the standard for measuring the ineffective assistance of counsel under the North Carolina Constitution.

The defendant contends his trial counsel was deficient in seven ways. He says first that his counsel did not properly investigate the case and prepare for trial. The defendant says specifically that there were twenty-one potential witnesses who should have been interviewed prior to trial. Twelve of these witnesses testified at trial. Some of those who were not interviewed would have testified they were living in the trailer or near the trailer in which one of the incidents allegedly occurred and they either did not hear anything unusual at the time of the incident or that they observed the victim shortly after the incident allegedly occurred and there was nothing peculiar in the way he walked. There was testimony from other witnesses at trial to this effect. If the witnesses which the defendant's attorney did not interview had testified their testimony would have been cumulative. We cannot hold that if this cumulative testimony had been used the result of the trial would have been different.

The defendant also complains that his trial counsel did not visit the crime scene or have photographs made of it for introduction as evidence. He says this is important because it would show the closeness of the rooms in the trailer and the likelihood that someone in the trailer would have heard a noise if the incident had occurred as contended by the State. We believe the average juror would know of the close quarters in a trailer. Pictorial evidence would have been cumulative.

The defendant also says that his trial counsel should have had a chemical analysis performed of the mattress on which the alleged incident occurred in order to determine whether there was blood on the mattress. The mattress was available at the time of the hearing before Judge Lewis and no chemical analysis had been performed. We do not know what such an analysis would have shown.

We hold that the defendant has not shown that there is a reasonable possibility that but for errors of the defendant's

counsel in his pretrial investigation the result of the trial would have been different.

The second instance which the defendant contends shows his counsel was ineffective is the failure to pursue alibi as a defense. At the hearing before Judge Lewis the defendant contended he was living with his mother in Burnsville at the time of the offense and if his counsel had interviewed his mother he would have discovered his mother would have provided evidence of an alibi. The defendant's trial counsel testified the defendant told him he did not know where he was at the time of the alleged incidents. The defendant testified to the same thing at trial. In *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed. 2d 674, the United States Supreme Court said:

> And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.

Id. at 691, 80 L.Ed. 2d at 696. From the testimony of defendant's trial counsel and the testimony of the defendant at trial we cannot say it was unreasonable not to pursue an alibi defense at trial. At the remand hearing the defendant's mother testified the defendant was living with her in Burnsville at the time of the alleged incidents. She said she tried to call the defendant's trial attorney to tell him of this alibi evidence but was not able to get him. She did not come to the trial. The defendant contends this failure by his trial counsel to investigate by talking to his mother deprived him of alibi evidence and proves ineffectiveness on the part of his counsel. Judge Lewis found that the testimony of the defendant's mother was inherently incredible in light of the fact that the information was not given to defendant's counsel and indeed that the mother did not come to the trial. We hold the record supports this conclusion.

The defendant next argues that if his counsel had investigated more thoroughly he would have discovered that the victim's mother had a motive for prosecuting the defendant. The

defendant testified at the remand hearing that approximately one month before the crimes for which he was charged allegedly occurred that the victim's mother made sexual advances toward him which he rejected. He says this is important evidence of a motive to prosecute him which should have been developed. The defendant and his counsel testified at the hearing that the counsel asked defendant why the victim's mother would do this to the defendant and the defendant did not tell his counsel of the alleged sexual advance. The defendant testified he did not see the importance of it. The defendant's counsel may not be blamed for not knowing of this incident if the defendant did not tell him.

The defendant next complains that his trial counsel should have filed a number of pretrial motions, including a motion to compel discovery, a motion for a bill of particulars, a motion to require the State to elect between the charges of first degree sexual offense and taking indecent liberties with a child, a motion pursuant to *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed. 2d 215 (1963), requiring the State to produce all exculpatory evidence in its possession, including criminal records of the State's witnesses, and mental or physical conditions of witnesses affecting their ability to perceive or recall events, a motion to record all judicial proceedings (the voir dire hearing for the selection of the jury was not recorded), a motion to determine the competency of the victim to testify, and motions in limine to exclude evidence of the defendant's use of a gun and use of marijuana.

The defendant's trial attorney made a request for voluntary discovery with which the State did not comply. No motion for an order compelling discovery was made and the defendant contends this shows ineffective assistance of counsel. The defendant says this is so because the defendant's counsel had to analyze what discovery he was given during the trial. Except for those items the defendant was given at trial there has been no showing what else may have been discovered. As we point out in another part of this opinion the defendant was not prejudiced because he did not receive the items delivered to him before trial. We cannot say the defendant was prejudiced because his attorney did not file a motion to compel discovery when we do not know what other evidence could have been discovered other than the document given him at trial.

The defendant says the purpose of a bill of particulars is to inform the defendant of the specific occurrences intended to be brought out at trial and to limit the scope of inquiry at the trial. He says if the State had answered a bill of particulars and told him the exact time of day and the exact location at which the offenses allegedly occurred as well as the exact conduct which allegedly constituted a sexual offense it would have been valuable to the defendant in determining whether there was an alibi defense and whether there might have been any witnesses or physical evidence. We have discussed an alibi defense in another part of this opinion. We do not believe the defendant would have been in a better position to develop an alibi defense if he was told what time of day the offenses allegedly occurred when he had told his attorney he did not know where he was on those days. We also believe the defendant had adequate information to determine whether there were witnesses or physical evidence without a bill of particulars.

If the defendant's trial attorney had moved to require the State to elect which of the charges upon which the defendant would be prosecuted such a motion should have been denied. First degree sexual offense and taking indecent liberties with a child contain different elements. In such a case an election is not required. *State v. McGill*, 296 N.C. 564, 251 S.E. 2d 616 (1979).

The defendant argues that if a *Brady* motion had been made requiring the State to deliver to the defendant any exculpatory evidence in the possession of the State the defendant's attorney could have gotten (1) the prior criminal records of all the State's witnesses, (2) any inconsistent statements made by any State's witnesses, and (3) any mental or physical condition of a witness that could affect that witness' ability to perceive the alleged crime at the time it occurred or could affect the witness' ability to recall the crime. Criminal records of witnesses are not discoverable under *Brady*. *State v. Bruce*, 315 N.C. 273, 337 S.E. 2d 510 (1985). When asked by Judge Lewis at the remand hearing what *Brady* material had been withheld the defendant's attorney said, "[t]he specific mental condition of this child at the time." The defendant was certainly in a position to know of the mental condition of the victim without being told by the State. The defendant had lived in the house with the victim and his lawyer had interviewed him. The defendant argues that if a *Brady* motion had

been made "the State would have been required to give counsel a detailed description of that condition prior to trial." The difficulty with this assertion is that there is nothing in the record to show the State had more of a "detailed description" of the victim's mental condition than the defendant. The defendant has not shown he was prejudiced by his counsel's failure to get from the State whatever knowledge it had as to the victim's mental condition.

At the hearing before Judge Lewis the transcripts of two interviews with the victim were offered in evidence. One of them was a transcript of an interview with the defendant's trial counsel. The other is a transcript of an interview with the victim by some other person. In his interview with defendant's trial counsel the victim was much more equivocal as to what had happened than he was in his interview with the second person. The transcript of the interview with the other person was in the possession of the State. The defendant contends that a *Brady* motion would have required the State to deliver this prior inconsistent statement to the defendant's trial attorney and he would have been better able to cross-examine the witness. The district attorney had delivered before trial to the defendant's counsel a transcript of an interview the district attorney had with the victim. The defendant's trial counsel was aware the victim had been equivocal in answering questions as to the incidents during interviews. We cannot hold it was prejudicial to the defendant for his trial counsel not to have a transcript of yet another interview.

The defendant next contends his trial counsel should have filed a motion requesting the complete recordation of the trial including the voir dire on the jury selection. He says that by failing to have the questions asked on jury voir dire recorded he was prejudiced. He says this is so because if the voir dire had been recorded he might be able to show pursuant to *Batson v. Kentucky*, 476 U.S. 79, 90 L.Ed. 2d 69 (1986), that there was racial discrimination in the jury selection. We note that this case was tried in February 1986. *Batson* was handed down on 30 April 1986 and changed the law as to the proof required to show a constitutional violation by a racially discriminatory selection of a jury. We cannot hold an attorney is ineffective because he did not anticipate a change in the law by the United States Supreme Court.

Another motion the defendant says his trial counsel should have made was to disqualify the victim as a witness on the ground the victim was incompetent to testify. The defendant argues that if such a motion had been made the victim could have been found incompetent and not allowed to testify. He also says he could have made a record for appeal. The answer to this argument is that the defendant was not prejudiced because the record shows the victim was competent to testify. The competency of a witness to testify is governed by N.C.G.S. § 8C-1, Rule 601 which provides in part:

> (a) *General Rule*—Every person is competent to be a witness except as otherwise provided in these rules.
>
> (b) *Disqualification of witness in general*—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.

The record in this case clearly shows the victim was a competent witness. Before being sworn he stated, "I'll just tell it like it is. I do tell the truth." After being sworn he was able to state fully what had happened in both instances. We could not hold that the witness was incapable of understanding the duty of a witness to tell the truth or incapable of expressing himself so that he could be understood as to the matter.

The last pretrial motions the defendant says his trial counsel should have filed were motions in limine to exclude testimony that the defendant had a gun and that the defendant used marijuana. The defendant argues that if motions in limine had been made this testimony could possibly have been excluded. We do not believe that evidence the defendant had a gun when he committed the sexual offenses while hunting with the victim should be excluded. We also do not believe we should hold ineffective assistance of counsel can be proved by the failure of defendant's counsel to make a motion in limine in this instance. A ruling on a motion in limine is an interlocutory ruling which a trial court may change when the evidence is offered at trial. *State v. Lamb*, 321 N.C. 633, 365 S.E. 2d 600 (1988). In this case the fact that motions in limine were not made did not prevent the defendant from ob-

jecting to the evidence at trial. For that reason no prejudice occurred at that time. No assignment of error was made to the admission of this evidence and the defendant has not shown us how he was prejudiced by the admission of any evidence for which he says a motion in limine should have been made.

We hold the defendant has not shown his trial attorney was ineffective by the failure to make pretrial motions.

The defendant next complains that trial counsel did not make an opening statement. However, the defendant offers no argument as to why an opening statement would have been the only reasonable strategy in this case. Rather, he relies on statements in trial treatises regarding the importance of a good opening statement. We cannot hold that failure to make an opening statement is *per se* unreasonable under prevailing professional norms, especially when it is common practice in this State to waive the opening statement. *See* Blanchard and Abrams, *Opening and Closing Arguments: The Law in North Carolina* (1981), p. 3. Trial counsel testified at the hearing that he made the tactical decision not to give an opening statement in the present case because he was uncertain what evidence would be introduced at trial, and was even uncertain as to whether the victim would be allowed to testify. This was a tactical decision and we cannot review it. *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed. 2d 674.

The defendant next says his trial counsel was ineffective for failing to request six specific jury instructions which are (1) the failure to request an instruction on how to treat the evidence of the failure of the child to report the incidents for six months, (2) the failure to request the court to submit a charge of second degree sexual offense, (3) the failure to request a charge as to how to treat the corroborating testimony of the State's witnesses, (4) the failure to request a charge on the treatment of the victim's prior inconsistent statements, (5) the failure to request a charge on the motive of the victim's mother to prosecute the defendant, and (6) the failure to request an instruction on the consideration to be given the testimony of a mentally retarded child.

We have held that second degree sexual offense is not a lesser included offense of the first degree sexual offense charged in this case. The defendant's trial counsel should not have requested that it be submitted to the jury.

The other instructions which the defendant says should have been submitted dealt with subordinate features of the case. It was not error for the court not to charge on them. In *State v. Seagroves*, 78 N.C. App. 49, 336 S.E. 2d 684 (1985), *disc. rev. denied*, 316 N.C. 384, 342 S.E. 2d 905 (1986), the Court of Appeals held that in order to show ineffective assistance of counsel because of the failure to request jury instructions, the defendant must show that without the requested instructions there was plain error in the charge. These five requested instructions were directed at the credibility of the victim and other witnesses. Judge Lewis' conclusion with regard to these requested instructions was:

> With respect to failure to request instructions, the jury was aware that credibility was the issue in this case. The court instructed on interested witnesses, and both counsel argued on the credibility aspect of the case. The suggested instructions would have added little to the jury's awareness of the importance of deciding whom to believe.

The record supports this conclusion.

Finally, the defendant complains of trial counsel's failure to make an argument at the sentencing hearing. However, this failure cannot possibly have prejudiced the defendant; he effectively received the minimum possible sentence for his crimes, since the trial judge ordered all four sentences to run concurrently.

We hold that the defendant has made no showing that his trial counsel failed to render effective assistance of counsel, to the prejudice of his defense, and that Judge Lewis properly denied his motion for appropriate relief. The defendant had a fair trial, free from prejudicial error.

No error.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; AND DUKE POWER COMPANY v. PUBLIC STAFF—NORTH CAROLINA UTILITIES COMMISSION (APPELLANT); AND LACY H. THORNBURG, ATTORNEY GENERAL; CITY OF DURHAM; AND WELLS EDDLEMAN (CROSS-APPELLANTS)

No. 108A87

(Filed 28 July 1988)

1. **Appeal and Error § 68; Judgments § 37— Supreme Court decision—evenly divided Court—res judicata**

A Supreme Court decision by an evenly divided Court which affirmed a decision of the Utilities Commission allowing Duke Power Company to recover from its ratepayers costs expended on its abandoned Cherokee and Perkins nuclear power stations is res judicata as to such issue in this rate case involving the same parties.

2. **Electricity § 3; Utilities Commission § 42— electric rates—fair rate of return on common equity**

The Utilities Commission's conclusion that 13.4% is a fair rate of return on Duke Power Company's common equity was not supported by adequate factual findings where the approved rate of return coincides precisely with the return suggested by a study conducted by Duke's expert witness as he adjusted it to protect Duke's investors against down markets and to compensate for financing costs of issuing common stock; the record does not support the adjustments made by Duke's witness; and the Commission failed to make specific findings as to whether the 13.4% return included any adjustment for down markets and the amount of the adjustment it made for financing costs. N.C.G.S. § 62-79(a) (1982).

3. **Electricity § 3; Utilities Commission § 41— electric rates—capital structure—common equity ratio**

The Utilities Commission's decision that Duke Power Company's capital structure should include a common equity ratio of 46.3% is supported by substantial evidence where the testimony of two of Duke's witnesses supports the Commission's finding on changed economic conditions which, in turn, supports its conclusion that an increase, rather than a decrease, in the percentage of common equity from Duke's last rate proceeding is justified.

4. **Electricity § 3; Utilities Commission § 41— electric rates—common equity—investment in nonregulated subsidiaries**

The Utilities Commission was not required, as a matter of law, to reduce the common equity component of a power company's capital structure by an amount equal to the power company's investment in its wholly owned, nonregulated subsidiaries in determining the appropriate capital structure for ratemaking purposes.

Justice MARTIN dissenting in part.

APPEALS pursuant to N.C.G.S. § 7A-29(b) from a final order of the North Carolina Utilities Commission entered 31 October 1986 in Docket No. E-7, Sub 408, by intervenors Lacy H. Thornburg, Attorney General; Public Staff, North Carolina Utilities Commission; City of Durham; and Wells Eddleman. Heard in the Supreme Court on 7 December 1987.

James D. Little, Staff Attorney, for Public Staff Legal Division, North Carolina Utilities Commission, appellant.

Lacy H. Thornburg, Attorney General, by Jo Anne Sanford, Special Deputy Attorney General, and Karen E. Long, Assistant Attorney General, for Attorney General Lacy H. Thornburg and City of Durham, cross appellants.

Wells Eddleman, Intervenor pro se and cross appellant.

Steve C. Griffith, Jr., Senior Vice President and General Counsel, and Ronald L. Gibson, Assistant General Counsel, Duke Power Company; Kennedy, Covington, Lobdell & Hickman, by Clarence W. Walker and Myles E. Standish, for Duke Power Company, appellee applicant.

Richard E. Jones, Vice President and General Counsel, for Carolina Power & Light Company amicus curiae.

EXUM, Chief Justice.

On 27 March 1986, Duke Power Company ("Duke") filed an application with the North Carolina Utilities Commission ("Commission") seeking authority to increase annual electric revenues for its North Carolina retail customers by 14.7%, or $289,316,000. On 14 April 1986, the Commission declared Duke's application to be a general rate case, established the test period, and scheduled public hearings. Thereafter, the Attorney General, North Carolina Industrial Energy Consumers, the Commission's Public Staff, Carolina Utility Customers Association and Wells Eddleman intervened. On 31 October 1986, the Commission, Chairman Wells and Commissioner Cook dissenting in part, issued its Order Granting Partial Rate Increase, from which these appeals are taken, and which authorized Duke to increase its revenues for North Carolina retail customers by $133,080,000.

On intervenors' appeals the questions presented are whether the Commission erred in: (1) reaffirming its decision to allow Duke

to recover, in rates charged to its customers, costs expended on its abandoned Perkins and Cherokee nuclear power stations; (2) deciding that 13.4% is a fair rate of return on Duke's common equity; (3) adopting Duke's actual capital structure as it existed on 31 July 1986 as a proper capital structure for rate-making purposes; and (4) failing to reduce Duke's equity capital for rate-making purposes by deducting from it Duke's investment in certain of its wholly owned, nonregulated subsidiaries. We hold that the Commission's conclusion regarding the appropriate rate of return on common equity is not supported by adequate factual findings, and we remand for further proceedings on this question. We affirm the Commission's decision on all other questions presented.

I.

[1] The Attorney General, the City of Durham, and Wells Eddleman contend the Commission erred in reaffirming its earlier decisions to allow Duke to recover from its ratepayers costs incurred in its now cancelled Cherokee and Perkins nuclear power station projects. Duke responds that our earlier decision, *State ex rel. Utilities Comm. v. Eddleman*, 320 N.C. 344, 358 S.E. 2d 339 (1987), means this matter is *res judicata* and appellants are therefore barred from pressing this contention in the instant case. We agree with Duke and decline to address the merits of appellants' arguments.

In *Eddleman* we considered whether the Commission improperly allowed Duke to recover costs incurred in the construction of its abandoned Cherokee and Perkins nuclear power stations. Duke began constructing these stations in the mid-1970's in order to accommodate then predicted increases in electricity consumption. When consumption increases were not commensurate with these predictions, Duke's Board of Directors terminated construction of both plants. Duke sought, nevertheless, to recover in its rates costs, amortized over periods of years, incurred in the construction of these abandoned plants. The Commission, as it had done in the past without challenge on appeal, decided to permit this procedure. The Attorney General, the City of Durham, and Wells Eddleman appealed to this Court, contending for various reasons that the Commission's decision was legally impermissible. The Court, one Justice not participating, affirmed the Commission's

decision by an evenly divided vote. Concerning the effect of our decision we declared, "following the uniform practice of this Court, the decision of the Utilities Commission is affirmed, not as precedent but as the decision in this case." *Id.* at 380, 358 S.E. 2d at 362.

The doctrine of *res judicata* treats a final judgment as the full measure of relief to be accorded between the same parties on the same "claim" or "cause of action." C. Wright, *Federal Practice and Procedure*, § 4402 (1969). "The essential elements of *res judicata* are: (1) a final judgment on the merits in an earlier suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) an identity of parties or their privies in the two suits." *Hogan v. Cone Mills Corporation*, 315 N.C. 127, 135, 337 S.E. 2d 477, 482 (1986).

Applying the law enunciated in *Hogan* to the facts of the present case, we conclude, as a result of our *Eddleman* decision, that appellants are barred by the doctrine of *res judicata* from reasserting their claim that the Commission's treatment of the costs of the abandoned Perkins and Cherokee power stations is legally impermissible. Here and in *Eddleman* the parties and the claims are identical: the Attorney General, the City of Durham, and Wells Eddleman contend that the Commission erred in allowing Duke to include in its rates, on an amortized basis, costs incurred in the construction of its abandoned power plants. A final judgment on the merits of this claim was reached in *Eddleman*. Although our evenly divided decision had no precedential value, it operated, nevertheless, as the final decision in the case on this claim as to these parties.

Appellants contend that because the Court in *Eddleman* was evenly divided there was no final judgment on the merits of their claim. This argument stands at odds with our decision in *Seay v. Insurance Company*, 213 N.C. 660, 197 S.E. 151 (1935). In *Seay* we held that when a judgment is affirmed on appeal because of an evenly divided Court, the lower decision becomes the law of the case and is determinative of the rights of the parties with regard to the fully litigated claim. *Id.* at 661, 197 S.E. at 152. *Seay* involved a claim by an insurance agent to recover commissions he contended the defendant company owed him. In the initial action the superior court reversed a judgment of nonsuit entered

against the agent in municipal court. Defendant appealed, and this Court affirmed the superior court by an evenly divided vote. The agent brought a subsequent suit on the same claim against the insurance company's successor in interest, and again a judgment of nonsuit was entered against him. This Court reversed, holding that our earlier decision to reverse the judgment of nonsuit was determinative of the rights of the parties in any subsequent action on the same contract. *Id.* at 661, 197 S.E. at 152.

Seay controls the present case on the *res judicata* point. While our decision in *Eddleman* to affirm the Commission has no precedential value, it does finally determine the rights of the parties in that litigation on the abandoned plant cost issue. Since those parties and that issue are the same as in the instant case, those parties may not here relitigate that issue.

II.

[2] The Public Staff argues the Commission's conclusion that 13.4% is a fair rate of return on Duke's common equity is not supported by adequate findings of material facts. We agree and remand for further proceedings on this issue consistent with this opinion.

We note at the outset that the Commission has labeled its determination that 13.4% is a fair rate of return on common equity a "finding." This, of course, does not make it so. What constitutes a fair rate of return on equity, as the Commission in other parts of its order recognizes, is ultimately a matter of judgment. Matters of judgment are not factual; they are conclusory and based ultimately on various factual considerations. Facts are things in space and time that can be objectively ascertained by one or more of the five senses or by mathematical calculation. Facts, in turn, provide the bases for conclusions. *State ex rel. Utilities Comm. v. Eddleman*, 320 N.C. at 351, 358 S.E. 2d at 346. What constitutes a fair rate of return on common equity is a conclusion of law which must, in turn, be predicated on adequate factual findings.

All parties relied principally on what is known as "discount flow methodology" ("DCF") to determine the appropriate common equity rate of return. According to this method the proper rate of return is determined by adding to the common stock's current

yield a rate of increase which investors will expect to occur over time. C. F. Phillips, Jr., *The Regulation of Public Utilities* 356-57 (1984). While the use of DCF methodology presents some difficulties, especially in determining investor expectations, the parties in the present case agreed that a Duke-specific DCF is the best method for determining Duke's rate of return on common equity.

Duke witness Dr. Charles E. Olson performed a Duke-specific DCF study which, standing alone, suggested a return requirement of 11.9% to 12.4%. He "checked" the results of his study by performing a DCF study on a group of electric utilities comparable in risk to Duke. This study suggested a return requirement of 12.5% to 13.0%. Dr. Olson performed another check—a "risk premium study"—which suggested a return requirement of 13.75%. He acknowledged that the risk premium method is not as accurate as the DCF method. Dr. Olson's ultimate recommendation was for a 13.5% to 14.0% return on common equity.

Dr. Olson testified that in arriving at his recommendation he made two upward adjustments to the return requirement suggested by his Duke-specific DCF. The first adjustment was for the purpose of reimbursing Duke for the costs of issuing common stock in the future. Such costs are known as "flotation," or "financing," costs. The second adjustment was made to protect Duke's investors against dilution of their investment should Duke be required, during unfavorable market conditions, to issue stock below book value. Dr. Olson's financing cost adjustment would add one-half of one percent (.5%) and his "down market" adjustment, an additional .5% to the rate of return on Duke's common equity otherwise suggested by his Duke-specific DCF. Both adjustments, when added to the rate of return otherwise suggested by Dr. Olson's Duke-specific DCF, result in a rate of return on common equity of 13.4%. Each adjustment translates into a cost of $21.2 million annually to Duke's North Carolina ratepayers. Together they add $42.4 million annually to these ratepayers' electric bills.

Public Staff witness George T. Sessoms testified that he performed DCF studies which suggested that a 12.3% return on Duke's common equity would be proper. He arrived at this figure by performing a Duke-specific DCF and a DCF analysis of a group

of electric utility companies with risks similar to Duke's. The Duke-specific study indicated an investor return of 11.5% to 12.3%; and the study of the comparable group, 12.0% to 12.9%. From these ranges, Sessoms concluded that Duke's return requirement on its common equity should be 12.2%, only .2% less than suggested by Dr. Olson's similar, unadjusted, Duke-specific DCF. Sessoms then added .1% to this figure to compensate for those financing costs which, from Duke's past history of common stock issues, might be reasonably anticipated to occur in the future.

Attorney General witness Dr. John W. Wilson recommended an 11% rate of return on Duke's common equity. He based his conclusion on a DCF study which employs a regression and correlation analysis of the historical growth rate of Duke and 79 other electric companies. Dr. Wilson made no adjustment for financing costs or down markets.

The Commission concluded that Duke should have the opportunity to earn 13.4% on its common equity. This is precisely the return suggested by Dr. Olson's upwardly adjusted Duke-specific DCF study. To support this conclusion the Commission recited the testimonies of witnesses Olson, Sessoms and Wilson. It highlighted the problems inherent in the DCF method of determining the required rate of return on common equity, emphasizing that the volatility characterizing then current stock market conditions may have skewed the witnesses' ultimate recommendations. The Commission noted that in the last general rate case Duke was allowed a 14.9% common equity return. It went on to declare that

> the rate of return on common equity of 14.0% requested by the company is excessive, while the rates of return on common equity of 12.3% and 11% recommended by the Public Staff and the Attorney General, respectively, are too conservative and stringent and would severely handicap the Company in continuing to provide adequate and reasonably priced electric service to its customers.

The Commission did not state whether the 13.4% return included any adjustment for down markets. It did note that return included some adjustment for financing costs, but it did not quantify this adjustment.

Commission Chairman Robert O. Wells, joined by Commissioner Ruth E. Cook, dissented from the Commission's decision to allow Duke a 13.4% return on its common equity. Chairman Wells expressed the view that the majority improperly included within the 13.4% return a .5% adjustment for financing costs and a .5% adjustment for down markets. Concerning the financing cost adjustment he noted:

> Duke issued new shares of common equity five times over the entire 10-year period of 1975-1985. The total cost of issuance was $16.1 million for an average cost per issue of $3.2 million. To permit Duke to collect $21.2 million annually to cover Dr. Olson's flotation cost fiction is totally unwarranted. However, . . . such a result is . . . implicit in the Majority having allowed Duke a 13.4% return on common equity. Mr. Sessoms added only one-tenth of one percent (.1%) for flotation costs. A .1% flotation cost adjustment will provide annual revenues of $4.2 million on a North Carolina retail basis. Such a sum will more than compensate investors for the costs of issuance of new common stock. Furthermore, the evidence is that Duke will not issue new stock in the foreseeable future. Therefore, whatever allowance is made for flotation cost will, in the foreseeable future, compensate investors for a cost Duke will not incur.

Regarding an adjustment for down markets Chairman Wells wrote:

> [I]t is not the responsibility of this Commission, or of Duke ratepayers, to protect investors from swings in market price. The cost of Dr. Olson's down market adjustment to Duke's North Carolina retail ratepayers is another $21.2 million annually. The Majority, by allowing a 13.4% return on common equity, has in effect adopted a major portion of this down market adjustment. Again I note that Duke does not expect to issue any new common stock for the next three or four years. Indeed, the record reveals that Duke presently has surplus cash in excess of $400 million which could be used for capital expansion if needed.

The guidelines for determining a utility's rate of return in a general rate case are set forth in N.C.G.S. § 62-133(b)(4). This statute provides that the Commission shall fix an overall rate of

return on the cost of a utility's property as determined by subsection (b)(1) that will (1) enable a well-managed utility to produce a fair return for its shareholders, (2) allow the utility to maintain its facilities and services at a reasonable level, and (3) enable the utility to compete in the market for capital funds on terms that are reasonable and fair to its customers as well as its existing investors. *See* N.C.G.S. § 62-133(b)(4) (Cum. Supp. 1987). We have interpreted this statute to mean that

> [T]he Legislature intended for the Commission to fix rates as low as may be reasonably consistent with the requirements of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, those of the State Constitution, Art. I, Sec. 19, being the same in this respect.

Utilities Comm. v. Power Co., 285 N.C. 377, 388, 206 S.E. 2d 269, 276 (1974).

The overall rate of return is figured by combining the rates of return permitted on each form of capital accumulation, here long-term debt, preferred equity and common equity. In combining the rates of return each is weighted according to the ratio among the capital components of the company's capital structure, here 42.9% long-term debt, 10.8% preferred equity and 46.3% common equity. Here the proper rates of return were determined to be 8.91% for Duke's long-term debt and 8.27% for its preferred equity. When these are combined with the 13.4% return on common equity allowed by the Commission and all are weighted according to the ratios among all three forms of capital, the overall rate of return becomes 10.92%. It is this overall rate of return when applied to the rate base as determined by N.C.G.S. § 62-133 (b)(1) that produces the utility's required revenues.

Proper rates of return on debt and preferred equity are relatively easy to determine because they represent returns which, in effect, have been guaranteed to those who have furnished these forms of capital. These rates of return are sometimes called "imbedded costs." The proper rate of return on common equity is always the most difficult to determine and becomes, as we have noted, essentially a matter of judgment based on a number of factual considerations which vary from case to case.

The proper rate of return on common equity is here an extremely important determination because, as can be seen, it is the

most expensive form of capital accumulation, which expense is ultimately borne by the ratepayer, and it is the most heavily weighted in arriving at the overall return. It is important that a reviewing court be able to determine the factual underpinnings upon which the Commission's conclusion on this rate of return rests.

N.C.G.S. § 62-94 prescribes the scope of appellate review of a decision by the Utilities Commission. According to this standard, the reviewing court

> (b) . . . may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional provisions, or
>
> (2) In excess of statutory authority or jurisdiction of the Commission, or
>
> (3) Made upon unlawful proceedings, or
>
> (4) Affected by other errors of law, or
>
> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or
>
> (6) Arbitrary or capricious.
>
> (c) In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error.

N.C.G.S. § 62-94 (1982).

In order to facilitate appellate review, the Commission must comply with N.C.G.S. § 62-79(a), which provides that

> (a) All final orders and decisions of the Commission shall be sufficient in detail to enable the court on appeal to determine the controverted questions presented in the proceedings and shall include:
>
> (1) Findings and conclusions and the reasons or bases therefor upon all the material issues of fact, law, or discretion presented in the record, and

(2) The appropriate rule, order, sanction, relief or statement of denial thereof.

N.C.G.S. § 62-79(a) (1982). "The failure to include all the necessary findings of fact is an error of law and a basis for remand upon N.C.G.S. § 62-94(b)(4) because it frustrates appellate review." *State ex rel. Utilities Comm. v. The Public Staff*, 317 N.C. 26, 34, 343 S.E. 2d 898, 904 (1986).

With these principles in mind, we hold the Commission did not comply with N.C.G.S. § 62-79(a) because it failed to include material factual findings sufficient in detail to permit meaningful appellate review of its conclusion that 13.4% is a fair return on common equity.

First, we note that the Commission's approved rate of return coincides precisely with Dr. Olson's testimony as to the proper return suggested by his Duke-specific DCF study as he adjusted it to protect Duke's investors against down markets and to compensate for flotation costs. But the Commission made no findings as to whether it considered protecting Duke's investors against down markets in setting a proper rate of return on common equity, and if so, the extent to which this factor was employed.

Whether and the extent to which the Commission utilized such a factor is material to its rate of return conclusion. There is no evidence in this record that Duke proposes or can be reasonably expected to issue common stock under market conditions which would cause the value of its outstanding stock to fall. At least in the absence of this kind of evidence a rate of return based, in part, on such a projected phenomenon would be improper. We agree with Chairman Wells that ordinarily "it is not the responsibility of the ratepayers to protect investors from swings in the marketplace." Investors understand, and take the risk, that Duke might possibly at some time because of market conditions be required to issue shares at less than book value. But there is nothing in this record to show that such an event is contemplated or is a probability. Without such evidence we see no reason, nor has the Commission suggested any, for shifting the risk of possible stock issues in down markets from shareholders to ratepayers.

To attract capital, a utility does not need to charge, and is not entitled to charge, for its services rates which will make

> its shares . . . attractive to investors who are willing to risk substantial loss of principal in return for the possibility of abnormally high earnings. The reason is the utility, having a legal monopoly in an essential service, offers its investors a minimal risk of loss of principal.

Utilities Comm. v. Telephone Co., 281 N.C. 318, 337-38, 189 S.E. 2d 705, 718 (1972).

Second, the Commission acknowledges that the rate of return is designed to compensate for financing costs. It states in its order, "[t]he rate of return on common equity . . . includes an adjustment to allow for reasonable stock or issuance financing costs for the reasons generally stated by witnesses Olson and Sessoms in this case." But the Commission failed to quantify this factor, or to specify the extent to which this factor affected the ultimate rate of return approved. This again is a missing material factual finding. Because of its absence we are unable to say whether the Commission erred in its rate of return decision.

Since no evidence was introduced that Duke intends to issue new stock for the next three or four years, and because there was no evidence regarding the probable cost of a prospective issuance, we question whether the record supports any financing cost adjustment. On the other hand, the record reveals that both Dr. Olson, testifying for Duke, and Mr. Sessoms, for the Public Staff, adjusted the rate of return derived from their DCF studies to account for future financing costs. The adjustments they suggested, however, .5% and .1% respectively, differ widely and amount to a significant difference to ratepayers. A .5% financing cost adjustment will increase rates by $21.2 million annually, while a .1% increase will cost ratepayers only $4.2 million annually.

We find nothing in the record which supports a $21.2 million annual adjustment for financing costs. The record shows that over the entire period of 1975-1985 the total cost of Duke's new stock issues was only $16.1 million. The average cost per issue was approximately $3.2 million. The only reference in the record to Duke's plans to issue stock in the future was the statement of its Chairman, Mr. Lee, that the company's "present expectation is that we will be back into the capital markets for new funds in about three to four years."

On the basis of this evidence we agree with Chairman Wells that since the .1% financing costs adjustment suggested by Mr. Sessoms will provide annual revenues of $4.2 million, it will "more than compensate investors for the cost of issuance of new common stock" presently contemplated by Duke. On the other hand, the .5% financing costs adjustment recommended by Dr. Olson would be, on this record, grossly extravagant and not justified.

Thus, even if the record supports some adjustment for financing costs, the extent of that adjustment is of considerable importance to ratepayers. It is a material fact which should have been specifically found by the Commission in order to permit meaningful appellate review of the Commission's ultimate rate of return decision.

The Commission, then, was required to make specific findings showing what effect, if any, it gave to financing costs or down market protection, or both, in arriving at its common equity rate of return decision. *See Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 361, 189 S.E. 2d 705, 732-33 (1972). Failure to do so constitutes an error of law requiring a remand for further proceedings. *Id.* at 365, 198 S.E. 2d at 735.

On remand the Commission is directed to reconsider the proper rate of return on Duke's common equity in light of this opinion. The Commission is directed further to support its conclusion on this issue with specific findings as to its treatment of financing costs and down market protection. The Commission may make such other findings of material facts in support of its conclusion on this issue as it deems appropriate.

III.

[3] The Public Staff contends the Commission's decision that Duke's capital structure should include a common equity ratio of 46.3% is improper because it is not supported by substantial evidence. We disagree.

The ratios among common equity, preferred stock, and long-term debt used for rate-making purposes are important because of the relative expense to the utility of each form of capital accumulation. Common equity investors demand the greatest return; so, for the utility, this form of capital accumulation is, in terms of current expense, the most expensive of the three. The

higher the common equity ratio, the greater the rates which must be charged to cover the expense of providing the higher return demanded by common equity investors.

Evidence presented by Duke tended to show that its capital structure should be set so that the company could maintain between 45.0% and 50.0% common equity. Mr. William S. Lee and Mr. William R. Stimart testified that Standard and Poor's had recommended such a common equity ratio for AA rated utilities. Duke's application was for a capital structure based on its actual, per book capital structure as of 31 December 1985, consisting of 46.18% common equity, 10.97% preferred stock, and 42.85% long-term debt. In rebuttal, Mr. Stimart recommended that the Commission utilize Duke's actual capital structure as of 30 June 1986. This structure consisted of 46.49% common equity, 10.75% preferred stock, and 42.76% long-term debt. On cross-examination Mr. Stimart testified that Duke's capital structure as of 31 July 1986 included a common equity ratio of 46.3%.

Public Staff witness Sessoms testified that the capital structure requested by Duke was too conservative for rate-making purposes. According to Sessoms, Duke's capital structure was conservative in relation to the average capital structure of other publicly traded AA rated electric utility companies. He recommended a hypothetical capital structure of 45.0% common equity, 11.0% preferred stock, and 44.0% long-term debt.

Attorney General witness Dr. Wilson recommended ratios of 42.17% for common equity, 11.17% for preferred stock and 46.66% for long-term debt. Dr. Wilson arrived at these figures by adjusting Duke's capital structure to omit what he considered to be equity invested in Duke's nonregulated subsidiaries, Mill Power Supply Company, Church Street Capital Corporation, Cresent Land and Timber, and Eastover Mining Company. Dr. Wilson testified that since these nonregulated enterprises produce an equity return for Duke, Duke's electric utility ratepayers should not be forced to subsidize them by including in Duke's capital structure for rate-making purposes Duke's equity investments in them.

The Commission concluded that Duke's actual capital structure as of 31 July 1986 represented an appropriate structure for this rate-making proceeding. This capital structure is composed of

42.9% long-term debt, 10.8% preferred stock, and 46.3% common equity. The Commission supported this conclusion by finding that the recommendations of the witnesses for the Attorney General and the Public Staff

> would reduce Duke's common equity ratio below that which was approved in Duke's last general rate case; i.e., 45.52%. The evidence in this case does not support such a reduction. Mr. Lee, Dr. Olson, and Dr. Stimart all testified that S & P is increasing rather than decreasing the requirements for AA utilities and Dr. Olson testified that the tax reform act will have the effect of reducing Duke's fixed charge coverage ratio. The evidence in this case supports an increase rather than a decrease in Duke's common ratio.

Based on considerations such as these the Commission decided that the capital structure as of 31 July 1986 was "within the zone of reasonableness" according to the evidence presented. The Commission stated finally that while it considered the capital structure of 31 July 1986 appropriate in this case it was concerned about Duke's increasing equity percentage. The Commission concluded that it "believes that it is appropriate to place Duke on notice that the Company's actual capital structure will be closely scrutinized and examined for rate-making purposes in future general rate cases."

Chairman Wells dissented from the majority's decision concerning capital structure. He thought the majority failed to comply with its responsibility to fix rates as low as reasonably consistent with due process.

Turning again to the standard of review established in N.C. G.S. § 62-94, we must determine "whether there is substantial evidence, in view of the entire record, to support" the Commission's findings which, in turn, support its conclusion on the appropriate capital ratio for rate-making purposes. *State ex rel. Utilities Comm. v. Eddleman*, 320 N.C. at 355, 358 S.E. 2d at 339. Our function is not to conduct a review *de novo*. "A reviewing court may not modify or reverse [the Commission's] determination merely because the court would have reached a different result based on the evidence." *State v. The Public Staff*, 317 N.C. at 34, 343 S.E. 2d at 903-04. On the contrary, a Commission's order

> will not be disturbed if upon consideration of the entire record we find the decision is not affected by error of law and the facts found by the Commission are supported by competent, material and substantial evidence, taking into account any contradictory evidence or evidence from which conflicting inferences could be drawn.

Utilities Commission v. Carolina Utilities Customers Assn., 314 N.C. 171, 179-80, 333 S.E. 2d 259, 265 (1985).

We find no error in the Commission's decision concerning Duke's capital structure. The testimony of Duke's witnesses Lee and Stimart supports the Commission's finding on changed economic conditions which, in turn, supports its conclusion that an increase, rather than a decrease, in the percentage of common equity from Duke's last rate proceeding is justified.

IV.

[4] The Attorney General argues that the Commission's decision regarding capital structure is improper because it includes equity capital which Duke has invested in certain of its wholly owned, nonregulated subsidiaries. He argues that to permit inclusion of equity capital Duke has invested in its nonregulated subsidiaries in determining the equity capital ratio for rate-making purposes is unlawful because (1) it permits the utility to earn a return on property not actually used in producing electricity in violation of N.C.G.S. § 62-133(b)(1) and (4); and (2) it is arbitrary and capricious in violation of N.C.G.S. § 62-94(b)(6) in light of the Commission's decision in an earlier proceeding to exclude from the capital structure the common equity invested in two of Duke's subsidiaries, Cresent Land & Timber Corporation and Mill Power Supply Company. *See State ex rel. Utilities Comm. v. Eddleman*, 320 N.C. 344, 381, 358 S.E. 2d 339, 362, n. 11. We disagree.

The flaw in the Attorney General's argument, as we see it, is that it assumes that when Duke invests in a subsidiary company the invested proceeds are derived wholly from capital accumulated by the sale of common equity. This, of course, is not the case. As we have noted earlier, capital is derived from the sale not only of common equity but from the sale of preferred stock and bonds. When proceeds from capital accumulated from all three sources is invested elsewhere, the assumption must be that these proceeds

are derived from each source of capital in the same ratio as each source bears to the other on Duke's books. Thus, if any reduction in Duke's capital structure is to be made for rate-making purposes because of Duke's investment of some of its capital in nonregulated companies, the reduction must be made in each source of capital according to the ratio each source bears to the other. Such a reduction would effect no change in the ratios among the capital sources nor would it effect any change in the rate of return allowed for each component of capital.

To arrive at the level of income Duke is permitted to receive from its customers, the Commission first determines the utility's rate base, which is the original cost of all the utility's property used in producing electricity. It then allocates this rate base according to the ratio of its capital structure. Next it applies the rates of return allowed on each component of capital to that portion of the utility's rate base allocated to that component. *See generally*, N.C.G.S. § 62-133 (Cum. Supp. 1987). Whatever capital accumulated from whatever source Duke might have invested in unregulated subsidiaries, these investments have no effect on Duke's rate base upon which its permitted level of income is figured.

The result is that deducting from Duke's capital structure its investments in unregulated subsidiaries would have no ultimate effect on the determination of the level of income Duke is entitled to receive from its customers.

In *Eddleman* the Commission did adjust the equity component of Duke's capital structure by excluding Duke's investment in certain of Duke's nonregulated subsidiaries. Concerning this decision the Commission declared:

> Duke's capital structure should be adjusted to exclude the company's equity investment of $24,076,000 in two of its nonregulated subsidiaries (Cresent Land and Timber Corp. and Mill Power Supply Co.), particularly in view of the fact that the company has itself removed $21 million of long-term debt supporting such nonregulated subsidiaries . . . . It would clearly be inconsistent to exclude only the long-term debt portion of Duke's nonregulated investment in deriving the company's appropriate capital structure for rate-making purposes.

69 PUR 4th 375, 452 (1985). In *Eddleman* it was necessary to adjust Duke's equity component in order to compensate for Duke's adjustment to its debt component. One adjustment necessitated the other in order to maintain an appropriate ratio between the two components for rate-making purposes.

In the present case there has been no adjustment to any capital component associated with Duke's investment in unregulated subsidiaries. Thus, the ratio among the components of Duke's capital structure remains constant. The rates of Duke's electric customers are not affected by inclusion or exclusion of capital invested in subsidiaries so long as the ratio among the components of the capital structure remains constant.

This is not to say that the Commission cannot, or should not, take into consideration, among other things, Duke's investment in unregulated subsidiaries in determining either an appropriate capital structure for rate-making purposes or an appropriate rate of return to be earned on Duke's rate base. We hold only that the Commission is not required, as a matter of law, to reduce the common equity component of Duke's capital structure by an amount equal to Duke's investment in its nonregulated subsidiaries in determining the appropriate capital structure for rate-making purposes.

Summarizing, we hold the Commission erred only in failing to make sufficient material factual findings necessary to support its conclusion that 13.4% is a fair rate of return on common equity. This portion of the Commission's decision is reversed and the matter is remanded to the Commission for further proceedings consistent with this opinion. As to the other issues brought forward in these appeals, the Commission's decision is affirmed.

Affirmed in part; reversed in part and remanded.

Justice MARTIN dissenting in part.

I cannot agree with the approval by the majority of the Commission's treatment regarding the capital structure of Duke with respect to including equity capital that Duke had invested in its wholly owned, nonregulated subsidiaries. To this extent, I dissent from the majority opinion.

I find that the Commission acted in excess of its statutory authority by including common stock investment in non-utility enterprises in determining the appropriate capital structure in this rate case. The majority argues that it must be assumed that when proceeds from capital are invested, the proceeds are derived from each source of the capital in the same ratio as each source bears to the other on Duke's books. Therefore, the majority argues, if any reduction in the capital structure is made for rate-making purposes, the reduction would be in each source of the capital according to the ratio each source bears to the other and in such case a reduction would not affect any change in the rate of return allowed for each component of capital. However, it appears to me that this solution is too simplistic. The point is that such investments in nonregulated companies should not be included for the purpose of determining the equity capital ratio for rate-making purposes. The law does not permit, for rate-making purposes, a utility to earn a return on property not actually used or useful in producing electricity. N.C.G.S. § 62-133(b)(1), (4) (Cum. Supp. 1987).

Such non-utility and nonregulated subsidiaries owned by Duke should stand on their own feet. They should produce an equity return for Duke, and Duke's ratepayers should not be forced to subsidize these enterprises by including Duke's equity investments in them as a part of the electric utility capital structure. By removing these investments, the evidence shows that the equity portion of the capital structure would be reduced from 46.9 percent to 42.17 percent. The effect on rates would have lowered the company's requested increase by some twelve million dollars. Thus, the evidence indicates that by including these investments as a part of the capital structure, the rate-payers are being saddled with an additional twelve million dollars.

Apparently the argument of Duke Power Company is that these investments represent current assets waiting to be reinvested in the electric plant. Even so, Duke's witness, Mr. Stimart, testified on rebuttal that if the Commission were to remove the equity portion of Crescent Land and Timber Company and Mill-Power Supply Company, the equity portion of the capital structure would be reduced to some extent. The Commission, however, made no adjustment to Duke's capital structure to remove the equity of any of the nonregulated subsidiaries. In so doing, it discussed only Church Street Capital Corporation. The Commission

made no analysis as to why the equity investment in the other three major unregulated subsidiaries should not be removed. In this regard it is interesting to note that in 1985 this same Commission had removed from Duke's capital structure equity invested in Mill-Power Supply Company and Crescent Land and Timber Company. *In re Duke Power Company*, 69 PUR 4th 375, 452 (NCUC 1985). This Court agreed with that adjustment in *State ex rel. Utilities Comm. v. Eddleman*, 320 N.C. 344, 358 S.E. 2d 339 (1987).

N.C.G.S. § 62-133(b)(4) compels the Commission to fix rates which reflect the return on the cost of property ascertained pursuant to subdivision (1) as will enable the public utility to produce a fair return for its shareholders. Subdivision (1) of the statute requires the Commission to fix rates by ascertaining the reasonable original cost of the utility's property which is used and useful in providing service rendered to the public within this state. The Commission, by including in the capital structure the equity Duke had invested in nonregulated subsidiaries, violates these statutory requirements. *Smyth v. Ames*, 169 U.S. 466, 42 L.Ed. 819, *modified on other grounds*, 171 U.S. 361, 43 L.Ed. 1977 (1898). *See Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 189 S.E. 2d 705 (1972).

The exclusion of such equity investments in nonregulated subsidiaries when determining capital structure of the utility is common practice in most jurisdictions. 64 Am. Jur. 2d *Public Utilities* § 156 (1972); *In re New York Telephone Company*, 74 PUR 4th 590 (N.Y.P.S.C. 1986).

Further, the Commission apparently reversed its prior holding concerning Mill-Power Supply Company and Crescent Land and Timber Company without making any analysis or discussion in this present proceeding. Thus, it appears that this decision was arbitrary and capricious and unsupported by the evidence upon the whole record test. In the 1985 proceeding, the Commission removed $24,076,000 of the company's equity investment in Crescent Land and Timber Company and Mill-Power Supply Company and assigned as one reason the fact that Duke had removed $21,000,000 of long-term debts supporting such nonregulated subsidiaries. In the present proceeding, we have a reversal without explanation, the Commission's order being silent as to why it

reversed its previous ruling. Thus, it appears that the ruling is arbitrary and capricious and unsupported by the evidence.

I find that the Commission erred as a matter of law by including Duke's equity investments in the nonregulated subsidiaries as a part of its capital structure in calculating the rate of return. Therefore, I would vacate the Commission's findings in this respect and upon remand have the Commission exclude Duke's investments in its nonregulated subsidiaries from the rate structure.

STATE OF NORTH CAROLINA v. ROBERT LEE CARTER

No. 40A87

(Filed 28 July 1988)

Criminal Law § 84; Searches and Seizures § 4— blood sample—invalid nontestimonial identification order—no good faith exception to exclusionary rule under N.C. Constitution

There is no good faith exception under Art. I, § 20 of the North Carolina Constitution to the exclusion of evidence obtained by an unreasonable search and seizure. Therefore, Art. I, § 20 required the exclusion of evidence derived from a blood sample obtained by officers from defendant in reliance upon a nontestimonial identification order which was improperly issued because defendant was in custody where no search warrant authorizing the taking of defendant's blood was issued, defendant did not consent, and probable cause and exigent circumstances did not exist to justify a warrantless search.

Justice MITCHELL dissenting.

Justices MEYER and WEBB join in this dissenting opinion.

Justice MEYER dissenting.

Justices MITCHELL and WEBB join in this dissenting opinion.

APPEAL by defendant from judgments sentencing him to consecutive terms of life for conviction of rape in the first degree and thirty years for conviction of kidnapping in the first degree and to a term of two years, to run concurrently with the sentence for kidnapping, for conviction of misdemeanor assault, said sentences imposed by *Lee, J.*, at the 3 November 1986 session of Superior Court, ORANGE County. Heard in the Supreme Court 15 March 1988.

Lacy H. Thornburg, Attorney General, by Daniel C. Oakley, Special Deputy Attorney General, and John H. Watters, Assistant Attorney General, for the state.

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

MARTIN, Justice.

This case presents us with the question of whether there is a good faith exception under article I, section 20 of the North Carolina Constitution to the exclusion of evidence obtained by unreasonable search and seizure. We hold that there is no good faith exception to the requirements of article I, section 20 as applied to the facts of this case and, accordingly, we grant defendant a new trial because evidence that should have been excluded under our state constitution was admitted in the trial of his case.

Defendant was convicted of rape in the first degree, kidnapping in the first degree, and assault inflicting serious bodily injury on the seventy-eight-year-old victim.

Defendant contends on appeal that (1) taking a sample of his blood without a search warrant violated his rights under the federal and state constitutions, and (2) the record is inadequate to permit a conclusion that scientific testimony on blood types based upon the technique called electrophoresis is sufficiently reliable to permit its acceptance in a court of law. Because we hold that article I, section 20 of the North Carolina Constitution requires the exclusion of the scientific evidence derived from the blood sample, we do not find it necessary to reach other issues presented in this case. Nor do we find it necessary to review in detail all of the evidence presented at trial.

The state's evidence at trial showed that on 18 April 1986 defendant entered the home of the victim and forced her to go with him through her backyard and through a plowed field. He then raped her, severely beat her face, and left her unconscious. Defendant, a prisoner at the Orange County Prison Unit, had been working that day at Branson's sawmill, where he had a work-release job. At approximately 4:15 p.m. defendant was seen walking into the woods with a shovel and a roll of toilet paper, it being the practice of the workmen to relieve themselves in the

woods. He did not report to the van at 4:30 p.m. to be taken back to the prison unit as was expected of him. He was found by searchers at approximately 6:15 p.m., some thirty-three yards from where the victim was found unconscious at 11:00 p.m. Defendant smelled of alcohol and was dirty and disheveled. He was taken to a trailer on the sawmill grounds. The following day the victim's eyeglasses were found under defendant's hat in the trailer. A shovel and paper had been found near the unconscious body of the victim.

The victim's eyesight is considerably impaired, but she was able to describe her assailant as wearing a yellow shirt, a brown apron, work pants, and work shoes. This accords with the description of defendant's dress on the date in question given by witnesses with normal vision. The victim testified that her assailant covered his face but appeared to her to be wearing a red wig and to have a red complexion. Defendant was called "Red" by his co-workers at the mill.

On 21 April, State Bureau of Investigation agent William Weis made application for a nontestimonial identification order requesting, inter alia, that a blood sample be taken from defendant. The order was issued and blood was taken from defendant at North Carolina Memorial Hospital. Defendant made a pretrial motion to suppress any evidence obtained pursuant to the order because the resulting search violated the federal and state constitutions and constituted a substantial violation of chapter 15A of the North Carolina General Statutes. Defendant relied upon the holding in *State v. Welch*, 316 N.C. 578, 342 S.E. 2d 789 (1986), that drawing blood from an in-custody defendant without first obtaining a search warrant violated his fourth and fourteenth amendment rights under the Federal Constitution. *See also State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1977). However, in *Welch* this Court also recognized a good faith exception to the federal constitutional requirement that evidence illegally obtained not be admitted where an officer relied on a nontestimonial identification order to take blood from a defendant in custody. The trial court denied defendant's motion to suppress, ruling that "Officer Weis had acted in good-faith in obtaining the order . . . ."

At trial, SBI serologist Mark S. Nelson testified, over defendant's objection, that a blood smear on underwear seized from de-

fendant after he was returned to the Orange County Prison Unit on 18 April 1986 was consistent with the victim's blood type but definitely was not defendant's blood type. Defendant's blood type had been determined through analysis of the blood sample obtained on the authority of the contested nontestimonial identification order.

It is settled law in this jurisdiction that a nontestimonial identification order may not properly issue for identification procedures to be performed upon an in-custody suspect. We held in *Irick*, 291 N.C. at 490, 231 S.E. 2d at 840, that "Article 14 of Chapter 15A applies only to suspects and accused persons before arrest, and persons formally charged and arrested, who have been released from custody pending trial. The statute does not apply to an in custody accused." In *Welch*, this Court again held that the statute is not applicable for the issuing of a nontestimonial identification order when the suspect or accused is in custody. Similarly, article 14 of chapter 15A did not apply to the taking of the blood sample from defendant, who was in custody in the Orange County Prison Unit. Therefore, the question for resolution is whether the obtaining of the evidence from defendant violated his rights under our state constitution. Defendant argues that his rights under article I, section 20 of the North Carolina Constitution have been violated by the taking of the blood sample and the subsequent introduction at trial of evidence obtained from the sample. Because we decide this case on adequate and independent state constitutional grounds, we do not reach or decide the question of whether the challenged search violated defendant's fourth and fourteenth amendment rights under the Federal Constitution. The federal cases cited or discussed are being used only for the purpose of guidance and they do not compel the result that this Court has reached. *Michigan v. Long*, 463 U.S. 1032, 77 L.Ed. 2d 1201 (1983); *Jackson v. Housing Authority*, 321 N.C. 584, 364 S.E. 2d 416 (1988).

Our state constitution, like the Federal Constitution, requires the exclusion of evidence obtained by unreasonable search and seizure. *State v. Reams*, 277 N.C. 391, 178 S.E. 2d 65 (1970), *cert. denied*, 404 U.S. 840, 30 L.Ed. 2d 74 (1971); *State v. Colson*, 274 N.C. 295, 163 S.E. 2d 376 (1968), *cert. denied*, 393 U.S. 1087, 21 L.Ed. 2d 780 (1969). In language somewhat different from that of the fourth amendment to the United States Constitution, article I,

section 20 of the North Carolina Constitution forbids unreasonable search and seizure:

> General warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted.

Even were the two provisions identical, we have the authority to construe our own constitution differently from the construction by the United States Supreme Court of the Federal Constitution, as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision. *Michigan v. Long*, 463 U.S. 1032, 77 L.Ed. 2d 1201; *State v. Arrington*, 311 N.C. 633, 642, 319 S.E. 2d 254, 260 (1984).

Until 1914 neither state nor federal search and seizure law knew an exclusionary rule, with the sole exception of the state of Iowa. In that year, the United States Supreme Court barred from the federal courts the use of evidence obtained by federal officers in an illegal search. *Weeks v. United States*, 232 U.S. 383, 58 L.Ed. 652 (1914). In *Wolf v. Colorado*, 338 U.S. 25, 93 L.Ed. 1782 (1949), the Court held that the fourth amendment is enforceable against the states through the due process clause of the fourteenth amendment, but declined to extend the exclusionary rule to the states. *Wolf* left the states free to experiment with various methods of protecting their citizens' fourth amendment rights. With the exception of the state of Iowa, which held illegally obtained evidence to be inadmissible into its courts as violative of its state constitution in 1903, *State v. Sheridan*, 121 Iowa 164, 96 N.W. 730,[1] no state supreme court anticipated *Weeks* by holding that its state constitution gave rise to an exclusionary rule. The states followed the common law rule that the admissibility of evidence was not affected by the means used to obtain it. In the landmark case of *Mapp v. Ohio*, 367 U.S. 643, 6 L.Ed. 2d 1081 (1961), the United States Supreme Court held that the fourth amendment forbids the admission of illegally obtained evidence in state courts. Although the states did not anticipate *Weeks*,

1. *Sheridan* was overruled by *State v. Tonn*, 195 Iowa 94, 191 N.W. 530 (1923).

roughly half of them, including North Carolina, did not wait for *Mapp* but adopted an exclusionary rule under state law before that decision required that state courts exclude illegally obtained evidence under the Federal Constitution.[2] North Carolina repudiated the traditional common law principle in 1937 when the General Assembly enacted a statutory exclusionary rule, N.C.G.S. § 15-27. Thus the exclusionary rule was first received into our law fifty years ago, a quarter of a century before the *Mapp* decision mandated that under the Federal Constitution state courts must exclude illegally obtained evidence.

The withdrawal of a blood sample from a person is a search subject to protection by article I, section 20 of our constitution. *See Schmerber v. California*, 384 U.S. 757, 16 L.Ed. 2d 908 (1966); *State v. Welch*, 316 N.C. 578, 342 S.E. 2d 789. Although *Schmerber* and *Welch* were decided on federal constitutional grounds, an individual's constitutional rights under the Constitution of North Carolina must receive at least the same protection as such rights are accorded under the Federal Constitution. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 64 L.Ed. 2d 741 (1980). Therefore, under our state constitution, a search warrant must be issued before a blood sample can be obtained, unless probable cause and exigent circumstances exist that would justify a warrantless search. *Welch*, 316 N.C. 578, 342 S.E. 2d 789. Here, there were no exigent circumstances to justify a warrantless search; defendant's blood type would remain constant. No search warrant authorizing the taking of defendant's blood was issued. Therefore, obtaining the sample of defendant's blood violated his rights under article I, section 20 of the North Carolina Constitution to be free from unreasonable searches and seizures. Under our expressed public policy since 1937, the challenged evidence should have been suppressed. N.C.G.S. § 15A-974(1) (1983).

The state, however, urges this Court to adopt a "good faith" exception to our long-standing exclusionary rule. We now turn to address this issue.

Since deciding *Mapp* in 1961, the United States Supreme Court has limited the scope of application of the exclusionary rule

2. *Elkins v. United States*, 364 U.S. 206, 4 L.Ed. 2d 1669 (1960), contains an appendix presenting in tabular form the law of the states on admissibility of illegally seized evidence to that date.

in several cases. In each case the Supreme Court has weighed the costs of the more expansive application of the rule—which it has identified as that of a quantum of deterrence of police misconduct foregone—against the costs of lost probative evidence. In each case the Court has determined that the costs are too slight to outweigh the benefits of admissibility. Thus, in *Alderman v. United States*, 394 U.S. 165, 22 L.Ed. 2d 176 (1969), the Court held that a defendant has no standing to object to the admission of evidence obtained in violation of the fourth amendment rights of another. In *United States v. Calandra*, 414 U.S. 338, 38 L.Ed. 2d 561 (1974), the Court declined to apply the rule to grand jury proceedings. *United States v. Janis*, 428 U.S. 433, 49 L.Ed. 2d 1046 (1976), held that evidence illegally obtained by a state criminal law enforcement officer is admissible in a federal civil proceeding. *Stone v. Powell*, 428 U.S. 465, 49 L.Ed. 2d 1067 (1976), held that federal habeas corpus relief on the ground that illegally obtained evidence was admitted at trial is unavailable to a state prisoner who has had a full and fair state trial. *United States v. Havens*, 446 U.S. 620, 64 L.Ed. 2d 559 (1980), held that it is constitutionally permissible to admit illegally seized evidence to rebut a defendant's response to a matter first raised by the government during cross-examination.

In *United States v. Leon*, 468 U.S. 897, 82 L.Ed. 2d 677 (1984), the Supreme Court drew upon the analysis developed in these cases to work a more profound curtailment of the federal exclusionary rule. The Court there held that evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate, although ultimately found to be unsupported by probable cause, may be admitted in the government's case in chief. Justice White, writing for the Court in *Leon*, directs that a case-by-case approach supplant the *Weeks/Mapp* per se rule in suppression cases involving warrants ultimately found to be inadequate. Justice White concludes:

> We have now reexamined the purposes of the exclusionary rule and the propriety of its application in cases where officers have relied on a subsequently invalidated search warrant. Our conclusion is that the rule's purposes will only rarely be served by applying it in such circumstances.

468 U.S. at 926, 82 L.Ed. 2d at 700. We must agree with the recent observation of the New Jersey Supreme Court, in its 1987

decision, *State v. Novembrino*, 105 N.J. 95, 519 A. 2d 820, that at least with respect to searches under warrant, the *Leon* good faith exception has swallowed the *Weeks/Mapp* rule:

> According to Justice White's formulation, in suppression cases involving warrants the application of the exclusionary rule will be the exception, and recognition of the good-faith "exception" will be the prevailing standard.

105 N.J. at 139, 519 A. 2d at 846.

From its introduction through the present day, the exclusionary rule has met strong criticism from able judges and commentators and has also evoked forceful support. We shall not here attempt to recount every episode in this well-known history.[3] Chief Justice Weintraub of the New Jersey Supreme Court distilled the essence of the continuing controversy in an opinion written three years before *Mapp* was decided:

> The exclusionary rule rests upon two propositions. The first is that government should not stoop to the "dirty business" of a criminal in order to catch him. The second is that civil and criminal remedies against the offending officer are as a practical matter ineffective, and hence the rule of exclusion is the only available remedy to protect society from the excesses which led to the constitutional right.

Eleuteri v. Richman, 26 N.J. 506, 512, 141 A. 2d 46, 49 (1958). We subscribe to these propositions, both with respect to the exclusionary rule and with respect to a good faith exception to it. To reach this conclusion we draw upon the past fifty years of experience in this state, as well as the experience of other states: The exclusionary rule is indispensable to achieve the purposes for which prohibitions against unreasonable search and seizure were written into the constitutions of the revolutionary era.

Sam J. Ervin, Jr., formerly a justice of this Court, wrote with respect to this question:

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3. *See, e.g., People v. Defore*, 242 N.Y. 13, 150 N.E. 585 (1926), written by then Judge Cardozo, the best known case in which a state supreme court declined to follow the *Weeks* rule, and Wigmore's biting indictment of the *Weeks* decision, 8 Wigmore, *Evidence* § 2184 (3d ed. 1940).

This constitutional guaranty against unreasonable searches and seizures has its roots deeply implanted in the human heart, the common law of England, and tyrannies perpetrated by government on the people of England and the colonies.

The oldest and deepest hunger of the human heart is for a place where one may dwell in peace and security and keep inviolate from public scrutiny one's innermost aspirations and thoughts, one's most intimate associations and communications, and one's most private activities. This truth was documented by Micah, the prophet, 2,700 years ago when he described the Mountain of the Lord as a place where "they shall sit every man under his own vine and fig tree and none shall make them afraid" (MICAH 4:4).

The common law of England originated in the instincts, the habits, and the customs of the people. Hence, it is not surprising that on emerging from the mists of unrecorded history, the English common law embraced as a fundamental principle that every man's home is his castle and the correlative rule that every man may resist to the utmost unidentified persons who seek to enter his home against his will. . . .

. . . .

. . . The common-law courts of England . . . authorized searches and seizures only by special warrants, which were based on oaths disclosing the reasons for their issuance and describing the places to be searched and the persons or things to be seized.

The courts of England that were independent of the common law, such as the Court of Star Chamber . . . and the Court of High Commission . . . did not respect the principle of the common law that every man's home is his castle.

They authorized searches and seizures by general warrants, which were based on mere suspicion and commanded searches and seizures for the enforcement of particular laws without specifying the places to be searched or the persons or things to be seized. In so doing, the general warrants delegated to the persons executing them the autocratic

> power to decide according to their own notions what places should be searched, what persons should be arrested, and what things should be seized. . . .
>
> . . . .
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> . . . Despite honest beliefs of sincere persons to the contrary, the exclusionary rule is an essential ingredient of the Fourth Amendment. Apart from it, the Amendment's guaranty against unreasonable searches and seizures is worse than solemn mockery, and the Amendment might well be expunged from the Constitution as a meaningless expression of a merely pious hope. . . .
>
> If letters and private documents can be thus seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.

Ervin, *The Exclusionary Rule: An Essential Ingredient of The Fourth Amendment*, The True Bill (N.C. Bar Ass'n), vol. 5, No. 1, at 1-3 (1985). The framers of our constitution sought to check the tendency of government to overreach by placing a constitutional mantle around the right to privacy in one's person, home, and effects. They therefore constitutionalized the probable cause standard and the requirement that the government limit the scope of its invasion of privacy by identifying the persons, places, and items to be searched or seized.

North Carolina was among a handful of states that adopted an exclusionary rule by statute rather than by judicial creation. The 1937 statute requiring the exclusion of evidence obtained under an illegal search warrant was amended in 1951 to extend the rule to apply to unlawful warrantless searches.[4] The amended

4. In 1938, *State v. McGee*, 214 N.C. 184, 198 S.E. 616, presented to the Supreme Court the very question of the admissibility of the fruits of illegal

statute was repealed in 1969 and replaced, effective 1975, by N.C.G.S. § 15A-974. Section 15A-974 provides in pertinent part that "[u]pon timely motion, evidence must be suppressed if: (1) Its exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina." Since 1937 the expressed public policy of North Carolina has been to exclude evidence obtained in violation of constitutional rights against unreasonable searches and seizures.

The exclusionary sanction is indispensable to give effect to the constitutional principles prohibiting unreasonable search and seizure. We are persuaded that the exclusionary rule is the only effective bulwark against governmental disregard for constitutionally protected privacy rights. Equally of importance in our reasoning, we adhere to the rule for the sake of maintaining the integrity of the judicial branch of government.

The preservation of the right to be protected from unreasonable search and seizure guaranteed by our state constitution demands that the courts of this state not condone violations thereof by admitting the fruits of illegal searches into evidence. This thesis was adumbrated in *Weeks*. There Justice Day wrote:

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

232 U.S. at 392, 58 L.Ed. at 655. It was given its classical formulation by Justices Holmes and Brandeis in separate and prescient dissents in the 1928 decision, *Olmstead v. United States*, 277 U.S. 438, 72 L.Ed. 944. In his *Olmstead* dissent, Justice Holmes reasoned that "no distinction can be taken between the government as prosecutor and the government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business, it does not permit the judge to allow such iniquities

searches conducted without a warrant left open by N.C.G.S. § 15-27. The Court upheld the search over the dissent of Justice Devin, joined by Justice Stacy, who argued that the spirit if not the letter of the 1937 statute demanded the exclusion of an illegal warrantless search a fortiori since it forbade the admission of evidence obtained with a formally deficient warrant.

to succeed." 277 U.S. at 470, 72 L.Ed. at 953. With more passion but with equal force, Justice Brandeis concluded his dissent with these words:

> Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent, teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

277 U.S. at 485, 72 L.Ed. at 959-60.

Justice Brennan's dissent in *Leon* continues this line of interpretive argument about constitutional protections and the exclusion of illegally obtained evidence. Justice Brennan summarizes the position in these words: "The right to be free from the initial invasion of privacy and the right of exclusion are coordinate components of the central embracing right to be free from unreasonable searches and seizures." 468 U.S. at 935, 82 L.Ed. 2d at 706.

One of the great purposes of the exclusionary rule is to impose the template of the constitution on police training and practices. Unavoidably, a few criminals may profit along with the innocent multitude from this constitutional arrangement. As Justice Traynor noted in his opinion in *People v. Cahan*, 44 Cal. 2d 434, 449, 282 P. 2d 905, 914 (1955):

> He does not go free because the constable blundered, but because the Constitutions prohibit securing the evidence against him. Their very provisions contemplate that it is preferable that some criminals go free than that the right of privacy of all the people be set at naught.

We conclude that the exclusionary rule has been a potent force for achieving its intended deterrent purpose. Warrants today are more carefully prepared and scrutinized before issuance. Likewise, the exclusionary rule is responsible for the systematic, in-depth training of police forces in the law of search and seizure.[5] It can be no part of our constitutional duties to signal a retreat from these salutary advances in constitutional compliance which have guided police practice in this state since 1937.

In our view, logic and history combine to refute those who hope to spare society the costs resulting from the exclusionary rule by adopting alternative remedies. In the period of history between *Weeks* and *Mapp*, when the states were free to experiment with effective alternative remedial devices, none were developed. The *Mapp* Court was forced to conclude that "other remedies have proved worthless and futile." 367 U.S. at 652, 6 L.Ed. 2d at 1088. The damage action, which has inspired the most interest as an alternative to the exclusionary rule, may provide some relief upon occasion to an individual whose rights have been invaded, but offers scant prospect of replacing the exclusionary rule as an institutional deterrent to unconstitutional invasions of privacy. In sifting the prospects of this alternative remedy, commentators have aptly noted that its many defects include the disinclination of juries to doubt the testimony of police witnesses about conduct undertaken to protect the public, the doctrine of sovereign immunity, the judgment-proof character of the working police officer, and the difficulty that the aggrieved plaintiff may encounter in finding and paying counsel to represent him in a damage action.[6] Article I, section 18 of our state constitution directs our courts to provide every person with a remedy for injury. We will not abandon a proven remedy in favor of one which, because its ineffectualness is patent beforehand, mocks this constitutionally mandated guaranty.

5. *See* Milner, *Supreme Court Effectiveness and Police Organization*, 36 Law & Contemp. Prob., 467, 475 (1971); Kamisar, *Public Safety v. Individual Liberties: Some "Facts" and "Theories,"* 53 J. Crim. L.C. & P.S. 171, 179-82 (1962); Sachs, *The Exclusionary Rule: A Prosecutor's Defense*, 1 Crim. J. Ethics 28, 31 (1982).

6. *See* Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum. L. Rev. 1365, at 1387-88 (1983); 1 W. LaFave, *Search and Seizure* § 1.2(c) (1987); Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 430 n.37 (1974).

In determining the value of the exclusionary rule, we regard the crucial matter of the integrity of the judiciary and the maintenance of an effective institutional deterrence to police violation of the constitutional law of search and seizure to be the paramount considerations. We do not discount the implications of the failure to convict the guilty because probative evidence has been excluded in even one grave criminal case. The resulting injuries to victim, family, and society are tolerable not because they are slight but because the constitutional values thereby safeguarded are so precious.

The state, relying upon *Welch*, 316 N.C. 578, 342 S.E. 2d 789, argues that this Court should create a good faith exception to the exclusionary rule under our state constitution which would in the case before us permit the admission of evidence obtained by officers in objectively reasonable reliance on a nontestimonial identification order subsequently found to have been improperly issued. In interpreting the Federal Constitution in *Welch*, we adopted the holding of *Leon*, 468 U.S. 897, 82 L.Ed. 2d 677, and extended it to a case not involving a defective search warrant. Except for *Illinois v. Krull*, 480 U.S. ---, 94 L.Ed. 2d 364 (1987), the United States Supreme Court has applied a good faith exception to the exclusionary rule only in cases involving defective search warrants. *E.g.*, *Massachusetts v. Sheppard*, 468 U.S. 981, 82 L.Ed. 2d 737 (1984).

Here, one of the dissents relies heavily upon *Krull*. The distinctions of the present case and *Krull* are obvious. In *Krull*, the Supreme Court, in a 5 to 4 decision, applied a good faith exception to an unconstitutional search where the officer in good faith relied upon a statute authorizing warrantless administrative searches, the statute ultimately being found to violate the fourth amendment. *Krull* involved the least intrusive of searches, the search of an automobile wrecking yard to determine if the automobile parts dealer was complying with the Illinois Vehicle Code. The Court reasoned that where the officer in good faith relies upon such statute, the deterrent effect of the exclusionary rule is lost.

We are presently concerned with the *most* intrusive search, the invasion of defendant's body and the withdrawal of defendant's blood. Our constitution, as well as the Federal Constitution,

requires a valid search warrant for this purpose. The United States Supreme Court in *Krull* based its reasoning on the lack of deterrence to avoid the exclusionary rule. North Carolina, however, justifies its exclusionary rule not only on deterrence but upon the preservation of the integrity of the judicial branch of government and its tradition based upon fifty years' experience in following the expressed public policy of the state. Under the judicial integrity theory, our constitution demands the exclusion of illegally seized evidence. The courts cannot condone or participate in the protection of those who violate the constitutional rights of others. Although the United States Supreme Court applied a cost-benefit analysis in *Krull*, the basis of our exclusionary rule is not suited to such simplistic resolution of the issue. *See generally* Note, *Illinois v. Krull: Extending the Fourth Amendment Exclusionary Rule's Good Faith Exception to Warrantless Searches Authorized By Statute*, 66 N.C.L. Rev. 781 (1988).

In the present case we are not bound by our holding in *Welch* because here we are construing our state constitution rather than the Federal Constitution.

Counsel for the state argue that we should follow *Leon* and *Welch* because an order pursuant to article 14 of chapter 15A of the North Carolina General Statutes is tantamount to a search warrant. This argument must fail because the taking of a blood sample without consent violates our state constitution unless done pursuant to a valid search warrant or upon probable cause and under exigent circumstances. *Leon*, 468 U.S. 897, 82 L.Ed. 2d 677; *Schmerber v. California*, 384 U.S. 757, 16 L.Ed. 2d 908; *State v. Fisher*, 321 N.C. 19, 361 S.E. 2d 551 (1987). A nontestimonial identification order will not fulfill this requirement. This is true because a nontestimonial identification order can be issued without a probable cause finding as required for the issuance of a search warrant. N.C.G.S. §§ 15A-273, -242, -245 (1983). Probable cause to *arrest* cannot satisfy this requirement. There must be probable cause to believe that the item to be seized constitutes evidence of an offense or the identity of a person who participated in the crime in order to secure a search warrant. N.C.G.S. § 15A-242(4). A nontestimonial identification order may be issued upon a finding, as to the item to be taken, that it will be of "material aid in determining whether the person named in the affidavit committed the offense." N.C.G.S. § 15A-273(3). Further, the

requirement of N.C.G.S. § 15A-273(2) that there be "reasonable grounds to suspect" that the person named committed the offense fails to rise to the level of the probable cause requirement necessary to obtain a search warrant. *See* Comment, *Criminal Law and Procedure—Nontestimonial Identification Orders Without Probable Cause*, 12 Wake Forest L. Rev. 387 (1976).

It must be remembered that it is not only the rights of this criminal defendant that are at issue, but the rights of all persons under our state constitution. The clearly mandated public policy of our state is to exclude evidence obtained in violation of our constitution. N.C.G.S. § 15A-974(1). This policy has existed since 1937. If a good faith exception is to be applied to this public policy, let it be done by the legislature, the body politic responsible for the formation and expression of matters of public policy.

We are not persuaded on the facts before us that we should engraft a good faith exception to the exclusionary rule under our state constitution.

We reverse the ruling of the court below admitting the blood evidence and grant the defendant a new trial.

New trial.

Justice MITCHELL dissenting.

By refusing to permit the introduction of evidence seized by officers acting in the honest belief that a court order authorizing its seizure was lawful, this Court gives much greater protection to criminal defendants than they have been given by the Supreme Court of the United States. In fact, the Supreme Court has specifically stated in a similar situation, "[W]e refuse to rule that an officer is required to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested." *Massachusetts v. Sheppard*, 468 U.S. 981, 989-90, 82 L.Ed. 2d 737, 744 (1984). We should take the same position as to the court ordered search in this case.

In its failing effort to strike a proper balance between the guarantee against unreasonable searches and the public safety, the majority has chosen to place such a heavy thumb on the scales of justice that they will always weigh in favor of the crim-

inal defendant. The inflexible exclusionary rule the majority has selected for North Carolina will not advance the right to be free from unlawful searches, but it will prevent trial courts from reaching the truth and convicting the guilty in a substantial number of cases. The majority should recognize a good faith exception to our exclusionary rule similar to that applied by the Supreme Court under the Constitution of the United States. To do otherwise serves no valid purpose, substantially interferes with enforcement of the criminal law and diminishes the integrity of the judicial branch of government. Therefore, I dissent.

I recognize that our State Constitution, like the Constitution of the United States, requires the exclusion of evidence obtained by an unreasonable search and seizure. *State v. Reams*, 277 N.C. 391, 178 S.E. 2d 65 (1970), *cert. denied*, 404 U.S. 840, 30 L.Ed. 2d 74 (1971). I even agree with the majority that in the past the exclusionary rule may have been the only practical remedial device for preventing unreasonable searches and seizures. *But see United States v. Leon*, 468 U.S. 897, 918, 82 L.Ed. 2d 677, 696 (1984). Even the majority seems to recognize, however, that conditions causing the Supreme Court of the United States to first adopt the exclusionary rule have largely ceased to exist.

One need only read any daily newspaper on a regular basis to know that civil judgments against law enforcement officers for violations of constitutional rights are no longer unusual. Indeed, it is now quite possible for evidence unlawfully seized to be excluded in a criminal case against an accused, while the accused receives additional or double relief in the form of a civil judgment for the same violation of rights. The decision of the majority here greatly increases the likelihood of cases in which criminals will be set free while, at the same time, public officials who have made honest mistakes in good faith are required to pay them damages. It is obvious beyond any need for further discussion that such cases will not further the majority's goal of promoting the integrity of the judiciary, but will result, instead, in the judiciary being subjected to well-deserved ridicule by the general public.

The majority has devoted several pages of its opinion to noble and stirring quotations of legal luminaries of the past, such as former Justices Holmes and Brandeis and our own Sam J. Ervin, Jr., former United States Senator and former Justice of this

Court. Although I agree with almost everything contained in those quotations from decades past, it appears that their scope and grandeur have blinded the majority to the obvious fact that they have almost no relevance to the present case.

The high-minded quotations relied upon by the majority warn against permitting courts to be used to further the designs of law enforcement officers who *intentionally* break the law to gather evidence against criminals. All courts have taken those warnings to heart, and evidence seized by *intentionally* unlawful methods has been excluded under the Fourth Amendment to the Constitution of the United States for decades. *Mapp v. Ohio*, 367 U.S. 643, 6 L.Ed. 2d 1081 (1961). Further, evidence seized by such intentionally unlawful means is not rendered admissible by the good faith exception to the exclusionary rule. *See United States v. Leon*, 468 U.S. 897, 82 L.Ed. 2d 677 (seizure under defective search warrant); *State v. Welch*, 316 N.C. 578, 342 S.E. 2d 789 (1986) (under non-testimonial identification order). The majority simply has chased a constitutional rabbit which was caught and skinned long ago.

By definition, the "good faith exception" to the exclusionary rule applies *only* in situations in which law enforcement officers have acted under the objectively reasonable belief that their actions were lawful and correct. Although the majority implies that by choosing a rule which excludes such evidence seized in good faith it somehow protects our privacy from invasion—by police, not by criminals—the majority completely fails to tell us how exclusion of evidence seized by officers in good faith reliance upon a court order will further this noble purpose. This failure of the majority is quite understandable, since exclusion of evidence in such cases will serve no valid purpose and will greatly harm the innocent public. *See generally United States v. Leon*, 468 U.S. 897, 82 L.Ed. 2d 677.

Only in recent years have researchers begun to study the effects of the exclusionary rule. At least one study indicates that the rule results in either a failure to prosecute or a failure to convict as much as 2.35% of all those arrested for felonies. *Id.* at 907-09 n.6, 82 L.Ed. 2d at 688-89 n.6 (citing California study). The same study suggests that the exclusionary rule is an even greater impediment to prosecutions for particular crimes such as drug

crimes which are unusually dependent on physical evidence. *Id.* Thus, it has been estimated that the exclusionary rule results in the failure to prosecute or the failure to convict in as much as 7.1% of felony drug charges. *Id.* Additionally,

> the small percentages . . . mask a large absolute number of felons who are released because the cases against them were based in part on illegal searches or seizures. "[A]ny rule of evidence that denies the jury access to clearly probative and reliable evidence must bear a heavy burden of justification, and must be carefully limited to the circumstances in which it will pay its way by deterring official unlawfulness." *Illinois v. Gates*, 462 US at 257-258, 76 L Ed 2d 527, 103 S Ct 2317 (White, J., concurring in judgment).

Id.

Even the terribly undesirable result of preventing criminal prosecutions by denying "the jury access to clearly probative and reliable evidence" would be an acceptable price to pay in cases such as this, *if it would have any substantial deterrent effect* on violations of constitutional liberties. Rejection of the good faith exception to the exclusionary rule, however, "can have no substantial deterrent effect in the sorts of situations under consideration in this case . . . [and] cannot pay its way in those situations." *Id.* The majority's calculated choice to reject the good faith exception to the exclusionary rule under our state constitution simply will *not* make our people more secure in their right to be free from unreasonable searches.

In the present case, officers relying in good faith upon a *written judicial order* took a sample of the defendant's blood for analysis and use as evidence. It should be obvious to anyone that excluding this evidence will not deter other officers from making similar mistakes in good faith as to the legal validity of court orders upon which they rely. When following judicial orders in the future, the officers still will not know they are doing anything wrong. Therefore, unlike punishment of intentionally unlawful conduct by officers, which the exclusionary rule arguably deters, punishment of an officer's good faith reliance on a judicial order cannot deter future similar conduct.

Certainly, a refusal to recognize a good faith exception to the exclusionary rule will have no significant "deterrent" effect on

judges and magistrates. As the Supreme Court of the United States has correctly pointed out:

> To the extent that proponents of exclusion rely on its behavioral effects on judges and magistrates . . . , their reliance is misplaced. First, the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates. Second, there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion.
>
> Third, and most important, we discern no basis . . . for believing that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magistrate. . . . And, to the extent that the rule is thought to operate as a "systemic" deterrent on a wider audience, it clearly can have no such effect on individuals empowered to issue search warrants. Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions. The threat of exclusion thus cannot be expected significantly to deter them. Imposition of the exclusionary sanction is not necessarily meaningful to inform judicial officers of their errors, and we cannot conclude that admitting evidence obtained pursuant to a warrant while at the same time declaring that the warrant was somehow defective will in any way reduce judicial officers' professional incentives to comply with the Fourth Amendment, encourage them to repeat their mistakes, or lead to the granting of all colorable warrant requests.

Id. at 916-17, 82 L.Ed. 2d at 694-95 (footnotes omitted). The same common sense reasoning is applicable to cases such as this, in which the search has been conducted pursuant to a nontestimonial identification order. *State v. Welch*, 316 N.C. 578, 342 S.E. 2d 789. Further, the reasoning of the Supreme Court is not made any less compelling by virtue of the fact that this issue arises under our State Constitution rather than the Constitution of the United States. The exclusionary rule is identical under both constitutions, and the good faith exception to that rule also should be applied equally under both constitutions.

The Supreme Court of the United States has always restricted application of the exclusionary rule "to those areas where its remedial objectives are thought most efficaciously served." *United States v. Calandra*, 414 U.S. 338, 348, 38 L.Ed. 2d 561, 571 (1974). The Supreme Court also:

> has acknowledged that the suppression of probative but tainted evidence exacts a costly toll upon the ability of courts to ascertain the truth in a criminal case. . . . [Supreme Court] cases have consistently recognized that unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury. . . . After all, it is the defendant, and not the constable, who stands trial.

United States v. Payner, 447 U.S. 727, 734, 65 L.Ed. 2d 468, 476 (1980) (citations omitted). This Court should adopt the same common sense reasoning expressed in such statements by the Supreme Court of the United States and apply it here. Regrettably, however, the majority chooses to be more dogmatic and doctrinaire than the Supreme Court of the United States in protecting criminal defendants by excluding evidence uncovered through honest mistakes of officers acting in good faith reliance upon court orders. I recognize that it is within the power of the majority to give criminal defendants greater protections under our State Constitution than those given them by the Constitution of the United States or the decisions of the Supreme Court of the United States; I simply think the majority is wrong to do so in the context of this case.

In the context of cases such as this, the majority's doctrinaire application of our exclusionary rule truly becomes a "mere technicality" applied with a vengeance to block enforcement of the criminal laws for no good reason. Application of the exclusionary rule here will not deter any future misconduct by anyone or lessen the likelihood of future infringements upon anyone's constitutional rights. The only effect of the majority's rejection of a good faith exception to the exclusionary rule in cases such as this is to punish the public by impeding the truth-finding function of its courts. This drastic choice by the majority does not lead to any corresponding societal or constitutional gain for anyone other than criminal defendants lucky enough to have officers make

honest errors in their cases. This diminishes the integrity of the judicial branch of government.

As I believe the majority has today dramatically tilted the scales of justice in favor of criminal defendants for no good or beneficial reason whatsoever, I respectfully dissent.

Justices MEYER and WEBB join in this dissenting opinion.

Justice MEYER dissenting.

I join the well-reasoned dissenting opinion of Justice Mitchell, and wish to add the following.

The majority dismisses the very recent United States Supreme Court case, *Illinois v. Krull*, 480 U.S. ---, 94 L.Ed. 2d 364 (1987), as a 5 to 4 decision which fails to address the "judicial integrity" justification for the exclusionary rule. In my view, this cavalier dismissal is a serious error. As a practical matter, the United States Supreme Court frequently divides rather sharply on hotly debated issues such as this one. *See, e.g., United States v. Leon*, 468 U.S. 897, 82 L.Ed. 2d 677 (1984) (6 to 3); *United States v. Havens*, 446 U.S. 620, 64 L.Ed. 2d 559 (1980) (5 to 4); *Michigan v. DeFillipo*, 443 U.S. 31, 61 L.Ed. 2d 343 (1979) (6 to 3). It is unwise to ignore the teachings of the majority opinion in such cases.

In my view, the case before the Court today is indistinguishable from *Krull*. There, a detective searched an automobile wrecking yard under authorization of a section of the Illinois Vehicle Code granting police officers wide latitude to make warrantless inspections of the records and premises of automobile parts dealers. The statute was later found to be unconstitutional. Here, the SBI agent and assistant district attorney made application for a nontestimonial identification order requesting that, among other things, a blood sample be taken from defendant. The order was improperly issued, since under *State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1977), article 14 of chapter 15A of the North Carolina General Statutes does not apply to an in-custody accused. In *Krull*, the United States Supreme Court held that its decision in *United States v. Leon*, 468 U.S. 897, 82 L.Ed. 2d 677, controlled the facts before it. Under *Leon*, the exclusionary rule does not apply to evidence obtained by a police officer who acts in objective-

ly reasonable reliance on a search warrant issued by a neutral magistrate that is later found to be defective. *Id.* at 922, 82 L.Ed. 2d at 698; *see* Note, *Illinois v. Krull: Extending the Fourth Amendment Exclusionary Rule's Good Faith Exception to Warrantless Searches Authorized by Statute*, 66 N.C.L. Rev. 781, 784 (1988). In *Krull*, the Supreme Court encountered no problems in analogizing the situation in which a police officer acts in reasonable reliance on an unconstitutional *warrant* to one in which he acts under the authority of what turns out to be an unconstitutional *statute*. So it should be in the case before this Court. Here we have a law enforcement officer acting in objectively reasonable reliance upon an order issued by a judge which was later found to have been improperly issued. If this Court followed *Krull*, the evidence deduced from the blood sample drawn from defendant would be properly admissible.

As the majority points out, when interpreting the Federal Constitution, we adopted the *Leon* holding and extended it to a case not involving a defective search warrant in *State v. Welch*, 316 N.C. 578, 342 S.E. 2d 789 (1986). In *Welch*, this Court held that the obtaining of a blood sample from an in-custody defendant by use of a nontestimonial order was an unreasonable search and seizure under the United States Constitution, but that since the officers acted in good faith in obtaining the blood through the nontestimonial order, the evidence need not be excluded. *State v. Welch*, 316 N.C. 578, 342 S.E. 2d 789. Under the logic of *Welch*, this Court should hold that the evidence derived from the blood drawn in this case should also not be suppressed since the seizure was in good faith. This is especially so since the samples were obtained from the defendant in the case *sub judice* before this Court's decision in *Welch* went down. The failure of the majority to give this case the same treatment as *Welch* is the worst sort of judicial arbitrariness.

The State here, in obtaining a nontestimonial order and in making the minor intrusions required to draw blood or get pubic and head hair samples, was acting in objectively reasonable reliance upon an order issued by a judge pursuant to statutory authority. *See, e.g., State v. Kuplen*, 316 N.C. 387, 343 S.E. 2d 793 (1986); *State v. Young*, 317 N.C. 396, 346 S.E. 2d 626 (1986). Logic demands that the good faith exception to the exclusionary rule be

properly extended to apply to the facts in the case before us today.

This Court ought not, on the basis of state constitutional law, reject the good faith exception to the federal exclusionary rule enunciated in *United States v. Leon*, 468 U.S. 897, 82 L.Ed. 2d 677, and *Massachusetts v. Sheppard*, 468 U.S. 981, 82 L.Ed. 2d 737 (1984). The law of search and seizure under the North Carolina Constitution should be interpreted as being no more restrictive than the fourth amendment to the United States Constitution. Article I, section 20 of the Constitution of North Carolina has generally been read as being the functional equivalent of the fourth amendment. *See State v. Kornegay*, 313 N.C. 1, 326 S.E. 2d 881; *State v. Arrington*, 311 N.C. 633, 319 S.E. 2d 254 (1984). In interpreting article I, section 20, this Court has generally relied on United States Supreme Court decisions on the fourth amendment as persuasive authority. *See, e.g., State v. Arrington*, 311 N.C. 633, 319 S.E. 2d 254.

As stated in *State v. Vestal*, 278 N.C. 561, 577, 180 S.E. 2d 755, 766 (1971), "there is no variance between the law of this State as declared by the decisions of this Court . . . and the requirements of the Fourth Amendment as interpreted by the Supreme Court of the United States." *See also State v. Kornegay*, 313 N.C. 1, 326 S.E. 2d 881 (1985). In *State v. Hendricks*, 43 N.C. App. 245, 258 S.E. 2d 872 (1979), *cert. denied*, 299 N.C. 123, 262 S.E. 2d 6 (1980), our Court of Appeals stated:

> Though the language in the North Carolina Constitution (Article I, Sec. 20), providing in substance that any search or seizure must be "supported by evidence," is markedly different from that in the federal constitution, there is no variance between the search and seizure law of North Carolina and the requirements of the Fourth Amendment as interpreted by the Supreme Court of the United States.

Id. at 251-52, 258 S.E. 2d at 877.

There is no reason, compelling or otherwise, for this Court to find there to be different exclusionary standards under the North Carolina Constitution than the United States Constitution. A dual set of rules and exclusionary standards will create a burdensome set of highly sophisticated rules which in no way furthers the ob-

jectives of the fourth amendment or article I, section 20 of the North Carolina Constitution. As pointed out in another context:

> "[T]he exclusionary rule[] is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be 'literally impossible of application by the officer in the field.'"

New York v. Belton, 453 U.S. 454, 458, 69 L.Ed. 2d 768, 773-74, *reh'g denied*, 453 U.S. 950, 69 L.Ed. 2d 1036 (1981) (quoting LaFave, *"Case-by-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 Sup. Ct. Rev. 127, 141).

Since the search and seizure portions of the North Carolina Constitution have heretofore been interpreted in light of the United States Constitution, I believe that the majority has grievously erred in ignoring the rationale of *Illinois v. Krull*, 480 U.S. ---, 94 L.Ed. 2d 364, and instead creating different exclusionary rules depending upon whether the state or federal Constitutions are invoked by a defendant making a suppression motion.

Justices MITCHELL and WEBB join in this dissenting opinion.

STATE OF NORTH CAROLINA v. CURTIS HERRING

No. 572A87

(Filed 28 July 1988)

1. Rape and Allied Offenses § 5— rape—serious personal injury—evidence sufficient

There was sufficient evidence to establish the serious personal injury element of first degree rape and first degree sexual offense where the State's evidence tended to show that defendant choked the victim into unconsciousness three times; her jeans were tied around her neck and used to

drag her nude body through a wooded area where she was left; she had a deep red ring around her throat and bruises and abrasions over nearly her entire body; the victim testified that the defendant had tried to put her eyes out with his thumbs; and one witness testified that the victim's eyes were "red as tomatoes and swollen real bad." N.C.G.S. § 14-27.2(a)(2)b, N.C.G.S. § 14-27.4.

2. Robbery § 4.2— common law robbery—felonious intent—evidence sufficient

The trial court properly denied defendant's motions to dismiss the charge of common law robbery based on an alleged failure of the State to present substantial evidence of felonious intent where no direct evidence established the defendant's intent at the time of the taking, but the evidence tended to show that after the rape and sexual offenses the defendant threw the victim's clothing out of the car, kept her pocketbook containing fifty dollars, and disposed of the pocketbook the next day.

3. Rape and Allied Offenses § 6— rape—serious injury—instructions

The trial court did not err in its instructions on the element of serious injury in a prosecution for rape and sexual offenses where the court instructed the jury on mental injury even though there was no evidence of mental injury in the present case because the trial court corrected its instructions on the element of serious injury when the lack of any evidence tending to show mental injury was drawn to the court's attention. The curative instruction prevented any confusion and the trial court left the jury with an accurate instruction as to serious personal injury.

4. Criminal Law § 122.1— additional instructions after jury retired—no error

In a prosecution for sexual offenses, rape, kidnapping, and common law robbery in which the jury requested additional instructions after it had begun deliberations, the trial court did not abuse its discretion by not giving defendant's special instructions verbatim where the court instructed the jury in substantial conformity with defense counsel's request.

5. Rape and Allied Offenses § 6.1— rape—request for instruction on assault on female as lesser included offense—denied—no error

The trial court did not err by denying defendant's request for an instruction on the offense of assault on a female as a lesser included offense of rape because assault on a female contains elements not present in the greater offense of rape and therefore is not a lesser included offense.

6. Rape and Allied Offenses § 4.3— rape—limited cross-examination of victim—no error

The trial court did not err in a prosecution for sexual offenses, rape, kidnapping, and common law robbery by not admitting testimony from the victim regarding an incident in which she was allegedly "making out" with a defense witness. The evidence in question did not fall within any of the exceptions of the Rape Shield Statute. N.C.G.S. § 8C-1, Rule 412 (1986).

7. Criminal Law § 102— statements by prosecutor—no prejudice

There was no prejudice in a prosecution for rape, kidnapping, sexual offenses, and common law robbery from statements made by the prosecutor

where no objections were made to some of the statements. Objections were made and sustained and curative instructions were given to others, and objections to some statements were properly overruled.

8. Bills of Discovery § 6; Constitutional Law § 30— defendant's pretrial statement —defendant provided with tape recording three days before trial—mistrial and discovery sanctions denied—no abuse of discretion

The trial court did not abuse its discretion in a prosecution for rape, sexual offense, kidnapping, and robbery by denying defendant's motions for discovery sanctions, for a continuance, or for a mistrial where defendant was provided with the substance of his statement by way of a copy of an officer's written report on 29 March 1987; defense counsel became aware of the existence of a tape recorded version of the statement on 14 July 1987, three days before the introduction of the written report at trial; defense counsel was given an opportunity to listen to the tape on that same date; and defendant neither had the tape recording analyzed nor scheduled a further date upon which to have it analyzed, and did not call an officer who was present throughout the interview to clarify any inaudible portions of the recording.

9. Bills of Discovery § 6; Constitutional Law § 30— failure to disclose footprint comparison—refusal of discovery sanctions—no abuse of discretion

The trial court did not abuse its discretion in a prosecution for rape, sexual offense, kidnapping, and common law robbery by refusing to sanction the State for failure to disclose the results of footprint comparisons where defendant did not object or request sanctions when the State offered the evidence.

10. Criminal Law §§ 42.4, 43.1— introduction of photograph of defendant and gun —no error

The trial court did not err in a prosecution for rape, sexual offense, kidnapping, and common law robbery by introducing an officer's testimony about a rifle found in defendant's car when he was arrested or another officer's testimony about her identification of a photograph of defendant. The mere fact that defendant possessed a firearm at the time of his arrest does not imply that he either used or intended to use the rifle for illegal purposes, and the fact that an officer was able to positively identify a photograph of defendant shortly after seeing him lends credence to her subsequent identification of him at trial. There was neither testimony nor markings on the photograph that would identify it as a mug shot.

11. Criminal Law § 75.2— admissibility of confession—finding of no threats or promises—no error

In a prosecution for rape, sexual offense, kidnapping, and common law robbery, the trial court's findings of fact and conclusion that defendant's inculpatory statement was voluntary was supported by competent evidence where an officer testified that defendant was read his rights and that he waived his right to remain silent and his right to counsel; defendant acknowledged his waiver by signing a waiver of rights form; and, although defendant presented contradictory testimony, the officer testified that on numerous occasions he and another officer told defendant that they could not negotiate plea bargains.

12. Criminal Law § 91.6— newly-obtained evidence—denial of continuance—no error

The trial court did not err in a prosecution for rape, sexual offense, kidnapping, and common law robbery by denying defendant's motion for a continuance where defense counsel learned of a tape recording of defendant's statement three days prior to its introduction at trial, was given a written report of the substance of his statement months before trial, was given access to the tape recording in ample time to prepare a probing cross-examination when the tape recorded version of defendant's statement was introduced during rebuttal, defendant cross-examined an officer regarding the contents of the tape recording, and defendant could have called another officer to clarify the contents of the tape recording if any doubts about its contents remained.

APPEAL as of right by the defendant pursuant to N.C.G.S. § 7A-27(a) from judgments imposing two consecutive life sentences entered by *Cornelius, J.*, at the 13 July 1987 session of Superior Court, FORSYTH County. The defendant's motion to bypass the Court of Appeals on his appeals of convictions for common law robbery and two counts of second-degree sexual offense was allowed on 30 November 1987. Heard in the Supreme Court on 14 April 1988.

Lacy H. Thornburg, Attorney General, by Doris J. Holton, Assistant Attorney General, for the State.

Joslin Davis for the defendant-appellant.

MITCHELL, Justice.

The defendant, Curtis Ray Herring, was tried upon proper bills of indictment charging him with rape, first-degree kidnapping, three counts of sexual offense and common law robbery. A jury found the defendant guilty of first-degree rape, first-degree sexual offense, first-degree kidnapping, two counts of second-degree sexual offense and common law robbery. The trial court entered judgments sentencing the defendant to two consecutive life sentences for first-degree rape and first-degree sexual offense, forty years for two counts of second-degree sexual offense and three years for common law robbery. The trial court arrested judgment on the conviction for first-degree kidnapping.

The defendant has brought forward on appeal numerous assignments of error. Having reviewed his assignments, we hold that the defendant's trial was free of reversible error.

The State's evidence tended to show, *inter alia*, that at approximately 9:30 p.m. on 29 September 1986, the female victim was walking along Ogburn Avenue in Winston-Salem when the defendant stopped his car beside her and asked if she wanted a ride. She answered "no" and continued walking. The defendant again drove up beside her and stopped. He told her to "get in the car or he was going to kill [her]." She got in as told, and the defendant held her hair so she could not get out of the car. The defendant drove to a dead-end road beside a church and stopped. He made the victim undress and threw her onto the back seat. He then performed cunnilingus upon her and made her perform fellatio upon him. The defendant also forcibly penetrated the victim with his penis, both vaginally and anally. She began to scream and the defendant choked her into unconsciousness. She regained consciousness as she was being dragged through the woods with her jeans tied around her neck. When the defendant saw her regain consciousness, he began choking her again. She once again lost consciousness. When she regained consciousness, the defendant was gone. Clad only in shoes and jeans, the victim went to the nearest house and telephoned the police.

The victim was taken by ambulance to Forsyth County Hospital. The attending physician testified that the victim suffered from numerous bruises and scratches over her body. The bruises around her neck resembled the "ends of fingers." The doctor observed dried blood in the victim's vaginal and anal areas.

Corporal Joyce Sink of the Forsyth County Sheriff's Department responded to the victim's call. She drove down the dirt road where the incident had occurred and saw a car with three men coming in her direction. She stopped the car and asked the occupants for identification. All three men denied having any identification. The defendant, Herring, identified himself as Ricky Davis.

On 3 November 1986, the defendant was apprehended in Narrows, Virginia pursuant to a fugitive warrant and returned to North Carolina. Deputy Thurman Stewart of the Forsyth County Sheriff's Department spoke with the defendant on 10 November 1986 and read his *Miranda* rights to him. The defendant signed the waiver of rights form and said he wanted to talk.

The defendant gave Deputy Stewart a statement in which he admitted taking the victim to "the end of [a dirt] road and rap[ing] her." He stated that she began to scream rape, "but he did not stop because he thought he would be in just as much trouble if he finished what he started . . . as he would be if he stopped." He further stated that he had drunk liquor and "shot two loads of cocaine" that evening and that he did not remember performing oral or anal sex on the victim. He admitted dragging the victim out of the car and into the woods. He stated that he and his two brothers returned to the area to see if the girl was injured. Finally, the defendant stated that he found the victim's purse and panties in his car the next day and threw them away.

By his first assignment of error, the defendant contends that the trial court erred in denying his motions to dismiss the charges against him at the close of the State's evidence and at the close of all of the evidence. We conclude that the trial court properly denied the defendant's motions to dismiss.

The defendant assigns as error the trial court's denial of his motions to dismiss the charges against him for insufficiency of the evidence. A defendant's motion for dismissal for insufficiency of the evidence in a criminal case raises the question of whether substantial evidence of each essential element of the offenses charged has been presented. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982). Substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion. *State v. Smith*, 300 N.C. 71, 265 S.E. 2d 164 (1980). In determining this issue, the evidence must be viewed in the light most favorable to the State, giving the State every reasonable inference which may be drawn therefrom. *State v. Jerrett*, 309 N.C. 239, 263, 307 S.E. 2d 339, 352 (1983). If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, a motion to dismiss should be denied. *E.g., State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649.

[1] The defendant first argues that the trial court erred in dismissing the charges of first-degree rape and first-degree sexual offense because the State failed to present substantial evidence of "serious personal injury" as that phrase is used in the definition of first-degree rape under N.C.G.S. § 14-27.2(a)(2)b and in the

definition of first-degree sexual offense under N.C.G.S. § 14-27.4. We do not agree.

In determining whether serious personal injury has been inflicted, the court must consider the particular facts of each case. *State v. Roberts*, 293 N.C. 1, 235 S.E. 2d 203 (1977). The element of infliction of serious personal injury is satisfied

> when there is a series of incidents forming one continuous transaction between the rape or sexual offense and the infliction of the serious personal injury. Such incidents include injury inflicted on the victim to overcome resistance or to obtain submission, injury inflicted upon the victim or another in an attempt to commit the crimes or in furtherance of the crimes of rape or sexual offense, or injury inflicted upon the victim or another for the purpose of concealing the crimes or to aid in the assailant's escape.

State v. Blackstock, 314 N.C. 232, 242, 333 S.E. 2d 245, 252 (1985).

In the present case, the State's evidence tended to show that the defendant choked the victim into unconsciousness three times. Her jeans were tied around her neck and used to drag her nude body through a wooded area where she was left. She had a deep red ring around her throat and bruises and abrasions over nearly her entire body. The victim testified that the defendant had tried to "put her eyes out with his thumbs." One witness testified that the victim's eyes were "red as tomatoes and swollen real bad." We conclude that the evidence, taken in the light most favorable to the State, supports the serious injury element of first-degree rape and first-degree sexual offense. *See generally State v. Boone*, 307 N.C. 198, 297 S.E. 2d 585 (1982).

[2] The defendant next argues that the trial court erred in denying his motions to dismiss the charge of common law robbery because the State failed to present substantial evidence of "felonious intent." Common law robbery is defined as "the felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear." *State v. Smith*, 305 N.C. 691, 700, 292 S.E. 2d 264, 270, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982). The felonious taking element of common law robbery requires "a taking with the felonious intent on the part of the taker to deprive the owner of his

property permanently and to convert it to the use of the taker." *State v. Lawrence*, 262 N.C. 162, 168, 136 S.E. 2d 595, 599-600 (1964).

In the present case, no direct evidence established the defendant's intent at the time of the taking to deprive the victim of her pocketbook. However, "[i]ntent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred." *State v. Bell*, 285 N.C. 746, 750, 208 S.E. 2d 506, 508 (1974). The evidence in the present case tended to show that after the rape and sexual offenses, the defendant threw the victim's clothing out of the car but kept her pocketbook containing fifty dollars. The next day the defendant disposed of the pocketbook. Taken in the light most favorable to the State and giving the State the benefit of every reasonable inference to be drawn therefrom, the evidence permitted, but did not compel, the reasonable inference that the defendant took the victim's pocketbook with the intent to permanently deprive her of her property and convert it to his own use. The trial court thus properly denied the defendant's motions.

[3] By his next assignment, the defendant contends that the trial court erred in instructing the jury on the element of serious injury, in denying his request for special jury instructions, and in refusing to reinstruct the jury using the defendant's special instructions. Prior to the charge conference, the defense counsel informed the trial court that she would request an instruction that "[a]ny injury is serious if the physical injury to the person may, but not necessarily must, result in death. The injury must be serious but fall short of causing death." The trial court agreed to give the requested instruction. The trial court also stated that there is "no evidence of any permanent or any mental injury . . . . On the basis of the law, there's no reason to submit an issue on that or charge the jury in that respect."

During its instructions on first-degree rape, the trial court instructed the jury, in pertinent part:

> In order for you to find serious personal injury because of the injury to the mind or nervous system, the State must satisfy you beyond a reasonable doubt that the injury extended for some appreciable time beyond the incident surrounding the crime itself.

Later, the defense counsel drew the court's attention to these instructions. At that point, the trial court reinstructed the jury on the element of serious personal injury as follows:

> First of all, when the Court was talking about serious personal injury, it told you that serious personal injury may be met by the showing of either mental injury as well as bodily injury. Now, in this case, there's no evidence of any mental injury involved in this case and so your sole consideration as to serious personal injury will be whether or not it meets the Court's standard as to serious bodily injury. And the Court has defined that the injury must be serious, but it must fall short of causing death. That will be the standard that you'll use in determining serious personal injury.

The defendant now argues that the trial court erred by erroneously instructing the jury on the element of serious injury and by failing to give the special instruction requested by the defendant. We conclude that the quoted portions of the instructions did not mislead the jury. *See State v. Bagley*, 321 N.C. 201, 362 S.E. 2d 244 (1987), *cert. denied*, --- U.S. ---, 99 L.Ed. 2d 912 (1988). The instructions, when read in their entirety, indicate that the trial court corrected its instructions on the element of serious injury when the lack of any evidence tending to show mental injury was drawn to the court's attention. The trial court then specifically instructed the jury that there was no evidence of mental injury in the present case and that the jury's sole consideration was whether there was serious *bodily* injury. After considering the entire charge, we conclude that the curative instruction prevented any confusion and that the trial court left the jury with an accurate instruction as to "serious personal injury." This assignment is overruled.

[4] Next, the defendant contends that the trial court erred in reinstructing the jury. After the jury had deliberated for some time, it sent a written request to the trial court asking that the court "provide a copy of each law the Judge read to us. This is so we won't forget any of the points that are needed to find the Defendant guilty or not guilty of the different degrees of first and second." Pursuant to the request, the trial court again instructed the jury on the elements of each offense. The defendant now contends that the trial court erred in denying the defendant's re-

quest that the additional instructions include the defendant's requested special instructions regarding consent and serious personal injury.

After the jury retires for deliberation, the trial court may repeat or clarify instructions in response to an inquiry of the jury made in open court. N.C.G.S. § 15A-1234(1) (1983). A trial court is not required to give a requested instruction in the exact language prayed for. *State v. Monk*, 291 N.C. 37, 229 S.E. 2d 163 (1976). If a requested instruction is correct in law and supported by the evidence, the court, "while not required to parrot the instructions 'or to become a mere judicial phonograph for recording the exact and identical words of counsel,' must charge the jury in substantial conformity to the prayer." *State v. Bailey*, 254 N.C. 380, 386, 119 S.E. 2d 165, 170 (1961) (quoting *State v. Henderson*, 206 N.C. 830, 175 S.E. 201 (1934)) *cited in State v. Davis*, 291 N.C. 1, 229 S.E. 2d 285 (1976). Whether the trial court instructs using the exact language requested by counsel is a matter within its discretion and will not be overturned absent a showing of abuse of discretion. *Id.*; *State v. Davis*, 291 N.C. 1, 229 S.E. 2d 285.

In the present case, the record discloses that the trial court instructed the jury in substantial conformity with the defense counsel's request. The court's refusal to give the defendant's special instructions verbatim was not an abuse of discretion. The assignment is, therefore, overruled.

[5] In the defendant's next assignment of error, he contends that the trial court erred by denying his request for an instruction on the offense of assault on a female as a lesser included offense of rape. "A defendant is entitled to have all lesser degrees of offenses supported by the evidence submitted to the jury as possible alternate verdicts." *State v. Drumgold*, 297 N.C. 267, 271, 254 S.E. 2d 531, 533 (1979) (quoting *State v. Palmer*, 293 N.C. 633, 643-44, 293 S.E. 2d 406, 413 (1977)). In determining whether one offense is a lesser included offense of another, we apply a definitional as opposed to a transactional test. *State v. Weaver*, 306 N.C. 629, 295 S.E. 2d 375 (1982). *See also State v. Bagley*, 321 N.C. 201, 362 S.E. 2d 244. "If the lesser crime has an essential element which is not completely covered by the greater crime, it is not a lesser included offense." *State v. Weaver*, 306 N.C. at 635, 295

S.E. 2d at 379. With these principles in mind we consider the elements of the crimes of assault on a female and rape.

The elements of assault on a female are (1) an assault, (2) upon a female person, (3) by a male person (4) who is at least eighteen years old. N.C.G.S. § 14-33(b)(2) (1986). Neither the element that the defendant be a male person nor the element that he be at least eighteen years old are elements of the crime of rape. N.C.G.S. § 14-27.2(a)(2)b (1985). We, therefore, conclude that assault on a female is not a lesser included offense of rape, because assault on a female contains elements not present in the greater offense of rape. *See State v. Wortham*, 318 N.C. 669, 351 S.E. 2d 294 (1987) (assault on a female not lesser included offense of attempted second-degree rape). The defendant's assignment of error is overruled.

[6] By his next assignment of error the defendant contends that the trial court abused its discretion in limiting his cross-examination of the victim. The defendant attempted to elicit testimony from the victim regarding an incident in which she was allegedly "making out" with defense witness Robert Harding. The trial court found the evidence was inadmissible under the Rape Shield Statute. N.C.G.S. § 8C-1, Rule 412 (1986).

It is a well-established principle that an accused is assured the right to cross-examine adverse witnesses. *E.g., State v. Newman*, 308 N.C. 231, 254, 302 S.E. 2d 174, 187 (1983). The scope of cross-examination, however, is within the sound discretion of the trial court, and its rulings thereon will not be disturbed absent a showing of abuse of discretion. *State v. Hinson*, 310 N.C. 245, 254, 311 S.E. 2d 256, 263, *cert. denied*, 469 U.S. 839, 83 L.Ed. 2d 78 (1984). Having reviewed the defendant's contentions, we conclude that the trial court properly limited the cross-examination of the victim pursuant to the Rape Shield Statute.

The Rape Shield Statute provides that "the sexual behavior of the complainant is irrelevant to any issue in the prosecution" except in four very narrow situations. The evidence in question in the present case did not fall within any of those exceptions and was properly excluded. The defendant does not contend that his attempted cross-examination fell within one of the exceptions. Rather, his sole contention is that cross-examination of the victim regarding her prior sexual behavior was "probative of the defend-

ant's position that the prosecutrix . . . consented to the sexual acts" with him. Such evidence is explicitly deemed irrelevant for that purpose, unless it falls within one of the specific exceptions under the Rape Shield Statute. N.C.G.S. § 8C-1, Rule 412. This assignment of error is overruled.

[7] By another assignment of error the defendant brings forth numerous allegations of prosecutorial misconduct. The defendant contends that the prosecutor made statements calculated to mislead the jury and to prejudice him. The defendant's arguments fall within several general categories to which different standards of review apply. In addressing these arguments, we will treat the prosecutor's statements as falling into three general categories, *i.e.*, statements to which no objection was made, statements to which objections were sustained and curative instructions were given, and statements to which objections were overruled.

It is well settled that "prosecutorial statements are not placed in an isolated vacuum on appeal. Fair consideration must be given to the context in which the remarks were made and to the overall factual circumstances to which they referred." *State v. Pinch*, 306 N.C. 1, 24, 292 S.E. 2d 203, 221-22 (1982). With this general principle in mind, we now consider the assignment in the present case.

The defendant has brought forth three arguments relating to statements made by the prosecutor during closing arguments to which no objection was made. When a defendant fails to object to statements made during closing arguments, "the standard we employ is whether the statements amounted to such gross impropriety as to require the trial judge to act *ex mero motu*." *State v. Oliver*, 309 N.C. 326, 356, 307 S.E. 2d 304, 324 (1983). Having failed to object at trial, the defendant may now only assert that the trial court should have corrected the argument on its own motion. *See id.*; *State v. Craig*, 308 N.C. 446, 454, 302 S.E. 2d 740, 745, *cert. denied*, 464 U.S. 908, 78 L.Ed. 2d 247 (1983). After reviewing the challenged statements in their context, we conclude that they were not extremely or grossly improper.

Next, we consider eight other allegedly improper statements made by the prosecutor during closing arguments. The defendant interposed timely objections to these statements, and the trial court sustained the objections and instructed the jury to disre-

gard the arguments. "Ordinarily, improper argument of counsel is held cured by the court's action promptly sustaining the objection to the argument and cautioning the jury not to consider it." *State v. Sparrow*, 276 N.C. 499, 514, 173 S.E. 2d 897, 907 (1970); *see also State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976). In the present case, having reviewed the assignments of error and the arguments of counsel in their entirety, we conclude that the trial court's prompt action in instructing the jury to disregard the arguments removed any possibility of reversible error.

Finally, we consider the defendant's arguments relevant to the statements by the prosecutor and as to which the defendant's objections were overruled. In the first of those statements, the prosecutor commented on the purpose of the Rape Shield Statute. In her second statement, she commented that the defendant belonged in prison for a long time.

We have consistently held that counsel must be allowed wide latitude in jury arguments. *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629. Counsel "may argue to the jury the facts in evidence and all reasonable inferences to be drawn therefrom together with the relevant law so as to present his side of the case." *Id.* at 328, 226 S.E. 2d at 640. "Whether counsel abuses this privilege is a matter ordinarily left to the sound discretion of the trial judge, . . . unless there be such gross impropriety in the argument as would be likely to influence the verdict of the jury." *Id.*; *State v. Wortham*, 287 N.C. 541, 215 S.E. 2d 131 (1975). It is the duty of the trial court, upon timely objection, to censor remarks not warranted by the evidence or the law. *Id.*

In the present case, the trial court did not abuse its discretion in overruling the defendant's objection to the comment about the purpose of the Rape Shield Statute. During the trial the State invoked the protections afforded by the Rape Shield Statute, N.C.G.S. § 8C-1, Rule 412, and in her closing argument, the prosecutor attempted to explain that the statute was intended to insure that victims were not again "victimized" through inquiries about irrelevant sexual behavior. We conclude that the prosecutor's attempted explanation of the Rape Shield Statute was within the permissible bounds of closing arguments, and the trial court's ruling was proper. Further, we note that even though the trial court overruled the defendant's objection, it immediately

cautioned the jury: "Again, you'll follow the Court's instructions as to the law in this case." We conclude that the trial court's admonition to the jury erased any possibility of prejudice.

We further conclude that no prejudice resulted when the trial court overruled the defendant's objection to the prosecutor's statement that the defendant "belongs in prison . . . for a long time . . . you shouldn't be concerned about the punishment when you are back there deciding what the facts are. You know that's up to the court." The cautionary remarks of the trial court which immediately followed negated any possible prejudice. Taken as a whole, we conclude the statement properly directed the jury's attention to the fact that sentencing was the concern of the trial court. For the foregoing reasons, the defendant's assignments of error relevant to statements made by the prosecutor are overruled.

[8] By his next assignment of error, the defendant contends that the trial court erred in introducing his pretrial statement since he was not provided with the tape recorded version of the statement. The defendant also contends that sanctions should have been imposed upon the State for failure to provide him with the results of footprint comparisons. We will address the defendant's arguments separately.

On 10 November 1986, the defendant gave an inculpatory statement to Officers Stewart and Tuttle of the Forsyth County Sheriff's Department. Stewart took notes during the interview and tape recorded the defendant's statement. On 22 November 1986, Stewart, using the notes and tape recording to refresh his memory, typed a report of the defendant's statement. A copy of the report was given to the defendant on 26 March 1987 pursuant to his discovery motion. Prior to trial, the defendant filed a motion to suppress his pretrial statement.

The trial court held a lengthy *voir dire* hearing to determine whether the defendant's statement had been induced by means of improper promises, threats or violence. During the hearing, defense counsel became aware that the defendant's statement had been tape recorded. Officer Stewart testified that he listened to the tape recording, read his notes and then wrote his report. He testified that much of the report was a paraphrased version of the defendant's remarks and that direct quotations were indicated

by the use of quotation marks. Stewart further testified that parts of the recorded statement were clear, but other parts were difficult to understand.

Following the *voir dire* hearing in which the trial court ruled that the statement was admissible, the defense counsel was allowed to listen to the tape recording. The following day, the defendant filed a motion for sanctions to prohibit the State from introducing any evidence of the statement made by the defendant or to declare a mistrial to give the defendant an opportunity to have the tape recording analyzed. The trial court denied the motions.

At trial, the defense counsel requested a continuance "in order to meet . . . the recording that was revealed to [her] earlier in the week." The trial court denied the request, stating that a lengthy *voir dire* hearing had been held three days earlier regarding the statement and that the court had delayed the trial on three different occasions at the defense counsel's request. The defendant now contends that the trial court erred in denying his motion for sanctions, his motion for a mistrial and his motion for a continuance, because he did not have an opportunity to rebut the "newly discovered" evidence.

N.C.G.S. § 15A-903, which controls disclosure of evidence by the State, provides in pertinent part:

> (a) Statement of Defendant—Upon motion of a defendant, the court must order the prosecutor:
>
> (1) To permit the defendant to inspect and copy or photograph any relevant written or recorded statements made by the defendant, or copies thereof . . . .

N.C.G.S. § 15A-903(a) (1983). Sanctions against the State for failure to provide such information where required are governed by N.C.G.S. § 15A-910, which allows the trial court to (1) order the party to permit discovery or inspection, or (2) grant a continuance or recess, or (3) prohibit the party from introducing evidence not disclosed, or (4) declare a mistrial, or (5) dismiss the charge, with or without prejudice, or (6) enter other appropriate orders. N.C.G.S. § 15A-910 (1983). The sanction for failure to make

discovery when required is within the sound discretion of the trial court and will not be disturbed absent a showing of abuse of discretion. *State v. King*, 311 N.C. 603, 320 S.E. 2d 1 (1984); *State v. Dukes*, 305 N.C. 387, 289 S.E. 2d 561 (1982).

On 29 March 1987, the defendant was furnished the substance of the defendant's statement by way of a copy of the officer's written report. The defense counsel became aware of the existence of the tape recording on 14 July 1987, three days before the introduction of the written report. On the same date, defense counsel was given an opportunity to listen to the tape. Although the defense counsel knew of the existence of the tape several days before the introduction of the written report, she neither had the tape recording analyzed nor scheduled a future date upon which to have it analyzed. Neither did the defense counsel call Officer Tuttle, who was present throughout the interview, in an attempt to clarify any inaudible portions of the recording. In light of these failures—perhaps for understandable tactical reasons—to clarify any parts of the defendant's statement which were difficult to understand on the tape recording, we fail to see how the defendant was prejudiced by the introduction of a written statement which was in his possession months before trial. We conclude that the trial court acted within its discretion in refusing to impose sanctions against the State by excluding the statement or declaring a mistrial. This assignment of error is overruled.

[9] The defendant next contends that the trial court should have sanctioned the State for failure to disclose the results of footprint comparisons. When the State offered footprint comparison evidence, the defendant did not object or request sanctions against the State. The defendant may not now complain that the trial court abused its discretion in failing to sanction the State for this alleged discovery violation. Having failed to draw the trial court's attention to the alleged discovery violation, the defendant denied the court an opportunity to consider the matter and take appropriate steps. This assignment of error is overruled.

[10] By his next assignment of error, the defendant contends that the trial court erred in allowing the testimony of two law enforcement officers. Over the defendant's objections, the court allowed Officer D. W. Allen to testify that the defendant had a .22 caliber rifle in his car when he was arrested. The defendant con-

tends that this evidence was inadmissible under N.C.G.S. § 8C-1, Rules 401 and 402. He next contends that the trial court abused its discretion in allowing Deputy Sink to testify that during the course of her investigation she identified a photograph of the defendant. The defendant argues that Deputy Sink's testimony was prejudicial because it implied that the photograph was a mug shot of the defendant. The defendant argues that this implication was tantamount to evidence that the defendant had a prior criminal record.

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 show that the trial court erred in its ruling, relief ordinarily will not be granted absent a showing of prejudice. N.C.G.S. § 15A-1443(a) (1983).

In the present case even if it is assumed *arguendo* that the introduction of Officer Allen's testimony about the rifle was erroneous, we conclude that the defendant has not shown that he was prejudiced. The mere fact that the defendant possessed a firearm at the time of his arrest does not imply that he either used or intended to use the rifle for illegal purposes. There was no intimation by Officer Allen that the defendant attempted to use the rifle when he was arrested, that it was used in the commission of any crime or that possession of the rifle was otherwise unlawful. Considering the facts of this particular case, we conclude that the admission of Officer Allen's testimony relating to the defendant's rifle, if error, was not prejudicial. This assignment of error is overruled.

Next, we consider the defendant's arguments relating to Deputy Sink's testimony. Deputy Sink's testimony that she identified a photograph of the defendant prior to trial was properly admitted to corroborate her identification of the defendant as the man she saw on the night in question. On the evening of the crime, Sink stopped the defendant and his two brothers as they were leaving the crime scene. The defendant produced no identification and gave Sink a false name. Later that evening, Sink identified a photograph of the defendant as the man she saw leaving the scene of the crime. The fact that she was able to positively iden-

tify a photograph of the defendant shortly after seeing him lends credence to her subsequent identification of him at trial.

Furthermore, a careful review of the record reveals no evidence that would have led the jury to believe that the photograph was a mug shot. There was neither testimony in this regard nor markings on the photograph that would identify it as a mug shot. We fail to see how the jury could infer that the defendant had a prison record from Sink's testimony that she identified a photograph of the defendant prior to the trial. For the foregoing reasons, this assignment of error is overruled.

[11] By his next assignment of error, the defendant contends that the trial court erred in denying his motion to suppress his inculpatory statement. Specifically, the defendant contends that the evidence presented during a *voir dire* hearing did not support the trial court's findings of fact that "officers made no promises, offers, awards [or] inducements to make any statement."

After his extradition to North Carolina, the defendant was held at the Forsyth County Jail and charged with first-degree rape and first-degree kidnapping. On 10 November 1986, the defendant was appointed trial counsel during his first appearance. The uncontroverted evidence tended to show that on his way back to the holding cell after his first appearance, the defendant told Officer Stewart that he wanted "to talk with him; that [the defendant] had some information that [he] would give [Stewart] in exchange if [Stewart] would help [him] get a plea bargain." The testimony of Officer Stewart and the defendant sharply conflicts on the balance of the conversation. The defendant testified that Officer Stewart agreed to help negotiate a plea bargain. Officer Stewart testified that he did not.

During the interview, the defendant gave the officers information about a number of unrelated crimes in which he was not implicated. The conversation ended when the defendant said he was hungry and that he wanted to go back to the jail and eat dinner. Sometime later, Officers Stewart and Tuttle returned to the jail and took the defendant back to the interview room. Officer Stewart advised the defendant of his constitutional rights. The defendant agreed to waive his *Miranda* rights and signed a waiver form. Stewart further testified that he asked the defendant "if he wanted to talk to a lawyer and have him present during

questioning." The defendant responded, "no" and wrote "no" by that question on the waiver form. Stewart also asked the defendant if "he wished to answer questions," to which he replied "yes" and wrote "yes" beside that question. Stewart testified that during the interrogation the defendant appeared coherent and was able to understand the questions.

During the interview, the defendant recounted the events of 29 September 1986. Officer Stewart testified that the defendant mentioned that he wanted to negotiate a plea bargain, and at that time he was advised by Stewart and Detective Tuttle that they "could not make any promises or negotiate plea bargains, that that was between he or his attorney and the District Attorney's office." Stewart stated that the defendant was told several times prior to his statement that investigators could not make promises or plea bargains and that plea bargains were made through the District Attorney's office. Stewart agreed to "relay [the defendant's] message to the District Attorney." Stewart again cautioned the defendant that only the district attorney could negotiate plea bargains. After the defendant made his statement, he again mentioned a plea bargain and was again told that investigators could not negotiate plea bargains. During the two hour interview, the defendant never expressed a desire to stop talking or a desire to have an attorney present.

Findings of fact concerning the admissibility of a confession are conclusive and binding if supported by competent evidence. *State v. Simpson*, 314 N.C. 359, 368, 334 S.E. 2d 53, 59 (1985). This is true even if the evidence is conflicting. *State v. Nations*, 319 N.C. 318, 325, 354 S.E. 2d 510, 514 (1987); *State v. Williams*, 319 N.C. 73, 352 S.E. 2d 428 (1987).

In the present case, the trial court's finding that the officers did not induce the defendant's statement by means of threats or promises is supported by competent evidence. Officer Stewart testified that the defendant was read his rights and that he waived his right to remain silent and his right to counsel. The defendant acknowledged his waiver by signing a waiver of rights form. Further, Officer Stewart testified that on numerous occasions he and Officer Tuttle told the defendant that they could not negotiate plea bargains. Although this testimony conflicts with the defendant's testimony, we conclude that Stewart's testimony

was competent evidence sufficient to support the trial court's findings of fact and its conclusion that based on the totality of the circumstances, the defendant's statement was voluntary. *See State v. Corley*, 310 N.C. 40, 311 S.E. 2d 540 (1984). This assignment of error is overruled.

[12] By his last assignment of error, the defendant contends that the trial court abused its discretion in allowing the State to introduce the tape recorded version of the defendant's statement during rebuttal. The defendant again argues that the trial court's refusal to grant his motion for a continuance effectively denied him an opportunity to rebut this "new" evidence. We disagree.

As we have previously discussed at length, the defendant knew about the tape recording three days prior to its introduction at trial, and he was given a written report of the substance of his statement months before trial. On such facts, we do not classify the tape recording as "new" evidence.

As we have previously stated, the defendant was given access to the tape recording in ample time to prepare a probing cross-examination of Officer Stewart. At trial, the defendant cross-examined Officer Stewart regarding the contents of the tape recording. Further, the defendant could have called Officer Tuttle to clarify the contents of the tape recording if any doubts about its contents remained. The trial court did not effectively deny the defendant an opportunity to rebut the evidence. This assignment is overruled.

Having carefully reviewed the record and each of the defendant's assignments of error, we hold that defendant received a fair trial, free of prejudicial error.

No error.

STATE OF NORTH CAROLINA v. JOHN JACOB BANKS

No. 628A87

(Filed 28 July 1988)

1. **Criminal Law § 72; Rape and Allied Offenses § 4— defendant's age—lay opinion testimony**

In a prosecution for first degree sexual offenses and taking indecent liberties with minors, the trial court did not err in allowing a deputy to testify that in his opinion defendant appeared to be between 29 and 30 years of age since it was not necessary for the State to prove defendant's exact age in order to convict him of any of the crimes charged, and the deputy had ample opportunity to observe defendant during the booking process and in the courtroom. N.C.G.S. § 8C-1, Rule 701 (1986); N.C.G.S. §§ 14-27.4(a)(1) (1986) and 14-202.1(a) (1986).

2. **Criminal Law § 75.7— routine booking questions—date of birth—element of crimes—Miranda warnings unnecessary**

Miranda warnings were not required as a prerequisite to the admissibility of information as to defendant's birthdate routinely obtained during the booking process even though such information incidentally helped establish an essential element of sexual offense and indecent liberties charges for which defendant was booked.

3. **Bills of Discovery § 6— defendant's birthdate—failure to disclose statement—absence of sanctions—no prejudice**

Assuming arguendo that defendant's statement of his birthdate to a deputy during the booking process was discoverable, that the State should have produced it pursuant to defendant's discovery request, and that the trial court should have imposed sanctions pursuant to N.C.G.S. § 15A-910 in defendant's trial for sexual offenses and indecent liberties because of the State's failure to do so, defendant was not prejudiced by the admission of evidence of defendant's birthdate obtained during the booking process where the issue of defendant's age was not closely contested; it was obvious to the jury that he was considerably older than the age elements of the crimes charged required him to be; and a deputy's lay opinion testimony that defendant was 29 or 30 years old was properly admitted.

4. **Criminal Law § 102.8— election not to testify—jury argument—right to read Fifth Amendment clause to jury**

Defense counsel should have been permitted in closing argument to read to the jury that clause of the Fifth Amendment material to his election not to testify, i.e., "No person . . . shall be compelled in any criminal case to be a witness against himself . . ." and to say simply that, because of this provision, the jury must not consider defendant's election not to testify adversely to him, or words to this effect; however, defendant was not prejudiced by the trial court's refusal to permit defense counsel to read the privilege against self-incrimination clause of the Fifth Amendment where the court gave the jury an

accurate and complete statement of the law applicable to defendant's election not to testify.

5. **Rape and Allied Offenses § 19— indecent liberties with child—insertion of tongue into child's mouth**

The trial court in a prosecution for taking indecent liberties with minors did not err in instructing the jury that the kissing of a child involving the insertion of an adult's tongue into the child's mouth would constitute an "immoral, improper, or indecent" act within the meaning of subsection (1) of the indecent liberties statute and a "lewd or lascivious" act within the meaning of subsection (2) of that statute. N.C.G.S. § 14-202.1 (1986).

6. **Criminal Law § 128.2— conflict among jurors about smoking—one juror leaving jury room—failure to declare mistrial**

The trial court did not abuse its discretion in refusing to declare a mistrial when one juror left the jury room, told the bailiff that she was "not staying in there with those people," and lit a cigarette where the trial court carefully questioned the bailiff and another deputy and established that the conflict between this juror and the other jurors concerned whether smoking was allowed in the jury room, and the court appealed to the jurors to work together to reach a verdict and the jurors complied.

Justice MITCHELL concurring in the result.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing two concurrent life sentences entered by *Watts, J.*, at the 9 July 1987 Criminal Session of Superior Court, CURRITUCK County, upon defendant's conviction of four counts of first degree sexual offense. On 10 December 1987 we granted defendant's motion to bypass the Court of Appeals for review of his convictions of two counts of taking indecent liberties with children. Argued in the Supreme Court 12 April 1988.

Lacy H. Thornburg, Attorney General, by Daniel F. McLawhorn, Special Deputy Attorney General, for the state.

John W. Halstead, Jr. for defendant-appellant.

EXUM, Chief Justice.

Defendant contends the trial court erred in: (1) admitting opinion testimony as to defendant's age; (2) refusing to exclude evidence of defendant's age obtained during the booking process; (3) refusing to permit defense counsel in closing argument to read the Fifth Amendment to the United States Constitution; (4) improperly instructing the jury as to indecent liberties; and (5) denying defendant's motion for mistrial because of the behavior of a

juror during jury deliberations. We conclude the trial court erred only in refusing to permit defense counsel to read the privilege against self-incrimination clause of the Fifth Amendment. We also conclude that because of the trial court's jury instructions on defendant's election not to testify, this error does not entitle defendant to a new trial. Defendant received a fair trial free from reversible error.

I.

At trial the state's evidence tended to show the following:

On 26 April 1987 defendant's girlfriend invited her friend's four children, along with their maternal aunt, to eat supper and stay overnight at her home. Among the visitors were identical twin girls, age eight, the victims in this case.

Late in the evening, the twins were put to bed on a queen-sized mattress. While their aunt and their hostess were in another room, defendant got in bed between the twins. He kissed each of them, putting his tongue in their mouths, ears and noses. He touched and rubbed their genitals, inserting his finger several times into each twin's vaginal area. The victims asked defendant to stop but he persisted. They told him he was hurting them, asked him to leave and cried. Defendant put his hand over their mouths when they tried to cry out. He threatened to slap them and to kill their mother if they told her what had happened. In the silence that followed, the twins' aunt came into the room and sat down on the sofa. Defendant left the bed, and the aunt got into bed with the girls, one of whom immediately began to whine that she wanted to go home. As soon as defendant left the room, the other twin told her aunt that defendant had "kissed her the wrong way." Both girls were restless and had difficulty getting to sleep.

On Monday morning defendant stayed in his bedroom and the twins, anxious to leave, waited at the door for their mother. As mother and children together drove out of the driveway, the same twin who had told her aunt about being kissed "the wrong way" immediately told her mother how she had been kissed by defendant. That same afternoon, the twins told their aunt how defendant had touched their genitals. She asked them to repeat this to their mother, who immediately called the sheriff's department.

Their parents checked the twins for discharge or other signs of genital injury, but finding nothing more than slight redness, they decided not to take the girls to the hospital.

On Wednesday of the same week, when both children complained of burning and itching of their genitals, their mother took them to Albemarle Hospital. At the hospital Susan Pierson, R.N., and Waynette Spaith, L.P.N., interviewed the victims. They related again how defendant had inserted his finger in their vaginal area. Nurse Pierson was with Leroy Hand, M.D., when he conducted a pelvic examination of the first victim; Nurse Spaith was present when Dr. Hand examined the second victim. The nurses and doctor observed redness and a small tear in the mucous membrane between the labia majora and minora of each victim. The tears were located in the same place on both victims, between the external folds of the vagina on the left side. No other injuries to their vaginas were observed.

Defendant presented no evidence. Defense counsel moved for a mistrial based on the failure of the state to introduce evidence of defendant's age.* The trial court granted the state's motion to reopen its case for the purpose of adducing further evidence as to defendant's age. Over defendant's objection, Deputy Donald Cooper testified that on 2 May 1987 he served process on defendant. He said he took defendant to the Currituck County Sheriff's Department and, in order to complete the booking process, inquired about his birthdate. Defendant told Deputy Cooper that his birthdate was 8 May 1956. Deputy Cooper was also allowed to testify that, in his opinion, defendant appeared to be between 29 and 30 years old.

II.

[1] Defendant first argues the trial court erred in allowing Deputy Cooper to testify, over defendant's objection, that in his opin-

* Under N.C.G.S. § 14-27.4 a person is guilty of first degree sexual offense if he, being at least 12 years old and at least four years older than the victim, engages in a sexual act with a victim under the age of 13.

Under N.C.G.S. § 14-202.1 a person is guilty of taking indecent liberties with children if he, being 16 years of age or more and at least five years older than the child in question, "takes or attempts to take . . . indecent liberties . . . with a child under the age of 16 years . . . ."

ion defendant appeared to be between 29 and 30 years of age. There was no error in the admission of this testimony.

To convict a defendant of first degree sexual offense the state must prove, among other things, that the defendant "is at least 12 years old and is at least 4 years older than the victim . . . ." N.C.G.S. § 14-27.4(a)(1) (1986). To convict a defendant of taking indecent liberties, the state must prove that the defendant is "16 years of age or more and at least 5 years older than the child in question . . . ." N.C.G.S. § 14-202.1(a) (1986). At trial the state's evidence showed that both victims were 8 years old. Thus, in order to convict defendant under both statutes, the state had to prove, as to *defendant's* age, only that he was at least 16 years of age at the time of the crimes.

Under North Carolina Rule of Evidence 701 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). Deputy Cooper had ample opportunity to observe defendant both during the booking process and while they were together in the courtroom. Thus his opinion of defendant's age was rationally based on his perception of defendant, and it was helpful to the jury in determining the age requirements of the crimes charged. It, therefore, comports with the requirements of Rule 701.

When our Rules of Evidence as codified do not specifically address an evidentiary question, "North Carolina precedents will continue to control unless changed by our courts." *State v. Williams*, 322 N.C. 452, 456, 368 S.E. 2d 624, 626-27 (1988) (quoting N.C.G.S. § 8C-1, Commentary, Rule 102 (1986)). Our pre-Rules case, *State v. Gray*, 292 N.C. 270, 233 S.E. 2d 905 (1977), speaks clearly to the question of the admissibility of lay opinion evidence of the age of a criminal defendant when age is a necessary element of the crime. In *Gray*, defendant was prosecuted for first degree rape under N.C.G.S. § 14-21(a)(2). Under that statute, the state was required to prove the defendant was over sixteen years of age at the time of the alleged rape. In an effort to meet that burden, the state elicited lay opinions from several witnesses as to defendant's age. In concluding that the testimony was properly admitted we said:

> Since the age of a defendant is a fact peculiarly within his own knowledge, the state must be left some latitude within which to carry its burden of proof on this issue. We, therefore, adopt the rule that lay witnesses with an adequate opportunity to observe and who have in fact observed may state their opinion regarding the age of a defendant in a criminal case when the fact that he was at the time in question over a certain age is one of the essential elements to be proved by the state. It is important to note that the exact age of the defendant is not in issue, nor need the state prove it. It must prove only that he was at the time of the offense charged over sixteen. The rule we adopt should not be interpreted to extend to any case, criminal or civil, where the *exact* age of someone must be proved.

Id. at 287, 233 S.E. 2d at 916 (emphasis in original).

Deputy Cooper's opinion as to defendant's age was admissible under *Gray*. He had an opportunity to observe defendant; he in fact observed him; and it was not necessary in this case for the state to prove defendant's *exact* age in order to convict him of any of the crimes with which he was charged.

We conclude the lay opinion testimony was properly admitted, and accordingly overrule this assignment of error.

III.

Defendant next contends the trial court erred by allowing Deputy Cooper to testify that defendant told the deputy that his birthdate was 8 May 1956. Over defendant's objection, Deputy Cooper was permitted to testify that, during the booking procedure, he asked defendant several biographical questions, including defendant's name, age and date of birth. It was then that defendant told Deputy Cooper that his birthdate was 8 May 1956.

Defendant objected at trial to the admission of this testimony on two grounds, arguing that: (1) evidence of his age was obtained in violation of his privilege against compulsory self-incrimination; and (2) the state failed to disclose this oral statement during voluntary discovery. He brings the same arguments forward on his appeal.

A.

[2] The Fifth Amendment requires suppression of statements elicited from an accused during custodial interrogation unless questioning was preceded by appropriate warnings and a voluntary and intelligent waiver of the right to remain silent and to have counsel present. *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694 (1966).

In the leading case in this jurisdiction on point, *State v. Ladd*, 308 N.C. 272, 302 S.E. 2d 164 (1983), this Court held that *Miranda* warnings were not required as a prerequisite to the admissibility of information routinely obtained during the booking process, saying:

> An overwhelming number of courts that have considered this question have held that *Miranda* does not apply to the gathering of biographical data necessary to complete booking (citations omitted).
>
> We . . . hold that interrogation does not encompass routine informational questions posited to a defendant during the booking process.

Id. at 286-87, 302 S.E. 2d at 173. The Court in *Ladd* cautioned, however, that:

> [W]e do not construe this limited exception to include any and all questions asked during the booking process. Such a rule would totally emasculate the *Miranda* protections and render meaningless the defendant's rights to remain silent and to have the presence of counsel. If all questions asked during booking were free from *Miranda* proscriptions, police officials could quiz the defendant about any subject so long as they timed their queries to coincide with the incidence of booking, regardless of whether the defendant had been given the *Miranda* warnings, whether he had invoked his right to remain silent or whether he had previously asked for an attorney. We therefore limit this exception to *routine informational* questions necessary to complete the booking process that are *not* "reasonably likely to elicit an incriminating response" from the accused.

Id. at 287, 302 S.E. 2d at 173 (emphasis in original).

Defendant argues that because age is an essential element of the crimes for which he was being booked, questions regarding his date of birth would "elicit an incriminating response" and call for information which is not routine. Thus, defendant argues, the testimony would not be admissible under the *Ladd* exception to *Miranda* requirements.

We disagree. Under *Ladd*, the *Miranda* requirements are inapplicable to routine questions asked during the booking process unless such questions are designed to elicit incriminating information from a suspect. Deputy Cooper testified that when processing a suspect for booking, the processing officer regularly obtains certain routine information from the suspect, such as the suspect's name, date of birth, age, sex, race, social security number and address. As the processing officer in this case, Deputy Cooper obtained this kind of information from defendant. Deputy Cooper was not investigating any crime nor did he interrogate defendant for the purpose of eliciting incriminating information.

In determining the character of information for the purpose of applying the *Ladd* exception, the focus must be on the time and circumstances under which it was obtained, not the use to which it was ultimately put. That the information incidentally helped establish an essential element of the crimes for which defendant was booked does not make it more than routine at the time it was obtained.

We conclude, therefore, that defendant's Fifth Amendment privilege against compulsory self-incrimination was not violated.

B.

[3] Defendant argues that, even if his Fifth Amendment privilege against compulsory self-incrimination was not violated by the admission of Deputy Cooper's testimony, the statement regarding his birthdate should have been excluded under N.C.G.S. § 15A-910 (1983). Defendant argues that because the state failed to disclose this oral statement during voluntary discovery, the trial court should have excluded the testimony.

Before trial, defendant requested that the state disclose all relevant oral statements made by defendant. In its 2 July 1987 voluntary response to discovery, the state indicated that defendant had not made any oral statement to law enforcement officers

which would be relevant to the case. On direct examination, and over defendant's objection, Deputy Cooper was permitted to testify that defendant said his birthdate was 8 May 1956.

Under N.C.G.S. § 15A-902(a) a party seeking discovery must first request in writing that the other party voluntarily comply with the discovery request. "To the extent that discovery . . . is voluntarily made in response to a request, [it] is deemed to have been made pursuant to an order of the court . . . ." N.C.G.S. § 15A-902(b) (1983). If at any time during the proceedings the court determines a party has failed to comply with discovery, it may impose sanctions pursuant to N.C.G.S. § 15A-910 (1983). The choice of which sanction, *if any*, to impose is left to the sound discretion of the trial court. *State v. Gladden*, 315 N.C. 398, 412, 340 S.E. 2d 673, 682, *cert. denied*, --- U.S. ---, 93 L.Ed. 2d 166 (1986). A trial court will not be reversed on appeal absent a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision. *State v. Hayes*, 314 N.C. 460, 334 S.E. 2d 741 (1985).

Assuming arguendo that the statement was discoverable, that the state should have produced it pursuant to defendant's discovery request and that the trial court should have imposed sanctions pursuant to N.C.G.S. § 15A-910, we are satisfied that defendant was not prejudiced by the admission of Deputy Cooper's testimony. The issue of defendant's age was not closely contested. He was considerably older than the age elements of the crimes charged required him to be, a fact which must have been obvious to the jury. Deputy Cooper's lay opinion testimony that defendant was 29 or 30 years old was properly admitted. It is well established that a jury may "base its determination of a defendant's age on its own observation of him even when the defendant does not testify." *State v. Gray*, 292 N.C. 270, 286, 233 S.E. 2d 905, 915 (1977). *See also State v. Evans*, 298 N.C. 263, 258 S.E. 2d 354 (1979). In addition, there was evidence that defendant drove a truck and drank alcoholic beverages. There was, then, ample evidence, aside from defendant's statement to Deputy Cooper during the booking process, from which the jury could have found that defendant was at least 16 years of age on 26 April 1987.

Under N.C.G.S. § 15A-1443(a) (1983) 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." We are satisfied that had the evidence of defendant's date of birth obtained during the booking process not been admitted, the result at trial would have been the same. Accordingly, this assignment of error is overruled.

IV.

Defendant also contends the trial court erred by refusing to allow defense counsel, in arguing to the jury, to read the Fifth Amendment to the United States Constitution. We conclude this was error; but because the trial court correctly instructed the jury regarding the applicable law, we hold the error does not entitle defendant to a new trial.

During the jury instruction conference, defense counsel requested that in arguing the applicable law, he be allowed to read to the jury the Fifth Amendment. The district attorney objected. Judge Watts, treating the objection as a motion in limine, granted the motion and told defense counsel he could not read the Fifth Amendment because, under our case law, neither defense counsel nor the prosecuting attorney could comment on defendant's failure to testify. In his later instructions to the jury Judge Watts stated:

> The defendant . . . has not testified in this matter and has not offered any evidence. The law of North Carolina and the Fifth Amendment give Mr. Banks this privilege. Those same laws also assure Mr. Banks that his decision not to testify and his decision to offer no evidence, to rely upon the weakness, if any, in the state's case, create absolutely no presumption against him. Therefore, I caution you, ladies and gentlemen, that the defendant's silence is not to influence your decision in any way with regard to any of the six charges against him.

In jury trials all applicable law, the facts of the case and all reasonable inferences to be drawn from the facts may be argued to the jury. N.C.G.S. § 84-14 (1985); *State v. Taylor*, 289 N.C. 223, 221 S.E. 2d 359 (1976). Moreover, counsel may "*read or state* to the jury a statute or other rule of law relevant to such case."

State v. McMorris, 290 N.C. 286, 288, 225 S.E. 2d 553, 554 (1976) (emphasis added). But applicable also to the question here presented is N.C.G.S. § 8-54 (1986), which gives a person charged with a criminal offense the privilege of testifying in his own behalf but adds that his failure to exercise this privilege "shall not create any presumption against him." In *State v. Bovender*, 233 N.C. 683, 65 S.E. 2d 323 (1951), we said:

> The decisions . . . referring to this statute seem to have interpreted its meaning as denying the right of counsel to comment on the failure of a defendant to testify. The reason for the rule is that *extended comment* from the court or from counsel for the state or defendant would tend to nullify the declared policy of the law that the failure of one charged with crime to testify in his own behalf should not create a presumption against him or be regarded as a circumstance indicative of guilt or unduly accentuate the significance of his silence. To permit counsel for a defendant to *comment upon or offer explanation of* the defendant's failure to testify would open the door for the prosecution and create a situation the statute was intended to prevent . . . .
>
> While the mere statement by defendants' counsel that the law says no man has to take the witness stand *would seem unobjectionable*, it is obvious that further comment or explanation might have been violative of the rule established by the decisions of this Court.

Id. at 689-90, 65 S.E. 2d at 329-30 (emphasis added). The Court in *Bovender* held that any error in refusing to permit counsel to recite the law regarding defendant's election to testify was cured by the trial court's legally correct jury instructions on this issue.

A succinct statement of the law governing a defendant's election not to testify was given in *State v. Randolph*, 312 N.C. 198, 321 S.E. 2d 864 (1984):

> A criminal defendant cannot be compelled to testify, and any reference by the State regarding his failure to do so violates an accused's constitutional right to remain silent. *Griffin v. California*, 380 U.S. 609, *reh. denied*, 381 U.S. 957 (1965). Well before *Griffin*, N.C.G.S. 8-54 provided that the failure of a defendant to testify creates no presumption against him.

> We have interpreted this statute as prohibiting the prosecution, the defense, or the trial judge from commenting upon the defendant's failure to testify. *See, e.g., State v. Bovender*, 233 N.C. 683, 65 S.E. 2d 323 (1951); *State v. Humphrey*, 186 N.C. 533, 120 S.E. 85 (1923). A nontestifying defendant, however, has the right upon request to have the trial court instruct the jury that his failure to testify may not be held against him. *Carter v. Kentucky*, 450 U.S. 288 (1981); *State v. Leffingwell*, 34 N.C. App. 205, 237 S.E. 2d 550 (1977).

Id. at 205-06, 321 S.E. 2d at 869.

Our cases and those of the United States Supreme Court thus establish that any *comment or explanation* by the parties or the court on a defendant's election not to testify is improper. Our cases also make clear that the parties, through counsel, may read statutes and rules of law material to the case. Clearly this latter principle would also include material provisions of the state and federal constitutions. It would be anomalous, indeed, not to permit the reading by counsel in courts of law of material portions of cases, statutes and constitutions which, after all, provide the legal underpinning for all that happens in those courts. The mere reading of these authoritative legal texts, which, if they are material to the case, ought to be permitted, is not the same as "comment or explanation," which, in the case of a defendant's election not to testify, is prohibited.

[4] We hold that defense counsel should have been permitted to read to the jury that clause of the Fifth Amendment material to his election not to testify, i.e., "No person . . . shall be compelled in any criminal case to be a witness against himself . . ." and to say simply that because of this provision, the jury must not consider defendant's election not to testify adversely to him, or words to this effect. No further comment or explanation of his election should have been permitted.

In order to obtain a new trial, however, defendant must show that the error complained of is so prejudicial that without the error there is a reasonable possibility there would have been a different result at trial. N.C.G.S. § 15A-1443(a) (1983); *State v. Loren*, 302 N.C. 607, 613, 276 S.E. 2d 365, 369 (1981); *State v. Bovender*, 233 N.C. 683, 65 S.E. 2d 323 (1951). In his general instructions to the jury, Judge Watts gave an accurate and com-

plete statement of the law applicable to defendant's election not to testify. We are satisfied that even if defense counsel had been permitted to read that portion of the Fifth Amendment pertinent to this election, the result at trial would have been the same. No reversible error, therefore, was committed.

V.

[5] Defendant next argues the trial court improperly defined the crime of taking indecent liberties. He complains of Judge Watts' instruction that defendant's insertion of his tongue into the children's mouths in the act of kissing them could be an act punishable under the indecent liberties statute. Defendant contends that only acts which are "of an unnatural sexual nature," but not otherwise punishable under the crime against nature or incest statutes, N.C.G.S. §§ 14-177, -178 and -179, are punishable under the indecent liberties statute; and, he argues, the kissing described by Judge Watts is not such an act.

The indecent liberties statute provides:

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

N.C.G.S. § 14-202.1 (1986).

Upon evidence for the state which tended to show, among other things, that the thirty-year-old defendant placed his tongue in the mouth, ears and noses of the two eight-year-old victims, Judge Watts instructed the jury that under subsection (1) of the statute the state must prove, in addition to the age requirements of the statute:

> that the defendant willfully took an indecent liberty with the . . . child . . . for the purpose of arousing or gratifying sex-

> ual desire. An indecent liberty is defined as an immoral, improper or indecent touching by the defendant upon that child such as a fondling of the genital area or a kissing act involving the insertion of the defendant's tongue into the child's mouth.

Judge Watts also instructed the jury that under subsection (2) of the statute the state must prove, in addition to the age requirements of the statute:

> that defendant wilfully committed a lewd or lascivious act upon the . . . child . . . . Fondling of the genital area of a child or the kissing of a child involving the insertion of an adult's tongue into the child's mouth would be a lewd or lascivious act within the meaning or intent of the statute.

We find no error in these instructions. N.C.G.S. § 14-202.1 "clearly prohibits sexual conduct with a minor child." *State v. Elam*, 302 N.C. 157, 162, 273 S.E. 2d 661, 665 (1981). "Indeed, the legislature enacted section 14-202.1 to encompass more types of deviant behavior, giving children broader protection than available under other statutes proscribing sexual acts." *State v. Etheridge*, 319 N.C. 34, 49, 352 S.E. 2d 673, 682 (1987). The Court of Appeals properly recognized the great breadth of protection against sexual contact the statute seeks to afford children and the reasons for it in *State v. Hicks*, 79 N.C. App. 599, 339 S.E. 2d 806 (1986), when it said:

> Undoubtedly its [the statute's] breadth is in recognition of the significantly greater risk of psychological damage to an impressionable child from overt sexual acts. We also bear in mind the enhanced power and control that adults, even strangers, may exercise over children who are outside the protection of home or school.

Id. at 603, 339 S.E. 2d at 809.

Contrary to defendant's contentions, the indecent liberties statute is not intended to punish only acts which, if committed by and against adults, would be inherently "unnatural," such as crimes against nature and incest. Former N.C.G.S. § 14-202.1 required that the state prove defendant intended to "commit an unnatural sexual act." N.C.G.S. § 14-202.1 (Replacement 1969). The legislature rewrote the indecent liberties statute in 1975, 1975

Session Laws, Chapter 779, § 1, removing this requirement and dividing the statute into two subsections. The substantive features of the statute have remained unchanged since this rewrite. Under the present statute the state, in addition to the age requirements, must prove under subsection (1) an "immoral, improper, or indecent" liberty committed "for the purpose of arousing or gratifying sexual desire" and under subsection (2), a "lewd or lascivious act upon or with the body or any part or member of the body" of the child.

We are satisfied that defendant's conduct falls within the purview of both subsections of the statute. Defendant, a thirty-year-old man, waited until all the other adults were in another part of the house, entered the room where the victims lay, got into bed between the children and kissed each of them, putting his tongue in their mouths, ears and noses. He then threatened to strike the children and kill their mother if they told anyone what he had done. Under these circumstances, the acts of kissing as described by Judge Watts in his jury instructions are, as he properly told the jury, "immoral, improper, or indecent" acts within the meaning of subsection (1) of the statute. Likewise, as he also properly instructed, the acts of kissing here were "lewd or lascivious" acts within the meaning of subsection (2) of the statute.

This assignment of error is overruled.

VI.

[6] Finally, defendant argues the trial judge abused his discretion by denying defendant's motion for a mistrial based upon the behavior of, and remarks made by, one of the jurors in the case. We disagree.

Approximately one and one-half hours after the jury had begun deliberations, Juror 9 opened the door to the jury room and told Deputy Heath, "You can carry me to jail or any where you want to but I'm not staying in there with those people. . . ." Deputy Heath requested that she return to the jury room but she refused. He gave her a chair, summoned Deputy Keaton to stay with her and left to report the matter to the trial court. The juror asked Deputy Keaton for an ashtray and lit a cigarette.

The trial court, having been told by Deputy Heath what happened, summoned the entire jury back to the courtroom and asked whether they had reached a verdict. Upon being told the jury had not reached a verdict, the trial court gave further instructions and requested that the jury resume deliberations. As the jurors left the courtroom, Juror 9, the smoker, was overheard muttering, "a bunch of a-- h--." In the absence of the jury the trial court carefully questioned the two deputies. Based on their testimony and the fact that earlier in the week the jury foreman had complained of an allergic reaction to smoke in the jury room, the court concluded the episode resulted from a conflict over smoking and denied defendant's motion for mistrial.

A motion for mistrial is usually addressed to the sound discretion of the trial judge. *State v. Rogers*, 316 N.C. 203, 341 S.E. 2d 713 (1986). The decision of the trial court will not be reversed absent a showing of abuse of discretion. *State v. King*, 311 N.C. 603, 320 S.E. 2d 1 (1984). A ruling committed to the trial court's discretion will be upset only when the defendant shows that the ruling could not have been the result of a reasoned decision. *State v. Cameron*, 314 N.C. 116, 119, 335 S.E. 2d 9, 11 (1985). Mistrial is a drastic remedy which is warranted only when serious improprieties would make it impossible to attain a fair and impartial verdict. *State v. Calloway*, 305 N.C. 747, 291 S.E. 2d 622 (1982).

We are satisfied from the facts as set out above that the trial court did not abuse its discretion in denying defendant's motion for mistrial. Earlier in the trial the court had been made aware of a conflict over smoking in the jury room. The trial court carefully questioned both the bailiff and deputy, established that to smoke or not to smoke was the source of the conflict between Juror 9 and the other jurors. Judge Watts appealed to the jurors to work together to reach a verdict and the jurors complied. We find the denial of defendant's motion for mistrial to be a reasoned decision and conclude there was no abuse of discretion.

In defendant's trial we find

No error.

Justice MITCHELL concurring in the result.

I concur in most of the reasoning of the thoughtful opinion of the Chief Justice for the Court and in the result reached. However, although I agree that the trial court erred in refusing to permit the defendant's counsel to read the applicable clause of the Fifth Amendment to the jury, I do not agree with the Court's conclusion that the defendant's counsel was also entitled to "say simply that because of this provision the jury must not consider defendant's election not to testify adversely to him, or words to this effect." This would amount to allowing the defendant to comment upon his failure to testify and violate the prohibition set forth in our prior cases. *State v. Randolph*, 312 N.C. 198, 321 S.E. 2d 864 (1984); *State v. Boone*, 307 N.C. 198, 297 S.E. 2d 585 (1982); *State v. Bovender*, 233 N.C. 683, 65 S.E. 2d 323 (1951); *State v. Humphrey*, 186 N.C. 533, 120 S.E. 85 (1923).

More importantly, although our ordinary rules would permit the prosecutor to respond once the defendant had opened the door by commenting upon his own failure to take the stand and testify, the prosecutor is constitutionally prohibited from doing so in instances such as this. Requiring the State to argue its case with one hand tied behind its back in this fashion would not be necessary, however, if the Court simply adhered to the rule laid down in *Randolph, Boone, Bovender* and *Humphrey* prohibiting either the prosecutor or the defendant's counsel from discussing the defendant's failure to testify. As the Court's opinion demonstrates, that prohibition creates no prejudice to the defendant, as the trial court must correctly explain the application of the Fifth Amendment in the context of the defendant's decision not to testify, if requested to do so by the defendant. Therefore, the rule applied by the Court in this case *unnecessarily* places the prosecution at a disadvantage in arguing its case.

STATE OF NORTH CAROLINA v. DANNY ALEXANDER WHITE

No. 599PA87

(Filed 28 July 1988)

1. **Searches and Seizures § 33— exceeding scope of a warrant—plain view rule**

The trial court in a prosecution for possession of stolen property did not err when it denied defendant's motion to suppress items which had not been specifically identified in a search warrant application and which were seized during a search of his home. Even though officers carried with them incident reports concerning stolen property not listed in the search warrant, there is no evidence in the record that prior to the search police officers had established a linkage between the items listed on the incident reports and defendant's activities that amounted to probable cause to believe that these items were hidden at defendant's home; and police suspicions do not invalidate a search that subsequently confirms those suspicions unless police withhold information to the effect that they have probable cause. Moreover, there is no evidence in the record that when police officers came upon the items listed in the incident reports during the course of their search, they violated the requirement that they have probable cause to believe that the items in plain view were the fruits of criminal conduct by virtue of mere observation without moving, disturbing or handling any item of the contested evidence.

2. **Searches and Seizures § 33; Receiving Stolen Goods § 4— exceeding scope of search warrant—items not listed on warrant—not admissible**

The trial court erred in a prosecution for possession of stolen property by admitting into evidence property which was not listed on a search warrant but which was seized during a search of defendant's house where the county police who seized the items could not establish that they were evidence of crime until they had consulted city police after the search and seizure had occurred.

3. **Receiving Stolen Goods § 7— sentencing—multiple counts—multiple punishments not unconstitutional**

The trial court did not err when sentencing defendant for six counts of felonious possession of stolen property and two counts of misdemeanor possession of stolen property by not arresting judgment as to all but one of the offenses because N.C.G.S. § 14-71.1 individuates crimes of possession by the time at which the stolen goods came into the criminal's possession rather than homogenizing all simultaneously possessed stolen items into one possessory offense.

4. **Receiving Stolen Goods § 5.1— possession of stolen property—evidence sufficient**

The trial court did not err in a prosecution for felonious possession of stolen property by denying defendant's motion at the close of all the evidence to dismiss the charges where the State presented evidence of property recovered from defendant's home and testimony of break-in victims identifying the stolen property taken from the residences; an accomplice testified that he

and defendant had together committed six to eight break-ins; and defendant admitted that he took the stolen property in pawn. N.C.G.S. § 14-71.1.

Justice FRYE dissenting in part.

Justice WEBB dissenting in part.

ON the State of North Carolina's petition for discretionary review of the decision of the Court of Appeals, 87 N.C. App. 311, 361 S.E. 2d 301 (1987), which found error in defendant's trial before *Ferrell, J.*, at the 15 September 1986 session of Superior Court, MECKLENBURG County, and granted defendant a new trial on seven of the charges on which he had been convicted and remanded the case for entry of a new judgment on the remaining conviction. Heard in the Supreme Court 11 May 1988.

Lacy H. Thornburg, Attorney General, by John F. Maddrey, Assistant Attorney General, for the state, appellant.

Grant Smithson for defendant-appellee.

MARTIN, Justice.

Defendant was convicted of six counts of felonious possession of stolen property and two counts of misdemeanor possession of stolen property. The state appeals from the decision of the Court of Appeals granting defendant a new trial on seven of the eight counts of possession of stolen property. For the reasons set forth below, we reverse the ruling of the Court of Appeals granting a new trial on four counts but uphold the granting of a new trial on the three remaining counts on which defendant was convicted.

The state's evidence tends to show: Officer Bailey of the Mecklenburg County Police Department testified that he and other officers were investigating a series of break-ins that had occurred in the vicinity of South Mecklenburg High School. On 4 January 1986, police officers discovered a station wagon in the parking lot at the high school containing property stolen from a neighborhood residence. The registered owner of the station wagon testified that he had sold the vehicle to defendant. An informant, Andre Mobley, who confessed to being an accomplice of defendant's in carrying out six to eight of the break-ins, provided the officers with information concerning the crimes. The informant gave the Mecklenburg County police detailed information

about several of the break-ins and some of the property stolen. He told police he had seen certain specific items of stolen property at defendant's 512 West Worthington Avenue home in Charlotte. On 15 January 1986, Officer Bailey obtained a warrant to search defendant's home, which he and four other officers executed on 16 January. The warrant application listed the items that Mobley had seen and, on the strength of his information, asserted that there was probable cause to search defendant's home for these items.

When police officers searched defendant's home, they recovered only one item, a JVC stereo, that was listed in the search warrant. When the police officers executed the search warrant, they took with them Mecklenburg County police incident reports listing property stolen in the South Mecklenburg High School neighborhood rash of break-ins in the preceding six-week period. In addition to the JVC stereo, police officers seized items listed on police incident reports as having been stolen in recent break-ins in the same neighborhood. They also seized items that were listed neither on the search warrant nor on county police incident reports. These last-mentioned items were stolen during break-ins that were under investigation by city police rather than county police. Convictions were obtained in the cases of the eight break-in victims who testified at defendant's trial. Each identified one or more items seized during the 16 January search of defendant's house as among the items stolen from their residences. These items included stereo equipment, a raccoon coat, jewelry, and costume jewelry. One victim-witness recovered all of his stolen possessions. They were discovered by police either in defendant's station wagon on the night of 4 January or during the course of the search of defendant's home. The other victim-witnesses each testified that only a fraction of the property stolen from them was recovered.

[1] Defendant first contends that the trial court committed prejudicial error when it denied his pretrial motion to suppress items which had not been specifically identified in the warrant application and were seized during the 16 January 1986 search of his home. Defendant argues that his fourth and fourteenth amendment rights under the Federal Constitution were violated by the seizure of the items not listed on the warrant application because no valid exception to the fourth amendment's warrant require-

ment, in particular the "plain view" exception, was applicable to his case. The state argues that because the items in question were inadvertently discovered while a lawful search was in progress, their seizure falls within the plain view exception to the warrant requirement of the United States Constitution and also satisfies the strictures of N.C.G.S. § 15A-253. Because defendant has made no allegation of violation of his rights under the North Carolina Constitution, we decide this issue under the Federal Constitution and applicable statutory law.

In *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L.Ed. 2d 564 (1971), the United States Supreme Court set out three requirements which must be met in a lawful police seizure of evidence in plain view without a warrant. The *Coolidge* three-part test was applied in *State v. Williams*, 315 N.C. 310, 338 S.E. 2d 75 (1986). There Justice Meyer summarized the *Coolidge* requirements:

> First, the initial intrusion which brings the evidence into plain view must be lawful. *Id.* [403 U.S.] at 465, 29 L.Ed. 2d at 582. Second, the discovery of the incriminating evidence must be inadvertent. *Id.* at 469, 29 L.Ed. 2d at 585. Third, it must be immediately apparent to the police that the items observed constitute evidence of a crime, are contraband, or are otherwise subject to seizure. *Id.* at 466, 29 L.Ed. 2d at 583.

315 N.C. at 317, 338 S.E. 2d at 80.

In the case before us, the Court of Appeals concluded that while the seizure of the items not listed on the search warrant satisfied the first and third *Coolidge* requirements, the discovery was not inadvertent and the seizure of these items was thus illegal. The Court of Appeals reaches this result because it interprets "inadvertence" to mean "unanticipated" or "unexpected." We reject the analysis of "inadvertent discovery" employed by the Court of Appeals and, accordingly, reach a different result as to the admissibility of the contested evidence seized at defendant's home on 16 January 1986.

The *Coolidge* decision did not make explicit the meaning to be given to "inadvertence" in the test for the plain view exception to the warrant requirement. The *Coolidge* Court does, however, provide some general guidance through its discussion of the objectives of the warrant requirement of the fourth amendment:

> First, the magistrate's scrutiny is intended to eliminate altogether searches not based on probable cause. . . . The second, distinct objective is that those searches deemed necessary should be as limited as possible. Here, the specific evil is the "general warrant" abhorred by the colonists, and the problem is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings.

403 U.S. at 467, 29 L.Ed. 2d at 583. Justice Stewart, writing for the plurality in *Coolidge*, argues that the plain view exception does not thwart these objectives. The initial intrusion is justified by a warrant while the second requirement bars police from launching a general exploratory search. *Id.* at 467, 29 L.Ed. 2d at 583-84.

In *United States v. Hare*, 589 F. 2d 1291 (1979), the Sixth Circuit Court of Appeals provides an analysis of the concept of inadvertent discovery which we find persuasive. That court concludes that "inadvertence," in the context of the plain view doctrine, "means that the police must be without probable cause to believe evidence would be discovered until they actually observe it in the course of an otherwise justified search." *Id.* at 1294. The Sixth Circuit in effect proposes a two-step inquiry into the constitutional propriety of supposedly "plain view" seizures: (1) Prior to the search did the police have probable cause to secure a search warrant for the items subsequently seized—but not specifically listed in the warrant—at the location to be searched? If the answer is positive, the seizure is illegal and the fruits of it must be suppressed. If the answer is negative, the inquiry proceeds to the question, (2) did the police have probable cause to believe that the seized items were evidence of criminal conduct when the subsequent warrantless seizure actually took place? As to the second phase of the inquiry, the United States Supreme Court has recently confirmed the approach of the *Hare* court. In *Arizona v. Hicks*, 480 U.S. ---, 94 L.Ed. 2d 347 (1987), the Court ruled that in order to invoke the plain view doctrine, absent police operational necessities in efforts to detect certain types of crime, police must have probable cause to believe that items seized without a warrant are evidence of criminal conduct at the time of the seizure. *Id.* at ---, 94 L.Ed. 2d at 355. The *Hare* court explains its support for what we have called step one of an inadvertency analysis as follows:

> There are many times when a police officer may "expect" to find evidence in a particular place, and that expectation may range from a weak hunch to a strong suspicion. However, the Fourth Amendment prohibits either a warrant to issue or search based on such an expectation. Yet if in the course of an intrusion wholly authorized by another legitimate purpose, that hunch or suspicion is confirmed by an actual observation, the police are in precisely the same position as if they were taken wholly by surprise by the discovery. The same exigent circumstances exist, and no warrant could have been obtained before the discovery.

589 F. 2d at 1294. The Sixth Circuit reasons that when police come upon evidence they have no warrant to seize during a search legitimately targeted at other evidence, the seizure of that evidence is rendered exigent. To leave it is to risk its being spirited away by criminals or their confederates. The court distinguishes between exigencies of police officers' own making—where they have failed to include items they have probable cause to believe are at a location to be searched in their warrant application—from true exigencies giving rise to a legitimate exception to the warrant requirement. While the former cannot be tolerated, the latter imposes no significant diminution of fourth amendment privacy protections, for the alternative would be to secure the premises—a procedure which may in any event exceed police authority once the original warrant has been executed—while an officer is sent to obtain a new warrant, a process which would only delay the seizure. 589 F. 2d at 1294-95.

We now turn to the task of applying the *Hare* analysis to the case before us. We note that the record developed at the suppression hearing is sparse, giving a bare minimum of information about how the police conducted the search of defendant's home and the seizure of the contested evidence. The trial judge made conclusions of law following the suppression hearing that the contested evidence was competent to be offered and that its admission did not violate defendant's constitutional rights. The Court of Appeals disagreed, holding that "[t]he evidence clearly demonstrates that the officers' discovery of the items of stolen property listed in the incident reports was not inadvertent." 87 N.C. App. at 322, 361 S.E. 2d at 307. The Court of Appeals supports its conclusion as follows:

> The officers believed that the stolen property listed on the incident reports would be discovered at defendant's residence. They had more than a mere suspicion that discovery would occur. The officers carried the incident reports with them for the specific purpose of searching for and seizing items found in defendant's residence that comported with items listed in the reports.

Id. at 322, 361 S.E. 2d at 307. The Court of Appeals erred in treating police suspicions or beliefs as to what they might find at defendant's home as evidence that they launched a search for the items on the incident reports that took them outside the boundaries of the duly warranted search they were permitted to undertake. Nor is the fact, testified to by Officer Bailey, that the purpose of taking the incident reports to defendant's home was to make it possible to compare the property listed on the reports "with property that may have been found in the residence" evidence of police misconduct. There is no evidence in the record that prior to the search police officers had established a linkage between the items listed on the incident reports and defendant's activities that amounted to probable cause to believe that these items were hidden at defendant's home. We are in agreement with the *Hare* court that unless police withhold information to the effect that they have probable cause, either to circumvent the warrant requirement altogether or to give themselves illicit scope to conduct an exploratory search, police suspicions do not invalidate a search that subsequently confirms those suspicions.

As to the second stage of our analysis, there is no evidence in the record that when the officers came upon the items listed in the incident reports during the course of their search they violated the requirement set forth in *Hicks*, 480 U.S. ---, 94 L.Ed. 2d 347, for a plain view seizure. *Hicks* requires that police officers must have probable cause to believe that the items in plain view were the fruits of criminal conduct by virtue of mere observation of the area in which the legitimate search is taking place. Thus, police "came a cropper" in *Hicks* because a police officer moved stereo equipment in order to read and record the serial numbers on it. Justice Scalia, writing for the Supreme Court, explains that the distinction between merely looking at the equipment and moving it a few inches in order to inspect the serial numbers is the difference between satisfying and violating the plain view

doctrine under the fourth amendment. Justice Scalia reasons that because mere inspection does not subject the target of the search to any additional invasion of privacy beyond that forfeited in the course of the legitimate search, such inspection, without a further invasion, gives rise to no fourth amendment violation. *Id.* at ---, 94 L.Ed. 2d at 353-54. In the case before us, the very fact that the police came armed with the incident reports apparently allowed them to ascertain from mere inspection of the items listed on those reports that they were indeed stolen property, without, as far as the record reveals, moving, disturbing, or handling any item of the contested evidence.

Our result with respect to the items listed on the incident reports comports with *State v. Williams*, 315 N.C. 310, 338 S.E. 2d 75 (1986), and *State v. Richards*, 294 N.C. 474, 242 S.E. 2d 844 (1978), in which we held that to qualify as inadvertent a putatively plain view seizure must not be marred by police intent to search for and seize items not described in the warrant. Mere suspicion that the property might be at the place to be searched is not enough to preclude the application of the "plain view" doctrine. *Williams*, 315 N.C. 310, 338 S.E. 2d 75. There is no evidence in the record that the police officers intended to search beyond the limits imposed by the warrant. They seized evidence which mere inspection, inspired by suspicions harbored as a result of good police work, revealed to be evidence of crime. We note that in light of the *Hicks* decision, holding that at the time of seizure the police must have probable cause to believe that the items in plain view were the fruits of criminal conduct, there is an overlap between the *Coolidge* requirement that it be immediately apparent to police that the seized items are evidence of crime and the requirement that discovery be inadvertent: Both are satisfied if the police have probable cause to believe that what they have come upon is evidence of criminal conduct.

We therefore reverse the decision of the Court of Appeals with respect to cases 86CRS4863, 86CRS4888, 86CRS4902, and 86CRS4924.

[2] We turn now to the three counts of felony possession of stolen property which rest on evidence seized during the 16 January search which was neither described in the warrant nor listed on the incident reports. These were items stolen from

witnesses Hoagland, Grain, and Sawyer. The break-ins were under investigation by city police rather than Mecklenburg County police and thus the items were not listed on county police reports. Mecklenburg County police were not able to establish that this group of seized items was evidence of crime until they consulted city police after the search and seizure had occurred. It is evident that the officers who conducted the search did not have probable cause to believe that the items in this group were stolen property at the time that the seizures were consummated. *Hare*, 589 F. 2d 1291. We therefore hold that it was error to admit as evidence the property seized with respect to these three charges. The decision of the Court of Appeals granting defendant a new trial in cases 86CRS53468, 86CRS53472, and 86CRS53473 is affirmed.

[3] Defendant next contends that the trial court committed reversible error by not arresting judgment as to all but one of the offenses of which he was found guilty. Defendant argues that he was thereby unconstitutionally subjected to multiple punishments for the same crime. We find no merit in defendant's contention, which was likewise rejected by the Court of Appeals. At issue here is how defendant's criminal conduct is to be parsed. In *State v. Davis*, 302 N.C. 370, 275 S.E. 2d 491 (1981), in which we construed N.C.G.S. § 14-71.1, we implicitly rejected defendant's theory that the separate counts of possession of which he was convicted sprung from but one criminal offense. In *Davis* we explained that "possession . . . is a continuing offense beginning at the time of receipt and continuing until divestment." 302 N.C. at 374, 275 S.E. 2d at 494. Each separate count of which defendant was convicted grew out of a possession begun at different times of receipt following break-ins over a six-week period. N.C.G.S. § 14-71.1 therefore does not take the wholesale approach to possession envisioned by defendant. The statute individuates crimes of possession by the time at which the stolen goods came into the criminal's possession rather than homogenizing all simultaneously possessed stolen items into one possessory offense. Having found no merit in defendant's theory that he committed at most one offense of possession, we reject defendant's additional contention that he had ineffective assistance of counsel because his trial lawyer failed to move for arrest of judgment on the single offense theory.

[4] Defendant's final contention is that the trial court committed prejudicial error when it denied his motion at the close of all the evidence to dismiss all the felonious possession of stolen property charges against him. It is beyond cavil that when a defendant brings a motion to dismiss in a criminal case, the trial judge must consider all the evidence in the light most favorable to the state, giving the state the benefit of every reasonable inference that the evidence permits. *State v. Brown*, 310 N.C. 563, 566, 313 S.E. 2d 585, 587 (1984). There was sufficient evidence presented in defendant's case to establish his guilt. The state presented the evidence of the property recovered from defendant's home and the testimony of the break-in victims identifying the stolen property taken from their residences. Andre Mobley testified that he and defendant had together committed six to eight of the South Mecklenburg High School area break-ins. Defendant admitted that he took the stolen property in pawn. The evidence shows that defendant knew or had reasonable grounds to believe that the stolen property was stolen. N.C.G.S. § 14-71.1 (1986). We find no merit in this assignment of error.

The decision of the Court of Appeals finding no error in the trial of case 86CRS4916 is affirmed. However, the Court of Appeals vacated the judgment and remanded this case for the entry of another judgment. In the light of this Court's opinion, that portion of the decision of the Court of Appeals is vacated.

The result is:

86CRS4863—Reversed.

86CRS4888—Reversed.

86CRS4902—Reversed.

86CRS4924—Reversed.

86CRS53468—Affirmed.

86CRS53472—Affirmed.

86CRS53473—Affirmed.

86CRS4916—Modified and affirmed.

Justice FRYE dissenting in part.

On 16 January 1986, four Mecklenburg County police officers, armed with a search warrant, pried open the door of 512 West Worthington Street and seized property suspected of being the fruits of crime. Though the warrant possessed by these officers listed only a stereo, watch, and two pistols as the items to be seized, the officers in fact seized some fifty-five items. The only item found that was actually listed in the application for the search warrant was a JVC stereo.

The Court today endorses the actions of these officers by holding that the items not specifically identified in the warrant application were *inadvertently* discovered while the officers engaged in a lawful search. The majority, therefore, concludes that the seizure falls within the "plain view" exception to the warrant requirement of the United States Constitution, and satisfies the requirements of N.C.G.S. § 15A-253. Because this holding is a drastic departure from our cases interpreting the plain view exception to warrantless searches, I dissent from this portion of the majority's opinion.

The United States Supreme Court, in *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L.Ed. 2d 564 (1971), held that the police may seize without a warrant the instrumentalities, fruits, or other evidence of crime which is in plain view if three requirements are met. To remain within the strictures of the constitution, the warrantless seizure requires: (1) that the initial intrusion be lawful; (2) the discovery of the incriminating evidence be inadvertent; and last, (3) it be immediately apparent that the items observed constitute evidence of a crime. *Id.* at 466, 29 L.Ed. 2d at 583. The State falls woefully short in satisfying the second prong.

In its opinion in *Coolidge*, the United States Supreme Court gave little guidance as to what was meant by "inadvertent" discovery. In *State v. Richards*, 294 N.C. 474, 242 S.E. 2d 844 (1978), this Court interpreted the inadvertent requirement of the plain view doctrine to mean "that there must be no intent on the part of investigators to search for and seize the contested items not named in the warrant." *Id.* at 489-90, 242 S.E. 2d at 854. Quite recently, this interpretation was restated in *State v. Williams*, 315 N.C. 310, 338 S.E. 2d 75 (1986). In applying this now well-established standard, it is eminently evident that the seizure of

those items listed in the police reports and not listed in the application for the search warrant was not inadvertent as that requirement has been interpreted by this Court.

After securing the search warrant from a magistrate, Officer Bailey testified that he and several other officers drove to the home of defendant to execute the warrant. Officer Bailey took with him fifteen police incident reports which contained information concerning break-ins covering a period of almost two months. In fact, Officer Bailey stated:

> When we went to the residence to execute the warrant, I took with me a series of Mecklenburg County Police Reports that had occurred in the vicinity of South Mecklenburg High School over a six-week to eight-week period prior to the execution of the search. *And the purpose of that was because of the property listed on those Police Reports to be compared with property that may have been found in the residence.* (Emphasis added.)

Moreover, Officer McMurray, who assisted in executing the warrant, stated at trial that he studied these reports before leaving for defendant's home.

After arriving at the home of defendant and finding no one present, the officers forced their way in. The State's testimony revealed that the officers, almost immediately, discovered the stereo that was listed on the application to the search warrant. The officers found nothing else which comported with the items listed in the warrant application. The officers, however, did discover other items which, when checked against the fifteen reports that they had taken along, were thought to be fruits of crime. The officers confiscated these items along with the stereo and other items not listed in the reports.

The officers confiscated a total of fifty-five items including such seemingly innocuous evidence as screwdrivers and blank VCR tapes. Not only did the officers seize these items that were not named in the warrant, they also seized a copy of defendant's lease and a copy of a traffic citation. Apparently, these items were seized to support the State's contention that this residence was in fact that of the defendant. Officer Bailey stated at trial that some of the confiscated items still remained at police head-

quarters, unclaimed by their owners. In fact, it was revealed at trial that some of the property seized was the personal property of defendant and his wife. In my opinion, this wholesale rummaging through the defendant's home was never contemplated as being an exception to the fourth amendment's admonition against unreasonable search and seizures. Nor, until today, could such a search survive the scrutiny given this type of evidence by this Court.

The majority states that its result comports with *State v. Williams*, 315 N.C. 310, 338 S.E. 2d 75, and *State v. Richards*, 294 N.C. 474, 242 S.E. 2d 844. It simply does not. Those cases stand firmly for the proposition that, for a discovery to be inadvertent, there must be *no intent* on the part of the investigators to search for and seize contested items not named in the warrant. The Court's departure from this established and prudent principle goes unexplained.

Through the State's own witnesses, it was revealed that the only reason the officers took with them the incident reports of other crimes was to compare the items listed in the reports with what was to be found in defendant's home. It was the intention of the officers to go to defendant's home not only to search for items enumerated in the search warrant but also to search for other items of contraband. This is supported not only by the taking of the reports to the search but also by the careful study of the reports by the officers prior to departing for defendant's home. It thus becomes exceedingly evident that the reports were taken for no other reason than to search for and confiscate items listed therein. It follows then that the discovery of these items was not inadvertent but intentional.

The holding of the Court does little to discourage law enforcement officers from securing a warrant to search for one item, and then embarking on "exploratory rummaging in a person's belongings," *Coolidge v. New Hampshire*, 403 U.S. at 467, 29 L.Ed. 2d at 583, in one last effort to find fruits of crime. The inadvertent requirement of the plain view doctrine, as followed before by this Court, was an effort to thwart these attempts by law enforcement officers to cloak general exploratory searches under the veil of plain view. The majority succeeds in dismantling this effort.

I, therefore, respectfully dissent from that portion of the Court's opinion which holds that the discovery of items not mentioned in the application for the search warrant was inadvertent and allows the seized items into evidence under the plain view doctrine. I would affirm the unanimous decision of the Court of Appeals on this issue.

Justice WEBB dissenting in part.

I dissent from that portion of the majority opinion which affirms the judgment of the Court of Appeals ordering new trials for the convictions resting on the evidence seized which was neither described in the warrant nor listed on the incident reports. The majority says, "[i]t is evident that the officers who conducted the search did not have probable cause to believe that the items in this group were stolen property at the time the seizures were consummated." When these items were found with other items which the officers had cause to believe were stolen it seems to me the most logical inference to be drawn is that these items were probably also stolen. It is obvious the officers thought the items were probably stolen or they would not have seized them. I believe the officers were reasonable in this belief. I believe there was probable cause to believe these were stolen items and the officers properly seized them.

I concur in the rest of the majority opinion.

STATE OF NORTH CAROLINA v. JEFFERY EUGENE SHORT AND ELSON WAYNE WATERS

No. 212A86

(Filed 28 July 1988)

1. Jury § 6.1— murder—individual voir dire denied—no abuse of discretion

The trial court did not abuse its discretion in a prosecution for murder, armed robbery, burglary and conspiracy to commit burglary by denying defendant Short's motion for sequestration and individual voir dire of prospective jurors where defendant failed to identify any reasonable grounds upon which the trial court could have determined that there was good cause for granting his motion. N.C.G.S. § 15A-1214(j).

2. Criminal Law § 73.2— testimony of co-conspirator—no limiting instruction—not prejudicial

There was no prejudice in a prosecution for murder, armed robbery, burglary, and conspiracy to commit burglary upon the introduction without a limiting instruction of testimony concerning a conversation between a second and third co-conspirator related to an earlier conversation between defendant and the second co-conspirator. Defendant Short made only a general objection at trial and did not request any limiting instructions; moreover, the testimony which followed was innocuous and, even assuming it was inadmissible hearsay, instructions of the trial court following another objection prevented any resulting prejudice to defendant Short.

3. Criminal Law § 169— answer to rephrased question after objection sustained—admitted—no plain error

There was no plain error in a prosecution for murder, armed robbery, burglary, and conspiracy to commit burglary where a co-conspirator testifying under a plea bargain was asked about a conversation with a co-conspirator, the court sustained an objection, and defendant contends that the prosecution then sought to elicit the identical information by a rephrased question. Defendant did not object at trial to the rephrased question and did not show that any error caused the jury to reach a different verdict. N.C.G.S. § 8C-1, Rule 103(a)(1), N.C.G.S. § 15A-1446(a).

4. Criminal Law § 88.1— cross-examination—limited—no prejudice

There was no prejudice in a prosecution for murder, armed robbery, burglary, and conspiracy to commit burglary from the trial court's refusal to allow counsel to examine a co-conspirator who testified under a plea bargain on recross-examination with respect to statements read into the record on direct and redirect examination by the State. It is clear that the witness was cross-examined at great length, both by counsel for defendant Waters and counsel for defendant Short, regarding the previous statements he had made and the fact that there were inconsistencies in those statements and between them and his testimony in court, and the trial court took pains to advise counsel for defendant Short that his limitation of additional recross-examination related only to one statement, about which the witness had been extensively cross-examined by counsel for both defendants.

5. Criminal Law § 60.1— fingerprint evidence—enlarged photograph not admitted—original latent print available

There was no error in a prosecution for murder, armed robbery, burglary, and conspiracy to commit burglary from the introduction of fingerprint evidence from an SBI agent where a local police captain did not also make a positive identification and where photographs of the fingerprints were not used to illustrate the testimony. The local police captain was prevented from making a positive comparison by illness; even had he been unable to make a positive identification or had he concluded that the latent print was not that of defendant, that would have gone only to the weight and not the admissibility of the SBI agent's positive identification. There is no requirement that, when an original latent print is available in court, the witness must also produce an enlarged photograph of that print to illustrate the testimony.

6. Criminal Law § 99.3— limiting instruction—no prejudicial expression of opinion

Defendant failed to establish prejudice in a prosecution for murder, armed robbery, burglary and conspiracy to commit burglary from the court's limiting instruction concerning admissions made by a co-conspirator testifying pursuant to a plea bargain. Defendant did not object to the instructions at trial and does not contend on appeal that the instructions are incorrect except for the contention that the instructions constituted an impermissible expression of opinion; even assuming error, defendant did not establish a reasonable possibility that a different result would have been reached at trial absent the error. N.C.G.S. § 15A-1443(a) (1983).

7. Burglary and Unlawful Breakings § 5.3— conspiracy to commit burglary—accomplice's testimony—evidence sufficient

The trial court properly denied defendant Short's motion to dismiss a conspiracy to commit burglary charge where an accomplice's testimony established that Short entered into the plan to burglarize the home at the time of his conversation with the accomplice and that Short then cased the house with others to determine whether it was occupied. The uncorroborated testimony of a co-conspirator is competent and sufficient to establish the existence of a conspiracy and the defendant's participation therein.

8. Criminal Law § 92.1— burglary and robbery—joinder of defendants—no error

The trial court did not abuse its discretion in overruling defendant Waters' objection to the joinder of the cases against both defendants for trial where defendant's argument is based entirely on a statement made by defendant Short during the sentencing hearing and there is no way to determine whether Short would have testified in the same way or would have testified at all if the defendants had had separate trials. N.C.G.S. § 15A-926(b)(2). N.C.G.S. § 15A-927(a)(2) (1983).

APPEAL as of right by the defendants pursuant to N.C.G.S. § 7A-27(a) from judgments imposing sentences of life imprisonment for first-degree murder entered by *Lewis (Robert D.), J.*, at the 21 October 1985 Criminal Session of Superior Court, GASTON County. On 14 August 1987, the Supreme Court allowed the defendants' motions to bypass the Court of Appeals on their convictions for conspiracy to commit burglary, second-degree burglary, and robbery with a dangerous weapon. Heard in the Supreme Court on 14 March 1988.

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

Jeffrey M. Guller for the defendant-appellant Short.

Curtis O. Harris for the defendant-appellant Waters.

MITCHELL, Justice.

The defendants were each convicted by a jury of conspiracy to commit burglary, second-degree burglary, robbery with a dangerous weapon, and first-degree murder. The trial court entered judgments sentencing each defendant to life imprisonment for first-degree murder, fourteen years imprisonment for second-degree burglary and robbery with a dangerous weapon, and three years imprisonment for conspiracy to commit burglary.

On appeal to this Court, the defendants bring forward numerous assignments of error. Because they raise different issues on appeal, we address each defendant's assignments of error separately. Having reviewed the entire record and each defendant's assignments, we detect no error.

The evidence at trial consisted primarily of the testimony of Johnny Ray Arrendale, a co-conspirator who took part in the crimes and who testified pursuant to a plea bargain agreement. The State's evidence tended to show that on 31 March 1985 Arrendale had been living in the Gastonia area about three months, having moved from Georgia because he had family and friends in the Gastonia area. The defendant Wayne Waters, who also lived in Gastonia, is Arrendale's half brother.

On the afternoon of 31 March 1985, Arrendale went to see Waters. Arrendale and Waters then went to the Steak'N Eggs restaurant where they remained for several hours. Waters told Arrendale that he was waiting for someone. Thereafter, a person named Putnam joined them. Putnam and Waters left together, and Waters returned after about thirty minutes. Waters then explained to Arrendale that he had a friend who knew someone who was supposed to have "come into" approximately $100,000. This person supposedly had a fear of banks and was keeping the money in his house.

Waters asked Arrendale if he knew anyone who would help him break into the house and steal the money. Arrendale told Waters that he did, and Waters then drove Arrendale to the house of the defendant Short. Arrendale was looking for the defendant's brother, Otis Short, but he was not at home. Instead, Arrendale talked to the defendant, Jeffery Short, while Waters waited in the car.

Jeffery Short agreed to help break into the house, and the three returned to the Steak'N Eggs restaurant. A little after 9:00 p.m., Waters drove Short and Arrendale by the house in question. Waters let Arrendale and Short out of the car, and they proceeded to break into the house.

As Arrendale and Short were searching the house for money, the occupant, Robert Steele, entered through the front door. Steele was then struck on the head several times with an ax by Short. Steele fell partially onto the front porch and was dragged into the house. His pockets and wallet were searched, and the money he had on his person was taken.

Arrendale and Short then returned to the Steak'N Eggs restaurant on foot. They saw Putnam in the parking lot and asked him to go inside and get the defendant Waters. Arrendale could not go in himself because he had blood on his trousers and shoes. Short, Waters and Arrendale then left together. They went back by the Steele house and stopped about a block from it, where they split the proceeds from the robbery four ways. The "deal" was that Putnam, Arrendale, Short and Waters each would get one-fourth of the proceeds.

Thereafter, Arrendale and Short stopped by a poker house and then went to Short's house. The two of them, together with a girl, were given a ride to Myrtle Beach the next day. Short stayed for two days. Arrendale returned to Gastonia the same day, proceeded to Charlotte and caught a bus to Georgia where he was later arrested.

Expert medical evidence tended to show that Robert Steele received massive skull and brain injuries resulting from blows to the head that could have been caused by an ax. He died approximately two months after the incident as a result of the blows to the head received during the robbery.

The defendants did not offer any evidence at trial. By cross-examination, however, they pointed up various inconsistencies and discrepancies in the testimony given by Arrendale at the trial and in previous statements he had given to law enforcement officers.

We now consider the defendants' assignments of error *seriatim*.

SHORT'S ISSUES

[1] In his first assignment of error, the defendant Short asserts that the trial court erred in denying his motion for sequestration and individual *voir dire* of prospective jurors. The defendant contends that the jurors waiting to be examined were in the courtroom and heard the statements and preconceived opinions of others then being examined and that this prevented a fair trial. He argues that the trial court should have granted his motion for sequestration and individual *voir dire* to ensure a fair and impartial jury for the trial of his case, and to prevent the tainting of one potential juror by the answers of others to the questions propounded by counsel.

The murder case against the defendant was tried as a capital case. 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." N.C.G.S. § 15A-1214(j) (1983). We have stated, however, that this provision does not grant either party any absolute right. *See State v. Jackson*, 309 N.C. 26, 305 S.E. 2d 703 (1983). The decision 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. *Id.; State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979).

In this case the defendant has failed to identify any reasonable grounds upon which the trial court could have determined that there was "good cause" for granting his motion. Thus, we conclude that the trial court did not abuse its discretion in denying the defendant's motion for sequestration and individual *voir dire* of prospective jurors. There is no precedent for the defendant's suggestion that the jury *voir dire* must be conducted individually in all capital cases. This assignment of error is overruled.

[2] In his next assignment of error, the defendant Short contends that testimony by his co-conspirator Arrendale as to a conversation Arrendale had with Waters was improperly admitted. That conversation between Arrendale and Waters related to an earlier conversation between Arrendale and Short. The trial court

overruled the objection of the defendant Short on the ground that Arrendale could testify regarding a conversation that occurred between Arrendale and Short. Short complains that he was prejudiced by the trial court's failure to give limiting instructions that the jury could consider evidence of Arrendale's conversation with Waters as evidence against Waters but not against Short.

When Short objected, he made a general objection and did not request any limiting instructions. When evidence is competent for one purpose, but not for all purposes, the objecting party cannot rely on a general objection. *See* N.C.G.S. § 8C-1, Rule 105 (1986). He must state the grounds and ask for any desired limiting instructions. *See State v. Rinck*, 303 N.C. 551, 280 S.E. 2d 912 (1981). Consequently, the overruling of Short's general objection without an appropriate limiting instruction was not error.

Moreover, it is instructive to review the testimony that followed. Essentially, Arrendale testified he went to the Steak'N Eggs restaurant with Waters, drank coffee, and Waters told him he was waiting for someone. Thereafter, Short again objected to Arrendale's testimony, and at that time the trial court sustained the objection and instructed the jury not to consider any conversation Arrendale had with Waters in its deliberations against Short. Thus, even assuming *arguendo* that this innocuous testimony was inadmissible hearsay, the instructions of the trial court prevented any resulting prejudice to Short. This assignment is without merit.

[3] The defendant next contends that the trial court erred in allowing the witness Arrendale to answer a rephrased question after an objection had been sustained. The prosecutor originally asked the witness Arrendale about a conversation he and the defendant Waters had concerning another conversation with Putnam. The trial court sustained an objection and admonished the witness not to testify about anything he did not see or hear of his own knowledge. The defendant contends that the prosecutor then sought to elicit the identical information from the witness Arrendale by a rephrased question: "And what did you talk about during that period of time with Wayne [Waters] regarding the man who had a hundred thousand dollars? . . . Just tell us what you and Wayne talked about?"

We find it unnecessary to address the merits of the defendant's argument. Under N.C.G.S. § 15A-1446(a) and N.C.G.S. § 8C-1, Rule 103(a)(1) an assignment of error ordinarily will not be considered on appellate review unless the error has been brought to the attention of the trial court by appropriate and timely objection. *State v. Reid*, 322 N.C. 309, 367 S.E. 2d 672 (1988); N.C.G.S. § 15A-1446(a) (1983); N.C.G.S. § 8C-1, Rule 103(a)(1) (1986). Failure to do so amounts to a waiver. *State v. McDougall*, 308 N.C. 1, 301 S.E. 2d 308, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 173 (1983); *State v. White*, 307 N.C. 42, 296 S.E. 2d 267 (1982).

In the present case the defendant initially objected to Arrendale's testimony concerning a conversation between Arrendale and the defendant Waters relative to information relayed by Putnam. The trial court sustained the objection. Then the prosecutor asked Arrendale to relate only what Arrendale and Waters had talked about regarding the man who supposedly had $100,000. Short did not object either to the question or the innocuous answer that: "He just said that he knowed somebody that had a friend that was supposed to get a hundred thousand dollar settlement." Thus, this question was not properly preserved for appellate review.

The defendant, having failed to object, must establish "plain error" to receive relief on appeal. *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983). Before deciding that an error by the trial court amounts to "plain error," the appellate court must be convinced that absent the error the jury probably would have reached a different verdict. In other words, the appellate court must determine that the error in question "tilted the scales" and caused the jury to reach its verdict convicting the defendant. *State v. Black*, 308 N.C. 736, 303 S.E. 2d 804 (1983). This test places a much heavier burden upon the defendant than that imposed by N.C.G.S. § 15A-1443 upon defendants who have preserved their rights by timely objection. *State v. Walker*, 316 N.C. 33, 340 S.E. 2d 80 (1986). On the record in this case, the defendant has not carried his burden of showing that any possible error caused the jury to reach a different verdict than it would have reached otherwise. *See State v. Reid*, 322 N.C. 309, 367 S.E. 2d 672 (1988). This assignment is without merit.

[4] In his next assignment of error, the defendant suggests that the trial court erred by refusing to allow his attorney to point out

discrepancies in Arrendale's statement. The defendant contends that the court's refusal to allow counsel to examine Arrendale on recross with respect to statements Arrendale had read into the record on direct and redirect examination by the State was error. The defendant maintains that "the right to cross-examine a witness, at least as to the subject matter of his examination in chief and for purposes of impeachment, 'is absolute and not merely privilege,' and denial of it is 'prejudicial and fatal error.' " 1 Brandis on North Carolina Evidence § 35, at 177-78 (1982) (quoting *Citizens Bank v. Motor Co.*, 216 N.C. 432, 434, 5 S.E. 2d 318, 320 (1939)).

On direct examination the prosecution witness Arrendale testified that he had made previous statements to law enforcement officers and the prosecutor. Then, counsel for the defendant Short cross-examinaed Arrendale—consuming approximately 160 pages of the record—and pointed out discrepancies between his testimony and his previous statements. On redirect examination the prosecutor had Arrendale read a transcript of an earlier statement he had made to law enforcement officials on 22 April 1985. Again, on recross the defendant's attorney pointed out that there were inconsistencies in the statement Arrendale had read and the testimony he had given in court.

The North Carolina Rules of Evidence provide that error may not be predicated upon a ruling that excludes evidence unless a substantial right of the party is affected. N.C.G.S. § 8C-1, Rule 103(a) (1986). It is clear from the record on appeal that the witness Arrendale was cross-examined at great length, both by counsel for the defendant Waters and counsel for the defendant Short, regarding the previous statements he had made and the fact that there were inconsistencies in those statements and between them and his testimony in court. No prejudice to the defendant resulted from the court's limitation of additional recross-examination regarding that statement.

Moreover, it is noteworthy that the trial court took pains to advise counsel for the defendant Short that his limitation of additional recross-examination related only to the 22 April statement, about which the witness had been extensively cross-examined by counsel for both defendants. The trial court advised Short's counsel that he was not restricted as to additional cross-examination

regarding other statements Arrendale had made. In limiting the additional recross-examination of Arrendale, the trial court was merely exercising its responsibility to control the examination of the witness. This assignment is without merit.

[5] In his next assignment of error, the defendant Short submits that the trial court erred in allowing fingerprint evidence from the State Bureau of Investigation. Here, the defendant objects to the testimony of Donald Sollars, an agent with the State Bureau of Investigation, who testified that a latent print lifted from the ax found at the scene of the crime matched a fingerprint that had been obtained from the defendant Short. First, the defendant contends that the fact Captain Marvin Barlow of the Gastonia Police Department did not also make a positive identification of the fingerprints "tainted" the testimony in question. We disagree. Captain Barlow testified that he worked on the latent print that was lifted from the ax for about thirty minutes before he became ill. His illness, which kept him out of work for about three weeks, prevented his making a positive comparison between the latent print and the known prints of the defendant. There is no indication that Barlow's failure to make a positive comparison of the latent print and the defendant's fingerprint was due to anything other than his illness and inability to continue the comparison process. Further, even had Barlow been unable to make a positive identification or reached a conclusion that the latent print was not that of the defendant, any such finding would go only to the weight and not the admissibility of Sollars' positive identification of the latent print as that of the defendant Short.

The defendant also cites *State v. Travis*, 33 N.C. App. 330, 235 S.E. 2d 66, *disc. review denied*, 293 N.C. 163, 236 S.E. 2d 707 (1977), for the proposition that the fingerprint identification testimony should not have been admitted because the witness did not use photographs of the fingerprints to illustrate his testimony. In *Travis* the Court of Appeals cited *State v. Foster*, 284 N.C. 259, 200 S.E. 2d 782 (1973), a case in which this Court sustained the use of an enlarged photograph of a latent fingerprint when the card containing the original print had been lost and was not available at trial. In the instant case the card containing the latent print was available and was in fact introduced as a State's exhibit. There is no requirement that, when an original latent print is available in court, witnesses must also produce an en-

larged photograph of that print to illustrate their testimony. This assignment is without merit.

[6] In his next assignment of error, the defendant Short contends that the trial court erred in allowing witness David Thompson to testify concerning Arrendale's admissions, notwithstanding the trial court's cautionary instructions to the jury. Thompson testified that on the morning after the murder, Arrendale and Short came to his house. Arrendale asked him to take them to Myrtle Beach. Thompson testified that Arrendale said that he was in some trouble and that he and Short had broken into a house. At that point the defendant objected to the testimony, and the trial court gave the following limiting instruction:

> Members of the Jury, what this witness says that Arrendale told him on the 1st of April, 1985, is not substantive evidence. You can't consider it as proof of any fact in issue here. If you consider this statement related to you by Mr. David Thompson as to what Arrendale told him on the 1st of April for any purpose, you must limit that consideration to corroborating or supporting the in-court testimony given under oath in your presence by Arrendale. Except as what Thompson says Arrendale told him on the 1st of April tends to corroborate Arrendale's in-court testimony, you shall not use it for any purpose. It does not prove or disprove any fact in issue here.

The defendant contends that the giving of these limiting instructions constituted an impermissible expression of opinion by the trial court. The defendant, however, did not object to the instructions, nor does he contend on appeal that the instructions were incorrect, except for the contention that the instructions constituted an impermissible expression of opinion. Even assuming error *arguendo*, the defendant has failed to demonstrate prejudice. He has not established a reasonable possibility that, absent the error, a different result would have been reached at trial. N.C.G.S. § 15A-1443(a) (1983). Accordingly, this assignment of error is overruled.

[7] Next, the defendant Short contends that the trial court erred in not dismissing the conspiracy charge against him at the close of the State's evidence. The elements of a criminal conspiracy are set out in *State v. Bindyke*, 288 N.C. 608, 220 S.E. 2d 521 (1975):

> A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means. *State v. Littlejohn*, 264 N.C. 571, 142 S.E. 2d 132 (1965). To constitute a conspiracy it is not necessary that the parties should have come together and agreed in *express* terms to unite for a common object: 'A mutual, implied understanding is sufficient, so far as the combination or conspiracy is concerned, to constitute the offense.' *State v. Smith*, 237 N.C. 1, 16, 74 S.E. 2d 291, 301 (1953), quoting *State v. Connor*, 179 N.C. 752, 103 S.E. 79 (1920). The conspiracy is the crime and not its execution. *State v. Lea*, 203 N.C. 13, 164 S.E. 737 (1932). Therefore, no overt act is necessary to complete the crime of conspiracy. As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is completed. *State v. Goldberg*, 261 N.C. 181, 134 S.E. 2d 334 (1964).

Id. at 615-16, 220 S.E. 2d at 526.

It is in the context of this definition of conspiracy that we examine the evidence against the defendant Short. According to Arrendale's testimony, after he and Waters had agreed to burglarize the decedent's home, Waters asked Arrendale if he knew anyone who could help them break in. When Arrendale answered in the affirmative, Waters drove Arrendale to the home of the defendant Short. While Waters waited in the car, Arrendale approached Short and discussed with him the possibility of Short's assistance in the break-in. Short agreed to assist and got into the car with Waters and Arrendale. The three then drove by the decedent's house "to check and see if he was at home." After the three concluded that the victim was not at home, Waters let Short and Arrendale out of the car, and they proceeded to break into the house.

Upon a motion to dismiss, all of the evidence must be considered in the light most favorable to the State. *State v. Witherspoon*, 293 N.C. 321, 237 S.E. 2d 822 (1977). We find that Arrendale's testimony, viewed in the light most favorable to the State, established that Short entered into the plan to burglarize the Steele home at the time of his conversation with Arrendale. In furtherance of the conspiracy, Short then "cased" the house with Waters and Arrendale to determine whether it was oc-

cupied. The evidence thus tended to show not only Short's agreement to commit the crime, but also his active participation in subsequent events in furtherance of the conspiracy and preparatory to the actual burglary.

The defendant contends that Arrendale's testimony, standing alone, should not have been enough to establish the conspiracy and enable the State to withstand the defendant's motion to dismiss. We disagree. The uncorroborated testimony of a co-conspirator is competent and sufficient to establish the existence of a conspiracy and the defendant's participation therein. *State v. Albert*, 312 N.C. 567, 576, 324 S.E. 2d 233, 238 (1985) (citing *State v. Carey*, 285 N.C. 497, 206 S.E. 2d 213 (1974)). When giving the State the benefit of every reasonable inference that might be drawn from the evidence, as we must in reviewing a denial of the defendant's motion to dismiss, it is clear that Arrendale's testimony was sufficient to establish that Short entered into the conspiracy when he agreed with Arrendale that he would assist in the burglary. The evidence was sufficient to withstand the defendant's motion to dismiss.

WATERS' ISSUES

[8] In his first assignment of error, the defendant Waters argues that the trial court erred in overruling his objection to the joinder of the cases against both defendants for trial. Waters contends that if his cases had not been consolidated with those of defendant Short, he would have been able to call Short as a witness in his defense. Although the defendant Short did not testify at trial, he did testify during his sentencing hearing and at no time implicated Waters in a conspiracy. Short's testimony indicated that it was Arrendale's idea to break into the Steele residence and that he later showed Waters where the incident happened. Waters submits that the joint trials of the defendants deprived him of the right to disprove the State's assertions against him.

N.C.G.S. § 15A-926(b)(2) provides that upon motion of the prosecutor, charges against two or more defendants may be joined for trial when each of the defendants is charged with accountability for each offense. N.C.G.S. § 15A-926(b)(2) (1983). The trial court must deny a motion for joinder, however, if before trial such denial is found necessary to promote a fair determination of

the guilt or innocence of one or more of the defendants. N.C.G.S. § 15A-927(a)(2) (1983). The question before us, then, is simply whether the granting of the State's motion to join the charges against the defendants for trial deprived Waters of a fair trial. We conclude that it did not.

The question of whether to allow a motion to join defendants for trial ordinarily is addressed to the sound discretion of the trial court. *State v. Hayes*, 314 N.C. 460, 334 S.E. 2d 741 (1985). 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. Green*, 321 N.C. 594, 365 S.E. 2d 587 (1988); *State v. Nelson*, 298 N.C. 573, 260 S.E. 2d 629 (1979), *cert. denied*, 446 U.S. 929, 64 L.Ed. 2d 282 (1980).

In the present case Waters has failed to show that the trial court abused its discretion in permitting joinder or that he was deprived of a fair trial. Waters' argument to this Court is based entirely on a statement made by the defendant Short during his sentencing hearing. There is no way for this Court to determine whether Short would have testified in the same way or would have testified at all if the defendants had been given separate trials. Nor can we know whether any possible testimony by Short would have had any effect on the outcome of Waters' trial. The question of whether the trial court abused its discretion in granting the prosecution's pre-trial motion for consolidation must be viewed in light of the information before the trial court at that time. Moreover, the burden is on the defendant to show not only that error was committed, but that there is a reasonable possibility that the outcome of the trial would have been different had such error not occurred. N.C.G.S. § 15A-1443(a) (1983).

This is not a case in which the defenses of Short and Waters were antagonistic. *See State v. Alford*, 289 N.C. 372, 222 S.E. 2d 222, *death sentence vacated*, 429 U.S. 809, 50 L.Ed. 2d 69 (1976). Nor is this a case, such as *State v. Porter*, 303 N.C. 680, 281 S.E. 2d 377 (1981), in which testimony was received in evidence against one of the defendants that would not have been admissible had their trials not been consolidated. The defendant Waters has failed to show that the trial court abused its discretion in granting the prosecution's motion for consolidation. *See State v. Green*, 321 N.C. 594, 365 S.E. 2d 587 (1988).

In his second and final assignment of error, the defendant Waters contends that the trial court erred in denying his motion to set aside the verdicts or, in the alternative, to grant a mistrial. The defendant relies on his previous arguments in support of this assignment. For the reasons stated in the preceding analysis, we find no error in the trial court's rulings.

Having carefully reviewed the record and all of the assignments of error by each defendant, we conclude that the defendants received a fair trial, free of prejudicial error.

No error.

STATE OF NORTH CAROLINA v. LEONARD WAYNE SHAW

No. 244A86

(Filed 28 July 1988)

1. **Criminal Law § 67.1— voice identification testimony—no pretrial identification—voir dire hearing unnecessary**

The trial court did not err in denying defendant's request for a voir dire hearing to determine whether in-court voice identification testimony by a burglary and assault victim was of independent origin and not tainted by an illegal pretrial identification where there was no evidence of any pretrial identification of defendant by the victim. An interview in which the victim answered affirmatively when asked by the investigating officer whether she had recently hired anyone to work in her yard did not constitute a pretrial identification which would require a voir dire hearing.

2. **Criminal Law § 111.1— refusal to instruct on identification—harmless error**

The trial court in a burglary, larceny and assault case erred in failing to give an instruction on identification as requested by defendant. However, such error was not prejudicial where the trial court instructed the jury for each crime charged that it must find beyond a reasonable doubt that *this defendant* committed the crime in order to return a guilty verdict; the evidence pointing to defendant as the perpetrator of the crimes was strong and essentially uncontradicted; the defense emphasized its challenge of the identification of defendant as the perpetrator of the crimes; and it appears that the same result would have been reached by the jury had the instruction been given. N.C.G.S. § 15A-1443(a) (1983).

3. **Criminal Law § 99.4— court's remarks when ruling on objections—no expression of opinion**

The trial court's remarks, "Well, as phrased, sustained," and "Well, sustained for the moment," made when sustaining defendant's objections to ques-

tions asked by the prosecutor, did not constitute an improper expression of opinion on the evidence. N.C.G.S. § 15A-1222 (1983).

4. **Criminal Law § 102.6— jury argument—misstatement of evidence by prosecutor—no gross impropriety**

Any misstatement of the evidence by the prosecutor in his jury argument was not so grossly improper as to require the trial court to intervene *ex mero motu*.

5. **Criminal Law § 102.6— jury argument—comparison of jury to computer—no gross impropriety**

Assuming that the prosecutor's jury argument comparing the function of the jury to that of an "MIT computer" and stating that if the information produced by this trial was put into the computer the chances of the computer not finding defendant guilty would be "one in maybe ten million" was improper, the impropriety was not so gross or excessive as to require the trial judge to intervene *ex mero motu*.

6. **Constitutional Law § 48— effective assistance of counsel—jury selection—refusal to permit defendant's brother to sit at counsel's table**

The trial court's refusal to allow defendant's brother to sit at counsel's table during the jury selection process did not deprive defendant of the effective assistance of counsel where defendant's brother was allowed to sit directly behind defense counsel and to communicate with defense counsel during jury selection.

7. **Criminal Law § 50.2— officer qualified as expert—testimony admissible as lay opinion**

Testimony by a law officer who was qualified as an expert in fingerprint identification that tennis shoes found behind the victim's home and those worn by defendant measured eleven inches in length and that each pair of shoes showed signs of wearing on the heel and ball areas constituted proper lay opinion testimony which required no expertise so that the witness was not allowed to express expert opinions on matters outside his area of expertise. N.C.G.S. § 8C-1, Rule 701 (1986).

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from judgments entered by *Brannon, J.*, at the 2 December 1985 Criminal Session of Superior Court, DURHAM County. Heard in the Supreme Court 14 March 1988.

Lacy H. Thornburg, Attorney General, by Doris J. Holton, Assistant Attorney General, for the State.

Laurence D. Colbert for defendant-appellant.

FRYE, Justice.

Defendant was sentenced to life imprisonment for first degree burglary, ten years imprisonment for felonious larceny, and ten years imprisonment for assault with a deadly weapon inflicting serious injury. The ten year sentences are to run consecutively at the expiration of the sentence of life imprisonment. Defendant appeals his first degree burglary conviction and the resulting life sentence to this Court as a matter of right. His motion to bypass the Court of Appeals on the felonious larceny and assault with a deadly weapon inflicting serious injury convictions was allowed by this Court 26 June 1987.

Defendant contends he is entitled to a new trial on all charges because of alleged errors made by the trial court during his trial. Specifically, he alleges the trial court erred in (1) admitting evidence of voice identification without conducting a *voir dire* hearing; (2) failing to instruct the jury on identification of the defendant; (3) expressing an opinion on the guilt or innocence of the accused; (4) failing to interrupt the prosecutor's comments during closing argument; (5) denying defendant his right to effective assistance of counsel; and (6) allowing an expert to express an opinion on matters outside his area of expertise. Having reviewed the record and the assignments of error brought forward by defendant, we find that defendant received a fair trial, free of prejudicial error.

The evidence produced by the State tended to show that on the evening of 24 July 1985, Marjorie Shepard, age eighty-one, was alone in her home. Shortly past midnight, after retiring upstairs for bed, she was awakened by the creaking of stairs as someone ascended to her bedroom. Ms. Shepard, upon spotting the intruder, asked him what he wanted. He replied that he did not want to hurt her but wanted only a pistol and $20.00. She told the intruder that she had neither. This response apparently angered the intruder as he then began to choke the elderly woman and, on at least one occasion, hit her in the face. Ms. Shepard testified that this assault lasted from ten to fifteen minutes.

The State's evidence further showed that Ms. Shepard later directed the intruder to the location of a pickle jar containing quarters which was located in a dresser drawer in the bedroom.

While the intruder was looking for the quarters, she managed to escape down the stairs. Apparently, neighbors heard her screams and called the police.

Officer C. M. Bullock of the Durham County Police Department arrived at approximately 12:30 a.m. Officer Bullock began looking behind the victim's home and adjacent houses. Upon seeing Ms. Shepard at the front of her home, Officer Bullock approached her to offer his assistance. At that point neighbors called his attention to a person running toward the rear of the house but the officer was unable to apprehend or identify the suspect.

Detective Andrew Harris, also of the Durham County Police Department, was assigned to investigate the case. Not being able to speak with Ms. Shepard until her release from the hospital, Detective Harris began his investigation which included talking to her neighbors. One neighbor informed him that a young man, the defendant, had earlier worked for Ms. Shepard. The evidence revealed that several days prior to 25 July 1985, a young male had worked in Ms. Shepard's yard for several days, and on two occasions during that time had been in her home. Ms. Shepard had contracted to have yard work and painting done and defendant was selected by his employer to do this work.

Defendant's employer, Linwood Howard, testified for the State. He stated that on the morning of 25 July 1985 he arrived at the home of defendant to take him to work. Defendant stated that he could not work because he had left his shoes in his girlfriend's car the previous evening. Defendant then was given money by Howard to buy another pair. Howard testified that upon returning from work that day, he and defendant stopped to purchase soft drinks. Howard had no change, so defendant furnished sufficient change to purchase cigarettes and a soft drink from a vending machine. Howard testified that the change appeared to be all silver and was in a bag or wrapped in something white. Howard further stated at trial that defendant had not been paid yet, and that he thought it strange that defendant had money because he had frequently loaned defendant money.

The investigation of the crime scene conducted by the Durham Police Department revealed that there was a forcible entry through the furnace room door located at the rear of the victim's

home. Pry marks were found on the outside of the door around the lock. The investigation also revealed a break in a pane of glass in the door and a tear was also discovered in the screen of the door near the latch. Behind the residence, Officer Bullock discovered a pair of Nike tennis shoes. The shoes were located beside the steps to the porch and had splotches of off-white paint on them.

The State presented additional evidence which tended to show that the Nike tennis shoes found near the point of entry and a red and black cap found on Ms. Shepard's bed belonged to the defendant. Moreover, a forensic chemist with the SBI testified that the paint on the tennis shoes found near the victim's home was the same with respect to color, texture, solvent characteristics, and inorganic composition as the off-white paint used by defendant in previous painting assignments during his employment with Mr. Howard.

Defendant presented no evidence during the trial.

The jury returned verdicts of guilty of first-degree burglary, felonious larceny, and assault with a deadly weapon inflicting serious injury. The trial court found as an aggravating factor that the defendant had a prior conviction or convictions for criminal offenses punishable by more than sixty days confinement. It found no mitigating factors and imposed sentences as previously indicated.

[1] By his first assignment of error, defendant contends that the trial court erred in overruling his objection to voice identification questions without conducting a *voir dire* hearing. Specifically, defendant argues that when the State offers a witness whose testimony tends to identify the defendant as the person who committed the crime charged, the trial court errs if it fails to make sufficient findings of fact that this in-court identification of the defendant was of independent origin and not tainted by an illegal pre-trial identification. We find this argument specious.

Defendant relies on this Court's decision in *State v. Accor and State v. Moore*, 277 N.C. 65, 175 S.E. 2d 583 (1970). This reliance is misplaced. That case involved a pre-trial identification of the defendant by the victim, thus properly presenting the question of whether the in-court identification was tainted by a pre-

trial identification. Here, there was no evidence of any pre-trial identification of the defendant by the victim. Therefore, the question of pre-trial taint does not arise.

Defendant argues that during the course of the investigation of this case, Detective Harris queried the victim about a particular person who had worked in her yard. Later during direct examination, when asked if she could identify the voice of the perpetrator of the assault and theft, Ms. Shepard stated that "it must have been the same person who came there and painted my bricks at the house because he knew how to come in the door and come upstairs." Defendant apparently characterizes as a "pre-trial identification" the questioning of Ms. Shepard by Detective Harris.

We find this characterization of the interview between the victim and the investigating officer as a pre-trial identification to be fallacious. Detective Harris neither mentioned nor suggested that the voice of the perpetrator of the crimes was similar to defendant's voice. We can find in the record no indication of any discussion regarding the defendant's voice that transpired prior to trial. The investigator merely asked the victim if she recently had hired anyone to work in her yard. To this, she answered in the affirmative. It was not until the trial itself, when asked had she heard the voice before, that she stated for the first time that the voice must have been that of the person who had worked in her yard.

In *State v. Green*, 296 N.C. 183, 250 S.E. 2d 197 (1978), this Court stated:

> where . . . there has been no pretrial identification procedure at all, there can be no requirement of a judicial determination of the independence and reliability of the in-court identification, for there has been no pretrial procedure upon which the in-court identification should depend. It further follows that, in the absence of pretrial identification procedures, formal findings of fact and conclusions of law regarding the independence and reliability of the identification are not required, for there are no relevant facts upon which to base a finding of the identification's independent origins.

Id. at 187, 250 S.E. 2d at 200.

Since there was no pre-trial identification of the defendant by the victim, it was not error for the trial judge to deny defendant's request for a *voir dire* examination. The accuracy of in-court identification testimony, in the absence of pre-trial identification procedures, is a proper subject for cross-examination and resolution by the jury. *State v. Cox and State v. Ward and State v. Gary*, 281 N.C. 275, 188 S.E. 2d 356 (1972). *Accord Watkins v. Sowders*, 449 U.S. 341, 66 L.Ed. 2d 549 (1981).

[2] Defendant brings forward as his second assignment of error the failure of the trial court to instruct the jury on identification. Defendant requested that the pattern jury instruction on identification be given. Because identification was a substantial feature of his case, defendant argues that the failure of the trial judge to give this instruction was error.

We agree with defendant that an instruction to the jury on identification was warranted. It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence. *State v. Farrell*, 300 N.C. 157, 265 S.E. 2d 210 (1980). The purpose of such a charge to the jury is to give a clear instruction to assist the jury in an understanding of the case and in reaching a correct verdict. Since defendant's defense was alibi, the identity of the perpetrator of the crimes charged was a substantial feature of the case.

The State argues that the trial judge did in fact instruct the jury on identification. Specifically, the State contends that the trial judge gave the identical instruction approved by this Court in *State v. Green*, 305 N.C. 463, 290 S.E. 2d 625 (1982). We agree with the State that the *Green* instruction adequately provides guidance to the jury on this substantial feature of the case. The *Green* instruction provided:

> the State has the burden of proving the identity of the defendant as the perpetrator of the crimes charged beyond a reasonable doubt. This means that you, the jury, must be satisfied beyond a reasonable doubt that the defendant was the perpetrator of each of the crimes charged before you may return a verdict of guilty as to that particular crime.

Id. at 476, 290 S.E. 2d at 633. Our review of the record, however, reveals no instance where the trial judge in the instant case gave

this instruction. We find the record silent. Because defendant's request for the instruction was correct in law and supported by the evidence in the case, the trial court was required to give the instruction, at least in substance. *State v. Howard*, 274 N.C. 186, 162 S.E. 2d 495 (1968). Failure to do so was error.

We must now determine whether this error was prejudicial. N.C.G.S. § 15A-1443(a) provides in part:

> (a) A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant.

N.C.G.S. § 15A-1443(a) (1983).

Under this provision, in order to receive a new trial, defendant has the burden of showing prejudice, that is, that there is "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." *Id.* Defendant has not met this burden.

Defendant contends that Ms. Shepard never definitely identified him as the perpetrator of the crimes. He further contends that the jurors were not aware that they must be satisfied beyond a reasonable doubt of his identity as the perpetrator before they could find him guilty of the crimes charged. After a careful review of the entire transcript, we are satisfied that, under the facts of this case, the jury was not misled as to the standard to be applied in determining the guilt or innocence of defendant.

In his closing argument to the jury, defendant's attorney essentially contended that someone other than defendant committed the offenses. He argued:

> We're not contending that these aren't very serious crimes. . . . But the important thing is that no one during the whole course of the evidence this week identified my client as the person who went in the house that night.

* * * *

> In this case the State is contending that the defendant took property belonging to Miss Shepard, those quarters, and that—that he carried them away, and that, you know, there's no question that Miss Shepard didn't consent to that. However, there's no one who actually saw him take those quarters out of there. Okay? I mean, there was someone there, as Miss Shepard testified, who went after those quarters, but not my client.

The trial judge then repeatedly informed the jury that to return a guilty verdict, they must be satisfied that *this* defendant committed the crime charged. Specifically, the trial judge charged "if you find from the evidence *beyond a reasonable doubt* that on or about July 25th, 1985, that *Leonard Shaw* broke and entered Marjorie Shepard's dwelling without her consent in the nighttime . . . it would be your duty to return a verdict of guilty of burglary in the first degree." (Emphasis added.) Similarly, as to the charge of felonious larceny, the jury was instructed that they must find *beyond a reasonable doubt* "that *Leonard Shaw* took and carried away Marjorie Shepard's coins without her voluntary consent . . . ." (Emphasis added.) A like instruction was given for the charge of assault with a deadly weapon inflicting serious injury.

The evidence pointing to defendant as the perpetrator of the offenses, though circumstantial, was very strong and essentially uncontradicted. The emphasis of the defense, throughout the proceedings, was upon its challenge of the identification of the defendant as the perpetrator of the crimes. We are convinced that, notwithstanding the trial court's failure to give the requested identification charge, the jury was satisfied beyond a reasonable doubt that this defendant committed the crimes charged. We are therefore convinced that the same result would have been reached by the jury had the error in question not been committed. Defendant thus has suffered no prejudice. *See* N.C.G.S. § 15A-1443(a) (1983).

[3] Defendant next argues that the trial judge erred when ruling on evidentiary issues by coaching the prosecutor as to the manner of presenting his case, thus impermissibly expressing an opinion. Defendant cites several instances where he claims the trial judge's comments constituted an expression of an opinion which

prejudiced the jury. In two exchanges, the trial court sustained objections by the defendant to questions asked by the prosecutor in the presence of the jury. Specifically, the trial court stated in one exchange, "[w]ell, as phrased, sustained" and in another, "[w]ell, sustained for the moment." Defendant argues that the cumulative effect of these remarks constituted an improper expression of opinion by revealing the trial court's alignment with the State's cause.

N.C.G.S. § 15A-1222 provides that a "judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C.G.S. § 15A-1222 (1983). We decline to hold that these relatively innocuous comments constitute an improper expression of opinion. To so hold would stretch the general prohibition of N.C.G.S. § 15A-1222 far beyond reasonable limits. We are not persuaded by defendant's argument.

Defendant cites additional comments made by the trial judge out of the presence of the jury and argues that they also improperly expressed an opinion of the trial court. Since the jury did not hear these comments there could have been no resulting prejudice to the defendant. This assignment therefore has no merit.

Defendant also contends that the trial judge committed reversible error by failing either to intervene *ex mero motu* during the State's closing argument to the jury, or to take corrective action with respect to incompetent and inflammatory matters placed before the jury. Because the defendant failed to object to the alleged improprieties in the State's final argument, appellate review is limited to whether the prosecutor's remarks were so extremely or grossly improper that the trial court should have intervened on its own motion. *State v. King*, 299 N.C. 707, 264 S.E. 2d 40 (1980).

[4] First, defendant contends that the prosecutor misstated the evidence when he told the jurors that Ms. Shepard had testified that she checked "the bowl and the sink" in her bathroom after defendant had used it the day he worked in her yard. The actual testimony of Ms. Shepard was that defendant remained in her bathroom for about two minutes and did not flush the toilet.

When asked if she had gone into the bathroom to check the toilet, she replied that she did not need to because it was not flushed.

We do not find the characterization of the evidence by the State to be so extremely or grossly improper as to have prejudiced the jury in its deliberations. Moreover, the closing arguments of both counsel were preceded by the trial judge instructing the jury that:

> if any of these good lawyers in their closing speeches to you state anything to be a fact or be the evidence in a way that differs in the slightest from your own recollection and recall of what has been testified to here, then you will disregard what these lawyers have said the evidence is to the extent that it differs from your own recollection, because you and you alone are here as the judges of the facts and therefore you alone determine what the witnesses have said or as to any other evidence in the case.

Any impropriety in the argument was not so severe as to require the trial court to intervene *ex mero motu*. *State v. Martin*, 322 N.C. 229, 367 S.E. 2d 618 (1988).

[5] Similarly, defendant, not having objected at trial, assigns as error the trial judge's failure to intervene when the prosecutor compared the function of the jury to that of an "MIT computer." The prosecutor stated that if the information produced by this trial was put into a computer the chances of the computer not finding defendant guilty would be "one in maybe ten million." Assuming, *arguendo*, that the statements of which defendant complains were improper, we likewise find that the impropriety was not so gross or excessive as to require the trial judge to intervene *ex mero motu*. *Id.*

Other statements upon which this assignment of error was based were not made the subject of exceptions noted in the record. Therefore, these alleged errors are not properly before this court. N.C.R. App. P., Rule 10(a).

[6] Defendant next contends that he was deprived of effective assistance of counsel when the trial court refused to allow defendant's brother to sit at counsel's table and assist defense counsel in selecting prospective jurors. Defendant cites no authority for a right to have anyone other than legal counsel sit at counsel's

table during the selection of a jury. Even if defendant had such a right, he suffered no prejudice in the instant case.

Defendant's brother was allowed to sit directly behind defense counsel during jury selection and to communicate with the defense counsel. The concern of defendant was that his counsel have the benefit of his brother's wisdom during jury selection. The ruling of the trial judge merely restricted the area in which defendant's brother could be seated. His action did not actually or constructively prevent defendant's brother from communicating with defense counsel and therefore did not chill defendant's right to effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 80 L.Ed. 2d 674 (1984).

[7] Defendant, in his last argument, contends that the trial court committed prejudicial error in allowing a law enforcement officer to express an opinion on a matter outside of his area of expertise. We find no error.

Officer James Adams of the Durham Police Department was qualified as an expert in the field of identification and comparison of latent finger and palm prints. Subsequently, on direct examination, the officer testified that he and Detective Harris measured both the tennis shoes found behind the victim's home and those belonging to defendant. He and Detective Harris measured both pairs of shoes from heel to toe with a yardstick and found both to measure eleven inches in length. It is the promulgation of the results of this measurement by Officer Adams at trial upon which defendant bases this assignment of error.

The gravamen of defendant's argument is that Officer Adams was not qualified as an expert in tennis shoe measurements and was therefore incapable of rendering such an opinion. However, Officer Adams' testimony in this regard was not the recitation of an expert opinion. The officer merely stated the length of defendant's shoe. The measuring task performed by the officer required only modest skill. Because specialized knowledge was not needed to enable this witness to measure in inches the shoe of the defendant, this testimony amounted to nothing more than lay opinion. Defendant was free to cross-examine this witness concerning the accuracy of such a measurement and to expose any perceived scientific defects.

Defendant also argues that this witness' testimony that each pair of shoes showed signs of wearing on the heel and ball areas were matters outside the expertise of this witness. To this we also disagree. No specialized expertise or training is required for one to determine that two shoes share wear patterns. Such a determination may be made by merely observing each pair. The jurors had the opportunity to observe the shoes themselves and to make independent determinations as to whether the shoes shared wear patterns. This opinion was lay opinion rationally based upon the perceptions of the witness. *See* N.C.G.S. § 8C-1, Rule 701 (1986). Since this opinion required no expertise, defendant's argument that this testimony was outside the witness' realm of expertise is untenable.

The convictions and their resulting sentences remain undisturbed as our review of the trial of defendant has revealed no reversible error.

No error.

TWO WAY RADIO SERVICE, INC., A NORTH CAROLINA CORPORATION v. TWO WAY RADIO OF CAROLINA, INC., A NORTH CAROLINA CORPORATION

No. 29PA88

(Filed 28 July 1988)

Trademarks and Trade Names § 1— corporate name—no right to exclusive use of "two way radio"

The statutory prohibition against deceptively similar corporate names, N.C.G.S. § 55-12(c) (1982), did not extinguish the common law rule proscribing exclusive appropriation of the right to use a "descriptive phrase" in a trade name. Therefore, plaintiff did not, by its prior incorporation under a name that included the generally descriptive phrase "two way radio," acquire a right to the use of that phrase in its corporate name to the exclusion of that right in defendant and others subsequently incorporated.

ON discretionary review pursuant to N.C.G.S. § 7A-31 of an unpublished opinion of the Court of Appeals, reported at 88 N.C. App. 314, 366 S.E. 2d 870 (1987), which affirmed a judgment entered by *Huffman, J.*, at the 19 January 1987 civil term of District Court, STANLY County, enjoining defendant from doing business

under the name "Two Way Radio of Carolina, Inc." Heard in the Supreme Court 11 May 1988.

Michael W. Taylor for plaintiff-appellee.

Weinstein and Sturges, P.A., by Michel C. Daisley and Hugh B. Campbell, Jr., for defendant-appellant.

WHICHARD, Justice.

The issue is whether the statutory prohibition against "deceptively similar" corporate names, N.C.G.S. § 55-12(c) (1982), extinguishes the common law rule proscribing exclusive appropriation of the right to use a "descriptive phrase" in a trade name. We hold that the common law rule survives.

Both plaintiff and defendant engage in the business of operating, selling, leasing, and maintaining radio-telephonic communication equipment. Both do business in Mecklenburg and Stanly counties. Plaintiff began doing business under the name "Two Way Radio Service" in 1959 and incorporated under that name in 1961. Defendant has done business under the names "Two Way Radio of Charlotte" and "Two Way Radio of Carolina" since 1956. In 1965 Defendant incorporated under the name "Two Way Radio of Carolina, Inc."

Plaintiff brought this action seeking to enjoin defendant from doing business under the name "Two Way Radio of Carolina, Inc." The complaint alleges that "[d]efendant's name is deceptively similar to plaintiff's name in violation of GS 55-12(c)." It further alleges:

> 6. Since September, 1984, defendant has listed its name and telephone number in the Albemarle-Badin-New London-Oakboro Telephone Directory, the primary telephone directory for Stanly County, with the result that telephone calls from customers seeking to do business with plaintiff have mistakenly been placed to defendant, resulting in continuing inconvenience, loss of business and other losses to plaintiff. A copy of the relevant page of the telephone directory is attached hereto as Exhibit "A."
>
> 7. Irreparable injury, loss, and damage will result to plaintiff if defendant continues to do business under its present name which is deceptively similar to that of plaintiff.

Defendant answered, denying that the names are deceptively similar. It admitted that it "has listed its name and telephone number in various telephone directories including the Albemarle-Badin-New London-Oakboro Telephone Directory," but denied that this resulted in calls intended for plaintiff being mistakenly made to defendant or in inconvenience and loss to plaintiff. It also denied that plaintiff will suffer irreparable injury, loss, and damage if defendant continues to do business under its present name.

Plaintiff moved for summary judgment and supported its motion with an affidavit from Raymond J. Miller, its president since its incorporation in 1961. The affidavit swore to the truth of the allegations of the complaint, then stated:

> 5. Two examples of the inconvenience and confusion caused by defendant's name being deceptively similar to plaintiff's name of which I have personal knowledge are as follows:
>
> A. Approximately two years ago, Southeastern Materials, Inc. mistakenly sent to defendant a check intended for plaintiff in the amount of approximately $700.00 in payment for some equipment purchased from plaintiff. Defendant deposited the check, and it took great effort and six months of time on plaintiff's part to recover the money from defendant.
>
> B. In September, 1985, W. L. McIver, Jr., Director of Telecommunications at the University of North Carolina Center for Public Television in Chapel Hill, was trying to contact me regarding the possible use of a frequency in the Charlotte area being used by a customer of plaintiff. Mr. McIver told me that every time he tried to get plaintiff's telephone number, he was given that of defendant by information and had a hard time convincing information that there was another corporation in Albemarle different from defendant.

Plaintiff later filed a further affidavit from Miller in which Miller averred that plaintiff had received a check from Stanly County, payable to plaintiff, which was intended for defendant. He further averred that a customer had sent a check, intended for plaintiff, to defendant. Finally, he averred that a tabulation sheet for bids "on the Stanly County fire system communications"

contained markings indicating confusion between the two firms on the part of people in Stanly County.

Defendant initially filed a responsive document labeled "motion," in which it "moved" that plaintiff's motion for summary judgment be denied on the ground that " 'Two-Way Radio' is a generic term and is not subject to the provisions of N.C.G.S. Section 55-12(c)." Defendant supported its "motion" with an affidavit from its corporate secretary which averred, in pertinent part, that defendant or its predecessor has continuously used the name "Two-Way Radio" since October 1956 "in commerce in North Carolina and in Stanley [sic] County."

Defendant subsequently filed its own motion for summary judgment. It again filed a supporting affidavit from its corporate secretary averring that it or its predecessor "has been continuously using the name 'Two Way Radio' since October, 1956, in the Stanly County, North Carolina area." The affidavit further averred:

> 7. Attached . . . are copies of advertisements obtained from various trade magazines which clearly show the frequent and common usage of the word [sic] "Two Way Radio" and "2-Way Radio" in both describing a product, a system of communication, and the name of other corporations throughout the country which use the term "Two Way Radio" as part of their corporate name.

Defendant attached to the affidavit advertisements containing language such as "2-Way Radio," "Two-Way Radios" or "Two-Way Radio Service."

Plaintiff responded by filing a further affidavit from Miller, its president, in which he averred:

> 3. The business [plaintiff's] was incorporated in 1961 and has been in continuous operation since that time. He never heard of another business with "Two Way Radio" as the first words in its name before the incorporation of plaintiff.
>
> 4. Several other businesses in Mecklenburg County use the term "2-Way Radio" in their names, but they do so with the distinguishing use of other names, such as surnames, before the term, and they do not spell out the word "Two"

but instead use the Arabic numeral. For example, some of the names are "Regency 2-Way Radio," "Johnson Professional 2-Way Radio Systems" and "Smith Frank 2-Way Radio Sales & Service." A copy of the relevant yellow page of the 1984 Charlotte Southern Bell Telephone Directory is attached.

5. No confusion has ever arisen to his knowledge between plaintiff corporation and the corporations referred to in paragraph 4. above which use the term "2-Way Radio" prefaced by distinguishing words.

The district court granted plaintiff's motion for summary judgment and enjoined defendant from doing business under the name Two Way Radio of Carolina, Inc., "so as to prevent reasonably intelligent and careful persons from being misled." The Court of Appeals affirmed in an unpublished opinion. It acknowledged that " 'two way radio' is . . . a generic, descriptive term" and that "a generic term descriptive of a type of business [cannot] be monopolized as a trade name" (citing *Steak House v. Staley*, 263 N.C. 199, 203, 139 S.E. 2d 185, 188 (1964)). It concluded, however, that the case is not controlled by the common law of unfair competition, but by N.C.G.S. § 55-12(c), which proscribes "deceptively similar" corporate names. N.C.G.S. § 55-12(c) (1982). The court reached this conclusion by construing N.C.G.S. § 55-12(c) in light of administrative guidelines published by the Secretary of State, which would now prohibit allowance of two corporate names as similar as plaintiff's and defendant's (citing N.C. Admin. Code tit. 18, r. 4.0503(a), (b) (Sept. 1987)). It determined that pursuant to these guidelines the names were deceptively similar, and it held that the injunction thus was properly granted.

On 9 March 1988 we allowed defendant's petition for discretionary review. We now reverse.

As in *Steak House*, "[w]e are concerned here with a trade name." *Steak House*, 263 N.C. at 201, 139 S.E. 2d at 187. In *Steak House*, we set forth the common law regarding exclusive appropriation in trade names of generic or generally descriptive[1] words and phrases:

1. Modern trademark law distinguishes between generic and descriptive terms. *See* 1 J. McCarthy, *Trademarks and Unfair Competition* § 11.1 (2d ed. 1984 &

> At common law generic, or generally descriptive, words and phrases, as well as geographic designations, may not be appropriated by any business enterprise either as a tradename or as a trademark. Such words are the common property and heritage of all who speak the English language; they are *publici juris*. If the words reasonably indicate and describe the business or the article to which they are applied, they may not be monopolized.

Id. While cases applying this rule in the context of corporate names are rare, applicability of the rule in this context is generally recognized. *See* Annot., "Protection of Business or Trading Corporation Against Use of Same or Similar Name by Another Corporation," 115 A.L.R. 1241, 1244 (1938); *Umpqua Broccoli Exch. v. Umpqua Valley Broccoli Growers*, 117 Ore. 678, 685-87, 245 P. 324, 327 (1926).

A well established exception to this rule applies when the descriptive phrase in question has acquired "secondary meaning." As stated in *Steak House v. Staley*:

> When a particular business has used words *publici juris* for so long or so exclusively or when it has promoted its product to such an extent that the words do not register their literal meaning on the public mind but are instantly associated with one enterprise, such words have attained a secondary meaning. This is to say, a secondary meaning exists when, in addition to their literal, or dictionary, meaning, words connote to the public a product *from a unique source*. It has been suggested, however, that when a descriptive word or phrase has come to mean a particular *entrepreneur*, the term *secondary meaning* is inaccurate because, in the field in which the phrase has acquired its new meaning, its so-called secondary meaning has become its primary, or natural, meaning.

263 N.C. at 201-02, 139 S.E. 2d at 187. Here, however, plaintiff neither alleges, nor forecasts evidence tending to prove, that the phrase "two way radio" has acquired a secondary meaning—a

Supp. 1987). Because we hold that the phrase "two way radio" cannot be exclusively appropriated because it is generally descriptive, we need not decide whether the phrase meets the more restrictive test of genericness. *See id.*

meaning signifying a producer rather than a product. *Id.* We thus are concerned only with the rule, not the exception.

The phrase "two way radio" clearly is "literally descriptive" of the product and service provided by the litigants; it is "no more original than it is unusual or fanciful." *Id.* at 202, 139 S.E. 2d at 188. The advertisements from trade magazines attached to the affidavit of defendant's corporate secretary demonstrate, without contradiction in the record, the commonness of use of the phrase "two way radio" or "2-way radio" in the names of businesses operating around the country. Indeed, plaintiff does not deny—and the Court of Appeals conceded—that the phrase is generally descriptive. Nothing else appearing, then, the common law rule applies, and plaintiff may not appropriate the phrase to its exclusive use. *Id.* at 201, 139 S.E. 2d at 187.

Plaintiff contends, however, that N.C.G.S. § 55-12 governs to the exclusion of the common law of trade names. This statute provides: "The corporate name shall not . . . be the same as, or deceptively similar to, the name of any domestic corporation or of any foreign corporation authorized to transact business in this State . . . ." N.C.G.S. § 55-12(c) (1982). It also provides for enforcement of the foregoing provision by injunction: "The use by a corporation of a name in violation of this section may be enjoined notwithstanding the filing of its articles by the Secretary of State." N.C.G.S. § 55-12(j) (1982). Thus, the issue is whether these statutes supersede the common law of trade names, or whether, instead, the common law of trade names survives to inform the interpretation and application of these statutes. We hold the latter.

Several commentators have indicated that disputes concerning corporate names should be resolved in light of common law trademark or trade name principles. Russell Robinson states:

> Actually, the statutory prohibition against identical or deceptively similar corporate names *is merely supplementary to the common law of unfair competition as it applies to trademarks and trade names.* Consequently, the North Carolina Supreme Court has held, and the Business Corporation Act expressly recognizes, that a company which has acquired a proprietary interest in a trade name can enjoin its infringement by the use of a confusingly similar name notwithstanding the fact that the Secretary of State may have

> permitted an incorporation under the infringing name; and the Act further provides that the issuance of a charter to any domestic corporation does not confer any trademark or trade name rights or constitute a defense to an infringement action. The Court has further held, though, that a corporate name (i.e., a trade name) is like a trademark to the extent that a proprietary interest therein can be acquired only by adoption and continuous use; and therefore, no infringement can be established without an allegation and proof of continuous and exclusive use. It is to be expected that other trademark principles, such as the doctrine of secondary meaning in connection with surnames or descriptive terms, will also be applied in cases alleging a corporate name infringement.

R. Robinson, *North Carolina Corporation Law and Practice* § 4-1, at 52 (3d ed. 1983) (footnotes omitted) (emphasis added).

An A.L.R. annotation reflects the general law:

> The right of a corporation to protection against the use of the same or a similar name by another corporation is intimately connected with the right to protection for a trademark or a tradename, and the right to protection against unfair competition. Indeed, in a great many instances, . . . the principles to be applied in the two classes of cases are practically identical.

Annot., "Protection of Business or Trading Corporation Against Use of Same or Similar Name by Another Corporation," 66 A.L.R. 948, 950 (1930). Speaking directly to the issue here, the annotation notes that "[u]nder the English statute [prohibiting similar names], after the companies have once been registered, the statute no longer applies, and an action subsequently brought, to enjoin the use of the name of one of the companies, *is governed by common-law rules.*" *Id.* at 951 (emphasis added).

Similarly, a leading treatise states that "[p]rotection against the confusing use of commercial and corporate names is afforded upon the same basic principles as apply to trademarks in general," and this protection is circumscribed by "the same limitations and conditions as are trademarks," including the rules applicable to descriptive names. 1 J. McCarthy, *Trademarks and Unfair Competition* § 9:1, at 300-01 (2d ed. 1984 & Supp. 1987).

Our own statutory scheme governing the issuance of corporate names contains a provision which suggests that the General Assembly did not intend to preempt the common law of trademarks and trade names. This provision states:

> The issuance of a corporate charter to any domestic corporation shall not authorize the use in this State of the corporate name in violation of the rights of any third party under the federal Trademark Act, the Trademark Act of this State, *or the common law*; and the issuance of such charter shall not be a defense to an action for violation of any such rights.

N.C.G.S. § 55-12(k) (1982) (emphasis added). While this provision only prohibits a corporation from using the issuance of its charter as a shield to defend against violations of trademark law, it would seem—in spirit and intent—to prohibit plaintiff's use of its charter as a sword to pierce defendant's common law right to nonexclusive use of a generally descriptive phrase in a trade name.

Finally, two prior decisions of this Court have employed common law trademark or trade name principles in adjudicating the rights to corporate names. First, we employed trademark principles in *Bingham School v. Gray*, 122 N.C. 699, 30 S.E. 304 (1898), a case decided prior to enactment of N.C.G.S. § 55-12(c), in holding that the act of incorporating did not create an exclusive right to the use of a surname. Second, in *Tobacco Co. v. Tobacco Co.*, 145 N.C. 367, 59 S.E. 123 (1907), we stated:

> The law having authorized the selection of a name, and having declared the name so selected to be the name of the corporation, we see no reason why the law should not protect the corporation in the use of that name, *upon the same principle and to the same extent that individuals are protected in the use of trademarks.* Hence it necessarily follows that corporations, in the exercise of discretionary powers conferred by the statute, *must so exercise them as not to infringe upon the established legal rights of others.*

Id. at 374, 59 S.E. at 126 (quoting *Holmes v. Holmes*, 37 Conn. 278, 9 Am. Rep. 324 (1870)) (emphasis added).

While not dispositive, the foregoing authorities are instructive; in light thereof, and in the absence of clear legislative

guidance to the contrary, we conclude that the N.C.G.S. § 55-12(c) proscription against deceptively similar corporate names remains circumscribed by the salutary common law principle that generally descriptive phrases may not be exclusively appropriated in a trade name. *Steak House v. Staley*, 263 N.C. 199, 139 S.E. 2d 185. The trial court thus erred in enjoining defendant from doing business under a name which included the generally descriptive phrase "two way radio," and the Court of Appeals erred in failing to reverse the trial court. By choosing a generally descriptive phrase as a part of its corporate name, plaintiff assumed the risk that some consumers might confuse it with other producers. "[O]ne competitor will not be permitted to impoverish the language of commerce by preventing his fellows from fairly describing their own goods." *Bada Co. v. Montgomery Ward & Co.*, 426 F. 2d 8, 11 (9th Cir. 1970), *cert. denied*, 400 U.S. 916, 27 L.Ed. 2d 155 (1970). We thus hold that plaintiff did not, by its prior incorporation under a name that included the generally descriptive phrase "two way radio," acquire a right to the use of that phrase in its corporate name to the exclusion of that right in defendant and others subsequently incorporated.

For the foregoing reasons, the decision of the Court of Appeals upholding summary judgment for plaintiff is reversed. The case is remanded to the Court of Appeals for further remand to the District Court, Stanly County, for entry of summary judgment for defendant.

Reversed and remanded.

STATE OF NORTH CAROLINA v. ERNEST J. AGUALLO

No. 326A87

(Filed 28 July 1988)

1. Criminal Law § 50.2— testimony concerning characteristics of sexually abused children—witnesses not qualified as experts—admissible

The trial court did not err in a prosecution for first degree rape of a nine-year-old stepdaughter by admitting the testimony of two witnesses concerning the characteristics of sexually abused children where one witness had over fourteen years in child protective services and had during that time worked on

between twenty-five and thirty cases of child sexual abuse, and the other witness had investigated some one hundred cases. It is evident that the nature of their jobs and the experience which they possessed made them better qualified than the jury to form an opinion as to the characteristics of abused children; moreover, defendant only interposed general objections to the testimony and did not request a finding by the trial court as to the witnesses' qualifications as experts. N.C.G.S. § 8C-1, Rule 701 (1986).

2. **Criminal Law §§ 86.8, 53— child rape victim—physician's testimony that results of examination consistent with victim's statement—admissible**

The trial court did not err in a prosecution for the first degree rape of a nine-year-old girl by admitting a pediatrician's testimony that the results of a physical examination were consistent with the victim's pre-examination statement. The statement of the doctor only revealed the consistency of her findings with the presence of vaginal trauma and did not comment on the truthfulness of the victim or the guilt or innocence of defendant. N.C.G.S. § 8C-1, Rule 702 (1986).

3. **Criminal Law § 88.4— cross-examination of defendant—comment on credibility of other witnesses—no abuse of discretion**

The trial court did not abuse its discretion in a prosecution for the first degree rape of defendant's nine-year-old stepdaughter in ruling on the State's cross-examination of defendant where the prosecutor was cross-examining defendant about his testimony in a prior trial to reveal inconsistencies, the record fails to show that the questions asked were not based on proper information and asked in good faith, the prosecutor did not offer his own opinion or present facts which were not in evidence or not properly admissible, and defendant did not object at trial to those questions or move to strike the responses.

4. **Criminal Law § 89.3— corroborative testimony—new information—admissible**

The trial court did not err in a prosecution for the rape of defendant's nine-year-old stepdaughter by admitting as corroborative testimony a written statement made by the victim which contained an alleged statement by defendant to the victim's mother to "come see me or I'll get someone to come rape your children" where that statement went beyond the victim's earlier testimony. The additional fact added weight or credibility to the child's earlier testimony because the victim had previously testified that defendant had said he would hurt her mother if the child told anyone what had transpired, and the child had also testified on more than one occasion that she was afraid of defendant.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from a sentence of life imprisonment imposed by *Wood, Sr., J.*, at the 9 February 1987 Criminal Session of Superior Court, FORSYTH County. Heard in the Supreme Court 10 May 1988.

Lacy H. Thornburg, Attorney General, by Francis W. Crawley, Assistant Attorney General, for the State.

Leland Q. Towns for defendant-appellant.

FRYE, Justice.

Defendant's appeal of his conviction and resulting sentence of life imprisonment reaches this Court for a second time. Defendant's first appeal resulted in a new trial. *See State v. Aguallo*, 318 N.C. 590, 350 S.E. 2d 76 (1986). A thorough review of the record and assignments of error reveals that defendant's second trial was free of error.

We need only repeat those facts that are necessary to dispose of the case on this appeal. The State presented evidence which tended to show that defendant had vaginal intercourse with his stepdaughter, age nine, on 12 December 1984. During the course of the trial, the State called as witnesses a social services case worker and a juvenile investigator, both of whom had questioned the young victim following the assault. The two witnesses testified to the general characteristics of sexually abused children. The State also presented testimony from an examining pediatrician to corroborate the testimony of the child.

Defendant testified on his own behalf, essentially contending that the testimony of the prosecutrix was untrue. The jury returned a verdict of guilty of first degree rape, and the trial judge sentenced defendant to the mandatory life term. Defendant again appeals as a matter of right.

[1] Defendant, by his first assignment of error, contends that the trial court erred by allowing two witnesses to testify to the characteristics of sexually abused children. Defendant argues that such evidence was improper since the witnesses were not qualified as experts and that their testimony fails as lay opinion because it was not "rationally based on the perceptions of the witness." N.C.G.S. § 8C-1, Rule 701 (1986).

During the State's case-in-chief, the prosecutor called Amy Collins as a witness. Collins testified on direct examination that she was a case worker with the Davie County Department of Social Services in child protective services. She had been employed in that capacity for fourteen years and had investigated between

twenty-five and thirty cases of child sexual abuse. She interviewed the victim in this case, who told her about the abuse inflicted upon her by defendant. The prosecutor also called Juvenile Investigator Linda Sturgill of the Forsyth County Sheriff's Department. Ms. Sturgill had been employed in that capacity for seven years and had investigated over one hundred cases of child sexual abuse. The substance of both witnesses' testimony was a portrayal of the typical sexually abused child. Defendant offered general objections to most of this testimony.

In considering this assignment of error, we find instructive this Court's decision in *State v. Phifer*, 290 N.C. 203, 225 S.E. 2d 786 (1976). There, the defendant objected to the trial judge's decision to allow into evidence the testimony of two SBI agents. One agent gave his opinion as to whether the washing of one's hands would destroy any possibility of a valid gun residue test, and a second agent explained the differences between a latent lift and a fingerprint. Neither of the agents had been formally qualified as experts. We held that because of the nature of their jobs and the experience which they had, they were better qualified than the jury to form an opinion on these matters. *Id.* at 213, 225 S.E. 2d at 793. The Court further held that because the defendant never requested a finding by the trial court as to the witnesses' qualifications as experts, such a finding was deemed implicit in the ruling admitting the opinion testimony. *Id.* at 213-14, 225 S.E. 2d at 793.

In the instant case, Ms. Collins had over fourteen years in child protective services and had during that time worked on between twenty-five and thirty cases of child sexual abuse. Investigator Sturgill, likewise, was experienced in the area of child sexual abuse by having investigated some one hundred cases. It is evident that the nature of their jobs and the experience which they possessed made them better qualified than the jury to form an opinion as to the characteristics of abused children. In any event, defendant interposed only general objections to the testimony which is the subject of this assignment of error. He, like defendant in *Phifer*, never requested a finding by the trial court as to the witnesses' qualifications as experts. In the absence of such a request, the finding that the witness is an expert is implicit in the trial court's ruling admitting the opinion testimony. *Id.* Moreover, since defendant did not object on the grounds that

the testifying witnesses were not qualified as experts, he has waived his right to later make the challenge on appeal. *State v. Hunt*, 305 N.C. 238, 287 S.E. 2d 818 (1982).

[2] By defendant's second assignment of error, he contends that the pediatrician's testimony that the results of the physical examination were consistent with the victim's pre-examination statement was a comment on the victim's truthfulness or the guilt or innocence of defendant. We disagree.

Dr. Sinal, who performed a complete examination of the victim, testified that there had been a "lacerational cut" in the hymen area of the child. When asked if the findings from the physical examination were consistent with what the child had told her, the doctor responded affirmatively. At a later time during direct examination, the prosecutor again asked the doctor if, in her opinion, the lacerations and adhesions she found were consistent with what the child had told her. Over objection she responded, "I felt it was consistent with her history."

Defendant relies on a line of cases in which this Court has held it reversible error for medical experts to testify as to the veracity of the victim. This Court has found reversible error when experts have testified that the victim was believable, had no record of lying, and had never been untruthful. *See State v. Aguallo*, 318 N.C. 590, 350 S.E. 2d 76; *State v. Kim*, 318 N.C. 614, 350 S.E. 2d 347 (1986); *State v. Heath*, 316 N.C. 337, 341 S.E. 2d 565 (1986). This case, however, is distinguishable.

Essentially, the doctor testified that the physical trauma revealed by her examination of the child was consistent with the abuse the child alleged had been inflicted upon her. We find this vastly different from an expert stating on examination that the victim is "believable" or "is not lying." The latter scenario suggests that the complete account which allegedly occurred is true, that is, that this defendant vaginally penetrated this child. The actual statement of the doctor merely suggested that the physical examination was consistent with some type of penetration having occurred. The important difference in the two statements is that the latter implicates the accused as the perpetrator of the crime by affirming the victim's account of the facts. The former does not.

The statement of the doctor only revealed the consistency of her findings with the presence of vaginal trauma. This expert opinion did not comment on the truthfulness of the victim or the guilt or innocence of defendant. The questions and answers were properly admitted to assist the jury in understanding the results of the physical examination and their relevancy to the case being tried. N.C.G.S. § 8C-1, Rule 702 (1986).

[3] Defendant next argues that the trial court abused its discretion by allowing the prosecutor to question defendant during cross-examination as to whether several of the State's witnesses told less than the truth during their testimony. One colloquy between the prosecutor and defendant was as follows:

> Q. [Prosecutor] You had your pants down, and that is what Mary saw when she walked in?
>
> A. That's wrong.
>
> Q. You're saying Mary made that up, she saw you with *her* pants down? (Emphasis added.)
>
> A. She didn't see me with my pants down. They weren't down.
>
> Q. You're saying she made that up?
>
> A. That's what she testified to.
>
> Q. Did she make that up?
>
> A. I can't speak for Mary. I'm telling you my pants were up.
>
> Q. Well—
>
> A. They were unbuttoned, but remember—
>
> Q. They had slipped down?
>
> A. Yeah, when I got up off the couch.
>
> Q. I understand that. And Mary's lying about this?
>
> A. Don't make me call my wife a liar.
>
> Q. Beg pardon? [sic]
>
> A. Don't make me call my wife a liar.

Q. Well, you called her a liar at the last trial, Mr. Aguallo.

Mr. Stroud: [defense counsel] Objection.

Q. [Prosecutor] And you had no hesitation at the last trial calling her a liar.

Mr. Stroud: Objection, Your Honor.

The Court: Overruled.

A. I been [sic] away from my wife for two years.

Defendant argues that the foregoing questions exceeded the proper bounds of cross-examination in that they called for the defendant to comment on the credibility of his wife Mary Aguallo.

The bounds of permissible cross-examination were stated in *State v. Dawson*, 302 N.C. 581, 276 S.E. 2d 348 (1981). In *Dawson*, this Court held that: (1) the scope of cross-examination is subject to the discretion of the trial judge; and (2) the questions offered on cross-examination must be asked in good faith. *Id.* at 585, 276 S.E. 2d at 351, *citing State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971). The cases in which this Court has found abuse of discretion based upon a challenge of improper cross-examination have involved instances where the prosecutor has affirmatively placed before the jury his own opinion or facts which were either not in evidence or not properly admissible. *See State v. Locklear*, 294 N.C. 210, 241 S.E. 2d 65 (1977) (prosecutor said witness was lying through his teeth); *State v. Britt*, 288 N.C. 699, 220 S.E. 2d 283 (1975) (prosecutor informed jury that defendant had previously been on death row). Such egregious conduct did not occur in the instant case.

Here, the prosecutor was cross-examining defendant about his prior testimony at the first trial to reveal inconsistencies. Prior statements by a defendant are a proper subject of inquiry by cross-examination. *See* N.C.G.S. § 8C-1, Rules 607, 608, and 613 (1986). The record fails to show that the questions asked were not based on proper information and asked in good faith. *See State v. Gaiten*, 277 N.C. 236, 176 S.E. 2d 778 (1970). The prosecutor did not offer his own opinion or present facts which were not in evidence or not properly admissible. We, therefore, find that the trial court did not abuse its discretion in its ruling on the State's

cross-examination of defendant. *State v. Ziglar*, 308 N.C. 747, 304 S.E. 2d 206 (1983).

Defendant argues that the prosecutor's tactics on cross-examination also required defendant to comment on the credibility of other witnesses, including the victim. However, defendant did not object, at trial, to these questions or move to strike the responses thereto. Failure to object at the time the evidence is offered or to move to strike the evidence is deemed a waiver of the right to assert error on appeal. *See* N.C.R. App. P., Rule 10(b)(1); *State v. Gardner*, 315 N.C. 444, 340 S.E. 2d 701 (1986).

[4] Defendant contends in his final assignment of error that the trial judge erred by denying his motion to strike the testimony of a witness who allegedly presented new facts under the guise of corroborative testimony. The State sought to read to the jury a written statement made by the young victim. The trial court admitted it for the limited purpose of corroborating the child's earlier testimony that defendant threatened her mother. Defendant objected to a sentence in the statement in which defendant allegedly told the victim's mother to "come see me or I will get someone to come rape your children." Specifically, he argues that the written statement of the prosecutrix, read at trial by a State's witness, did not corroborate the victim's testimony because it contained this additional fact which went beyond her earlier testimony. This contention is without merit.

We are guided by this court's decision in *State v. Ramey*, 318 N.C. 457, 349 S.E. 2d 566 (1986). There, we held that testimony was corroborative if it tended "to add weight or credibility to such testimony." *Id.* at 469, 349 S.E. 2d at 573. More important, in *Ramey*, we expressly rejected this Court's previous statements that new information, contained in the witness' prior statement, but not referred to in his trial testimony, may never be admitted as corroborative evidence. *Id.* Consequently, our analysis does not end simply because the new statement read to the jury contained statements not previously heard by the jury. Rather, we must determine whether these additional facts "add weight or credibility" to the child's earlier testimony. *Id.*

The victim previously testified that defendant had said he would hurt her mother if the child told anyone what had transpired. The child also testified on more than one occasion that she

was afraid of defendant. The portion of the written statement about which defendant now complains supports the earlier concerns expressed by the young victim, that is, her fear of retaliation. Although the written statement included facts not otherwise in evidence, the additional facts tended to add weight or credibility to those already admitted into evidence. For that reason, the trial court properly denied defendant's motion to strike.

In defendant's trial, we find

No error.

STATE OF NORTH CAROLINA v. HERBERT W. ROSIER

No. 331A86

(Filed 28 July 1988)

1. **Criminal Law § 34.8— first degree sexual offense—evidence of other offenses—admissible**

The trial court did not err in a prosecution for first degree sexual offense involving a seven-year-old girl by admitting testimony that defendant had admitted fondling the private parts of two other children where the other incidents occurred within three months of the incident for which defendant was tried and were similar to the incident for which defendant was tried. N.C.G.S. § 8C-1, Rule 404(b).

2. **Criminal Law § 102.7— jury argument—prosecutor's comment on payment of witness—outside of evidence—no prejudice**

There was no prejudice in a prosecution for first degree sexual offense involving a seven-year-old girl from the prosecutor's comment in his closing argument on the payment of a medical witness where there was no evidence as to whether the doctor received any remuneration for testifying. It is well known that physicians are paid for their work and the fact that the doctor may have been paid need not imply that he would not testify truthfully.

3. **Criminal Law §§ 126.3, 101.2, 101.4— motion for appropriate relief—jury misconduct—motion properly denied**

The trial court did not err in a prosecution for the first degree rape of a seven-year-old girl by denying defendant's motion for appropriate relief after the verdict based on affidavits from four members of the jury that the jury foreman had watched a series of programs on child abuse appearing that week on a local television station despite the court's instructions not to do so; that the foreman had told them of a fifteen to seventeen-year-old friend who had been raped; that some votes were changed from not guilty to guilty because of

the foreman's statements; that the foreman would not allow one juror to send a note to the judge asking for further instructions as to reasonable doubt and whether defendant could get some help if found not guilty; and that some jurors stated they did not think defendant was guilty but wanted to get him off the streets. Although the foreman of the jury should have obeyed the instructions of the court and not watched the program on child abuse, the matters he reported to the jury did not deal with defendant or with the evidence introduced in this case, and the other matters contained in the affidavits dealt with deliberations in the jury room, about which parties may not cross-examine jurors and about which jurors may not testify to impeach a verdict. N.C.G.S. § 15A-1240; N.C.G.S. § 8C-1, Rule 606.

APPEAL by defendant pursuant to N.C.G.S. sec. 7A-27(a) from a sentence of life in prison imposed by *Helms (William H.), J.*, at the 6 February 1986 Criminal Session of Superior Court, FORSYTH County. Heard in the Supreme Court 9 November 1987.

The defendant was tried for first degree sexual offense a violation of N.C.G.S. sec. 14-27.4. Evidence for the State showed that on 15 January 1984 the defendant visited a mobile home occupied by his friends Mackie and Christi Powers. The Powers were engaged in a domestic dispute and the defendant offered to take their seven year old daughter to a nearby restaurant while the couple resolved the quarrel. The Powers accepted defendant's offer and he took the child to lunch at approximately 2:00 p.m.

There was further evidence, consisting primarily of the child's testimony, that after finishing the meal the defendant carried the child to his trailer and had anal intercourse with her against her will. The child testified there was blood on her "private parts" as well as on the bed sheets.

The defendant would not allow the child to leave the trailer until her mother came for her. The child told her mother of the incident and her mother confronted the defendant. The defendant told Mrs. Powers that the child had fallen on the ice and that he had "checked her." Mackie Powers would not let his wife report the incident for fear it would result in his arrest on several unrelated charges in which arrest warrants for him were outstanding. In April 1985 Mackie and Christi Powers had separated and Christi Powers reported the incident to the authorities.

The defendant was convicted as charged and sentenced to life in prison. He appealed.

Lacy H. Thornburg, Attorney General, by James Peeler Smith, Special Deputy Attorney General, for the State.

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

WEBB, Justice.

[1] The defendant first assigns error to the admission of testimony as to acts by him with other children which were similar to the act for which he was charged in this case. Carolyn D. Beane, an officer with the City of High Point Police Department, testified over the objection of the defendant that she had interviewed the defendant in the Guilford County Jail and he had told her he fondled the private parts of two other children in February, March, and April of 1984. Ms. Beane testified the defendant told her he was afraid to tell anyone of his problem because he was afraid he would lose his job. He pled guilty to offenses involving the other children and was placed on probation.

The defendant contends the admission of this testimony violates N.C.G.S. sec. 8C-1, Rule 404(b) which provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show 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 admission of evidence of other crimes or wrongdoing to prove the defendant is guilty of the crime for which he is being tried has been discussed in many cases. *See* 1 Brandis on North Carolina Evidence sec. 91 (1982). Before and after the adoption of Rule 404(b) we have held that evidence that defendant committed similar acts which are not too remote in time may be admitted to show that these acts and those for which the defendant is being tried all arose out of a common scheme or plan on the part of the defendant. *State v. DeLeonardo*, 315 N.C. 762, 340 S.E. 2d 350 (1986); *State v. Effler*, 309 N.C. 742, 309 S.E. 2d 203 (1983); *State v. Goforth*, 59 N.C. App. 504, 297 S.E. 2d 128, *rev'd on other grounds*, 307 N.C. 699, 307 S.E. 2d 162 (1983). The other incidents for which evidence was admitted in this case occurred within

three months of the incident for which the defendant was tried. They were similar to the incident for which the defendant was tried. We hold that they were properly admitted to show a common scheme or plan out of which the crime for which the defendant was tried arose.

[2] The defendant next assigns error to the argument of the prosecuting attorney. Dr. Carl Hoffman, an obstetrician and gynecologist, testified that he examined the child on 31 May 1985 and did not find scarring in the vaginal or anal areas. He testified that in his opinion, if the child had been raped or sodomized by an adult male, she would have needed immediate medical attention because such a sexual act would have caused significant trauma in her vagina or rectum. There was no evidence as to whether Dr. Hoffman received any remuneration for testifying. In his jury argument the prosecuting attorney said:

> [L]et me get down to this, Dr. Hoffman. Good old Dr. Hoffman flying in here on the defendant's paycheck to testify for the defendant.
>
> MR. METCALF: Objection.
>
> MR. LYLE: And the first thing he wants to say is what a wonderful person he is in High Point, how he helps every victim and every little child in High Point.

The defendant argues that he is entitled to a new trial because of this argument by the prosecuting attorney. He contends it was prejudicial error for the prosecuting attorney to argue that Dr. Hoffman was paid for testifying when there was no evidence that Dr. Hoffman had been paid anything. An attorney may not argue to the jury matters which were not offered in evidence. *See* N.C.G.S. sec. 15A-1230(a) (1983); *State v. King*, 299 N.C. 103, 261 S.E. 2d 1 (1980). The court should have sustained the objection to this argument. The question is whether this was prejudicial error.

In order to show prejudicial error, a defendant must show that had the error in question not been committed there is a reasonable possibility a different result would have been reached at the trial. N.C.G.S. sec. 15A-1443(a) (1983); *State v. Sills*, 311 N.C. 370, 317 S.E. 2d 379 (1984). We hold that this argument does not constitute prejudicial error. The statement suggests Dr. Hoffman received some remuneration for testifying. It is well known that

physicians are paid for their work. The fact that Dr. Hoffman may have been paid need not imply that he would not testify truthfully. We hold the defendant has not shown there is a reasonable possibility there would have been a different result if this argument had not been made.

[3] The defendant next assigns error to the denial of his motion for appropriate relief which was made eight days after the jury verdict was returned. The motion was based on what the defendant contends is jury misconduct. The motion was supported by affidavits from four members of the jury. Before each recess the court instructed the jury not to talk to anyone about the case and not to read, watch or listen to any publication or broadcast concerning the trial. The court specifically instructed the jury not to watch a series of programs on child abuse which was appearing that week on a local television station. The affidavits contained statements by the jurors that the foreman of the jury had watched the program on child abuse. The affiants also said the foreman told them about a fifteen to seventeen year old friend of his who had been raped. Some of the affiants said some votes were changed from not guilty to guilty because of the foreman's statements. One of the affiants said she wanted to send a note to the judge asking for further instructions as to reasonable doubt and whether the defendant could "get some help if the jury found him not guilty." The foreman refused to let this note be sent to the judge. Some of the jurors stated they did not think the defendant was guilty but "just wanted to get him off the streets." The court denied the motion for appropriate relief.

The reception of evidence to impeach the verdict of a jury is governed by N.C.G.S. sec. 15A-1240 and N.C.G.S. sec. 8C-1, Rule 606. N.C.G.S. sec. 15A-1240 provides:

> (a) Upon an inquiry into the validity of a verdict, no evidence may be received to show the effect of any statement, conduct, event, or condition upon the mind of a juror or concerning the mental processes by which the verdict was determined.
>
> (b) The limitations in subsection (a) do not bar evidence concerning whether the verdict was reached by lot.
>
> (c) After the jury has dispersed, the testimony of a juror may be received to impeach the verdict of the jury on which

he served, subject to the limitations in subsection (a), only when it concerns:

(1) Matters not in evidence which come to the attention of one or more jurors under circumstances which would violate the defendant's constitutional right to confront the witnesses against him; or

(2) Bribery, intimidation, or attempted bribery or intimidation of a juror.

Rule 606(b) provides:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

There have been several cases interpreting N.C.G.S. sec. 15A-1240. *See State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979); *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979), *cert. denied*, 446 U.S. 941, 64 L.Ed. 2d 796 (1980); *State v. Carter*, 55 N.C. App. 192, 284 S.E. 2d 733 (1981); *State v. Froneberger*, 55 N.C. App. 148, 285 S.E. 2d 119 (1981), *appeal dismissed*, 305 N.C. 397, 290 S.E. 2d 367 (1982); *State v. Gilbert*, 47 N.C. App. 316, 267 S.E. 2d 378 (1980). *Smith v. Price*, 315 N.C. 523, 340 S.E. 2d 408 (1986) and *State v. Costner*, 80 N.C. App. 666, 343 S.E. 2d 241 (1986), were decided after the adoption of Rule 606. The rule was not applied in *Price* because the case was tried before the effective date of the rule. The allowance by N.C.G.S. sec. 15A-1240(c) of testimony by a juror as to "[m]atters not in evidence which came to the attention of one or more jurors under circumstances which would violate the defendant's constitutional right to confront the witnesses against him" comports with the requirement of the

United States Constitution that a defendant be allowed to confront his accusers. *See Parker v. Gladden*, 385 U.S. 363, 17 L.Ed. 2d 420 (1966). Some commentators have suggested that Rule 606 has broadened N.C.G.S. sec. 15A-1240 by allowing jurors to testify as to "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." *See* Commentary on Rule 606(b); 1 Brandis on North Carolina Evidence sec. 65 (1982). If the affidavits of the four jurors should have been considered by the court it would be because they dealt with information that was brought to the jury's attention in such a way that the defendant was denied a right to confront a witness against him as provided in N.C.G.S. sec. 15A-1240(c)(1) or extraneous prejudicial information was improperly brought to the jury's attention as provided in Rule 606. We hold the court should not have considered the affidavits under either N.C.G.S. sec. 15A-1240(c)(1) or Rule 606.

Although the foreman of the jury should have obeyed the instructions of the court and not have watched the program on child abuse, the matters he reported to the jury did not deal with the defendant or with the evidence introduced in this case. It would be naive to believe jurors during jury deliberations do not relate the experiences they have had. This is what the jury foreman did. Parties do not have the right to cross-examine jurors as to the arguments they make during deliberation as the foreman did in this case. The defendant is not entitled to relief under N.C.G.S. sec. 15A-1240.

We hold that the matters with which the jurors' affidavits dealt are not extraneous information within the meaning of Rule 606. We interpret the Rule to mean that extraneous information is information dealing with the defendant or the case which is being tried, which information reaches a juror without being introduced in evidence. It does not include information which a juror has gained in his experience which does not deal with the defendant or the case being tried. The other matters contained in the affidavits, that votes were changed because of the foreman's statements, that the foreman would not let a juror send a note to the judge, and that some of the jurors did not think the defendant was guilty dealt with deliberations in the jury room. A juror may

not impeach a verdict by testifying to them. This assignment of error is overruled.

No error.

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

BAUCOM'S NURSERY CO. v. MECKLENBURG COUNTY

No. 207P88.

Case below: 89 N.C. App. 542.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 28 July 1988.

BELL v. WEST AMERICAN INS. CO.

No. 203P88.

Case below: 89 N.C. App. 280.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 dismissed 28 July 1988.

BROWN v. RHYNE FLORAL SUPPLY MFG. CO.

No. 255P88.

Case below: 89 N.C. App. 717.

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 28 July 1988.

COLEMAN v. COOPER

No. 179P88.

Case below: 89 N.C. App. 188.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 28 July 1988. Petition by defendants (Cooper and Wake County) for discretionary review pursuant to G.S. 7A-31 denied 28 July 1988.

DEANS v. LAYTON

No. 211P88.

Case below: 89 N.C. App. 358.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 28 July 1988.

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

GOSNEY v. GOLDEN BELT MFG. CO.

No. 246P88.

Case below: 89 N.C. App. 670.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 28 July 1988.

GREGORY v. SADIE COTTON MILLS

No. 324P88.

Case below: 90 N.C. App. 433.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 28 July 1988.

HIGGINS v. SIMMONS

No. 147PA88.

Case below: 89 N.C. App. 61.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 28 July 1988.

IN RE HALL

No. 245P88.

Case below: 89 N.C. App. 685.

Petition by Mary Yates for discretionary review pursuant to G.S. 7A-31 denied 28 July 1988.

IN RE LYNETTE H.

No. 252PA88.

Case below: 90 N.C. App. 373.

Petition by the Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 28 July 1988. Petition by the State for writ of supersedeas allowed 28 July 1988.

MATTHEWS v. JOHNSON PUBLISHING CO.

No. 215P88.

Case below: 89 N.C. App. 522.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 28 July 1988.

N.C. DEPT. OF JUSTICE v. EAKER

No. 258P88.

Case below: 90 N.C. App. 30.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 28 July 1988.

PIEPER v. PIEPER

No. 303PA88.

Case below: 90 N.C. App. 405.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 28 July 1988.

PROCESS COMPONENTS, INC. v.
BALTIMORE AIRCOIL CO., INC.

No. 244PA88.

Case below: 89 N.C. App. 649.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 28 July 1988.

STATE v. ANDERSON

No. 243P88.

Case below: 89 N.C. App. 723.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 28 July 1988.

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

STATE v. BOGLE

No. 307A88.

Case below: 90 N.C. App. 277.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues allowed as to character evidence issue only 28 July 1988.

STATE v. LEAK

No. 295P88.

Case below: 90 N.C. App. 149.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 28 July 1988.

STATE v. PEGUESE

No. 294P88.

Case below: 88 N.C. App. 152.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 28 July 1988.

STATE v. SMITH

No. 163A88.

Case below: 89 N.C. App. 19.

Petition by defendants for writ of supersedeas allowed 14 July 1988 conditioned upon either: (1) original appearance bond remaining in full force and effect, or (2) a new appearance bond being executed in a sum to be set by the Superior Court, Mecklenburg County.

STATE v. TAYLOR

No. 325P88.

Case below: 90 N.C. App. 612.

Petition by defendant for writ of supersedeas and temporary stay denied 14 July 1988. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 14 July 1988.

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

TROXLER v. CHARTER MANDALA CENTER

No. 175P88.

Case below: 89 N.C. App. 268.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 28 July 1988.

WARD v. DURHAM LIFE INS. CO.

No. 309A88.

Case below: 90 N.C. App. 286.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues allowed 28 July 1988.

WILDWOODS OF LAKE JOHNSON ASSOC. v. L. P. COX CO.

No. 199P88.

Case below: 88 N.C. App. 88.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 28 July 1988.

PETITIONS TO REHEAR

McNEILL v. DURHAM COUNTY ABC BD.

No. 524PA87.

Case below: 322 N.C. 425.

Petition by plaintiff to rehear denied 28 July 1988.

STATE v. TAYLOR

No. 317A87.

Case below: 322 N.C. 433.

Petition by defendant to rehear denied 28 July 1988.

APPENDIXES

AMENDMENTS TO GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

ORDER IN THE MATTER OF PILOT PROGRAM OF MANDATORY, NONBINDING ARBITRATION

AMENDMENT TO RULES OF APPELLATE PROCEDURE

AMENDMENT OF ORDER CONCERNING ELECTRONIC MEDIA AND STILL PHOTOGRAPHY COVERAGE OF PUBLIC JUDICIAL PROCEEDINGS

CLIENT SECURITY FUND

AMENDMENT TO NORTH CAROLINA SUPREME COURT LIBRARY RULES

AMENDMENT TO GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

Pursuant to authority of N.C.G.S. § 7A-34, the General Rules of Practice for the Superior and District Courts are hereby amended to add a new Rule 2.1, *Designation of Exceptional Civil Cases*, as follows:

RULE 2.1 DESIGNATION OF EXCEPTIONAL CIVIL CASES

(a) The Chief Justice may designate any case or group of cases as "exceptional." A senior resident superior court judge, chief district court judge, or presiding superior court judge may ex mero motu, or on motion of any party, recommend to the Chief Justice that a case or cases be designated as exceptional.

(b) Such recommendation may include special areas of expertise needed by the judge to be assigned and may include a list of recommended judges.

(c) Such recommendation shall be communicated to the Chief Justice through the Administrative Office of the Courts.

(d) Factors which may be considered in determining whether to make such designation include: the number and diverse interests of the parties; the amount and nature of anticipated pretrial discovery and motions; whether the parties voluntarily agree to waive venue for hearing pretrial motions; the complexity of the evidentiary matters and legal issues involved; whether it will promote the efficient administration of justice; and such other matters as the Chief Justice shall deem appropriate.

(e) The Chief Justice may enter such orders as are appropriate for the pretrial, trial, and other disposition of such designated case or cases.

This amendment shall be effective on and after the fifth day of January, 1988, and shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

By order of the Court in Conference, this 5th day of January, 1988.

WHICHARD, J.
For the Court

AMENDMENT TO GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

Pursuant to authority of N.C.G.S. § 7A-34, the General Rules of Practice for the Superior and District Courts are hereby amended by rewriting the second paragraph of Rule 2(a), *Calendaring of Civil Cases*, to read as follows:

> The effective date of the plan and any amendments thereto shall be either January 1 or July 1. The plan must be promulgated in writing and copies of the plan must be distributed to all attorneys of record within the judicial district. In order to provide for statewide dissemination, copies of plans effective January 1 shall be filed with the Administrative Office of the Courts on or before October 31 and on or before April 30 for plans effective July 1.

Said rules are further amended by deleting the first paragraph of Rule 8, which now reads as follows:

> All desired discovery shall be completed within 120 days of the date of the last required pleading. For good cause shown, a judge having jurisdiction may enlarge the period of discovery.

These amendments shall be effective on and after the 1st day of July, 1988, and shall be promulgated by publication in the advance sheets of the Supreme Court and the Court of Appeals.

By order of the Court in Conference, this 16th day of May, 1988.

WHICHARD, J.
For the Court

SUPREME COURT OF NORTH CAROLINA

* *

IN THE MATTER OF PILOT PROGRAM OF MANDATORY, NONBINDING ARBITRATION	))))	ORDER

* *

WHEREAS, the Supreme Court of North Carolina adopted an order in this matter on 28 August 1986; and

WHEREAS, the Court now desires to revise the rules therein adopted;

Now, therefore, the Court orders:

The expiration date for this program is hereby extended from 31 December 1988 to 1 October 1989.

Done by the Court in conference this the 5th day of May 1988.

WHICHARD, J.
For the Court

AMENDMENT TO RULES OF APPELLATE PROCEDURE

Rules 4, 21, 29 and 31 of the North Carolina Rules of Appellate Procedure, 287 N.C. 671, are hereby amended to read as in the following pages. The amendments to Rules 4 and 21 shall be applicable to all appeals from judgments entered on and after 24 July 1987. The Amendments to Rules 29 and 31 shall be applicable to all appeals in which the notice of appeal is filed on or after 1 October 1987.

Adopted by the Court in Conference this 3rd day of September, 1987. These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

s/WHICHARD, J.
For the Court

WITNESS my hand and the Seal of the Supreme Court of North Carolina, this the 22nd day of June, 1988.

J. GREGORY WALLACE
Clerk of the Supreme Court

RULE 4

APPEAL IN CRIMINAL CASES—HOW AND WHEN TAKEN

(a) **Manner and Time.** Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a criminal action may take appeal by

(1) giving oral notice of appeal at trial, or

(2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within 10 days after entry of the judgment or order or within 10 days after a ruling on a motion for appropriate relief made during the ten-day period following entry of the judgment or order.

(b) **Content of Notice of Appeal.** The notice of appeal required to be filed and served by subdivision (a)(2) of this rule shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(c) **Service of Notice of Appeal.** Service of copies of the notice of appeal may be made as provided in Rule 26 of these rules.

(d) **To Which Appellate Court Addressed.** An appeal of right from a judgment of a superior court by any person who has been convicted of murder in the first degree and sentenced to life imprisonment or death shall be filed in the Supreme Court. In all other criminal cases, appeal shall be filed in the Court of Appeals.

Adopted: 13 June 1975:
Amended: 4 October 1978—(a)(2)—effective 1 January 1979;
13 July 1982—(d);
3 September 1987—(d)—effective for all judgments of the superior court entered on or after 24 July 1987.

RULE 21

CERTIORARI

(a) **Scope of the Writ.**

(1) **Review of the Judgments and Orders of Trial Tribunals.** The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to G.S. 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief.

(2) **Review of the Judgments and Orders of the Court of Appeals.** The writ of certiorari may be issued by the Supreme Court in appropriate circumstances to permit review of the decisions and orders of the Court of Appeals when the right to prosecute an appeal of right or to petition for discretionary review has been lost by failure to take timely action; or for review of orders of the Court of Appeals when no right of appeal exists.

(b) **Petition for Writ; to Which Appellate Court Addressed.** Application for the writ of certiorari shall be made by filing a petition therefor with the clerk of the court of the appellate division to which appeal of right might lie from a final judgment in the cause by the tribunal to which issuance of the writ is sought.

(c) **Same; Filing and Service; Content.** The petition shall be filed without unreasonable delay and shall be accompanied by proof of service upon all other parties. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the reasons why the writ should issue; and certified copies of the judgment, order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. The petition shall be verified by counsel or the petitioner. Upon receipt of the prescribed docket fee, the clerk will docket the petition.

(d) **Response; Determination by Court.** Within 10 days after service upon him of the petition any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied

by proof of service upon all other parties. The Court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response and any supporting papers. No briefs or oral argument will be received or allowed unless ordered by the court upon its own initiative.

(e) **Petition for Writ in Post Conviction Matters; to Which Appellate Court Addressed.** Petitions for writ of certiorari to review orders of the trial court denying motions for appropriate relief upon grounds listed in G.S. 15A-1415(b) by persons who have been convicted of murder in the first degree and sentenced to life imprisonment or death shall be filed in the Supreme Court. In all other cases such petitions shall be filed in and determined by the Court of Appeals and the Supreme Court will not entertain petitions for certiorari or petitions for further discretionary review in these cases.

Adopted: 13 June 1975.
Amended: 18 November 1981—21(a) and (e);
27 November 1984—21(a)—effective 1 February 1985;
3 September 1987—21(e)—effective for all judgments of the superior court entered on and after 24 July 1987.

RULE 29

SESSIONS OF COURTS; CALENDAR OF HEARINGS

(a) **Sessions of Court.**

(1) **Supreme Court.** The Supreme Court shall be in continuous session for the transaction of business. Unless otherwise scheduled by the Court, hearings in appeals will be held during the week beginning the second Monday in the months of February through May and September through December. Additional settings may be authorized by the Chief Justice.

(2) **Court of Appeals.** Appeals will be heard in accordance with a schedule promulgated by the Chief Judge. Panels of the Court will sit as scheduled by the Chief Judge. For the transaction of other business, the Court of Appeals shall be in continuous session.

(b) **Calendaring of Cases for Hearing.** Each appellate court will calendar the hearing of all appeals docketed in the court. In general, appeals will be calendared for hearing in the order in which they are docketed, but the court may vary the order for any cause deemed appropriate. On motion of any party, with notice to all other parties, the court may determine without hearing to give an appeal peremptory setting or otherwise to vary the normal calendar order. Except as advanced for peremptory setting on motion of a party or the court's own initiative, no appeal will be calendared for hearing at a time less than 30 days after the filing of the appellant's brief. The clerk of the appellate court will give reasonable notice to all counsel of record of the setting of an appeal for hearing by mailing a copy of the calendar. When a reply brief is allowed by rule or ordered by the Court, the appeal will be calendared or recalendared for hearing at a time not less than 10 days after the time for filing the reply brief.

Adopted: 13 June 1975.
Amended: 3 March 1982—29(a)(1);
3 September 1987—29(a)(1).

RULE 31

PETITION FOR REHEARING

(a) **Time for Filing; Content.** A petition for rehearing may be filed in a civil action within 15 days after the mandate of the court has been issued. The petition shall state with particularity the points of fact or law which, in the opinion of the petitioner, the court has overlooked or misapprehended, and shall contain such argument in support of the petition as petitioner desires to present. It shall be accompanied by a certificate of at least two attorneys who for periods of at least five years respectively, shall have been members of the bar of this State and who have no interest in the subject of the action and have not been counsel for any party to the action, that they have carefully examined the appeal and the authorities cited in the decision, and that they consider the decision in error on points specifically and concisely identified. Oral argument in support of the petition will not be permitted.

(b) **How Addressed; Filed.** A petition to the Supreme Court shall be addressed to the court. Two copies thereof shall be filed with the clerk.

A petition to the Court of Appeals shall be addressed to the court. Two copies thereof shall be filed with the clerk.

(c) **How Determined.** Within 30 days after the petition is filed, the court will either grant or deny the petition. Determination to grant or deny will be made solely upon the written petition; no written response will be received from the opposing party; and no oral argument by any party will be heard. Determination by the court is final. The rehearing may be granted as to all or less than all points suggested in the petition. When the petition is denied the clerk shall forthwith notify all parties.

(d) **Procedure When Granted.** Upon grant of the petition the clerk shall forthwith notify the parties that the petition has been granted. The case will be reconsidered solely upon the record on appeal, the petition to rehear, new briefs of both parties, and the oral argument if one has been ordered by the court. The briefs shall be addressed solely to the points specified in the order granting the petition to rehear. The petitioner's brief shall be filed within 20 days after the clerk has given notice of the grant of the petition; and the opposing party's brief, within 20 days after petitioner's brief is served upon him. Filing and service of the new briefs shall be in accordance with the requirements of Rule 13. If the court has ordered oral argument, the clerk shall give notice of the time set therefor, which time shall be not less than 30 days after the filing of the petitioner's brief on rehearing.

(e) **Stay of Execution.** When a petition for rehearing is filed, the petitioner may obtain a stay of execution in the trial court to which the mandate of the appellate court has been issued. The procedure is as provided for stays pending appeal by Rule 8 of these rules.

(f) **Waiver by Appeal from Court of Appeals.** The timely filing of a notice of appeal from, or of a petition for discretionary review of, a determination of the Court of Appeals constitutes a waiver of any right thereafter to petition the Court of Appeals for rehearing as to such determination or, if a petition for rehearing has earlier been filed, an abandonment of such petition.

(g) **No Petition in Criminal Cases.** The courts will not entertain petitions for rehearing in criminal actions.

Adopted: 13 June 1975.
Amended: 27 November 1984—31(a)—effective 1 February 1985;
3 September 1987—31(d).

AMENDMENT TO RULES OF APPELLATE PROCEDURE

Rules 13, 14, 15, 16, 26, and 28 of the North Carolina Rules of Appellate Procedure, 287 N.C. 671, are hereby amended to read as in the following pages. All amendments shall be effective on and after 1 September 1988.

Effective 1 September 1988, the Drafting Committee Notes and Commentary which have been appended to each of the Rules of Appellate Procedure shall be deleted. In their stead shall be annotations containing the date of each rule's adoption and any subsequent dates of amendment, indicating which of the rule's paragraphs was amended by the action and the effective date thereof.

Adopted by the Court in Conference this 30th day of June, 1988. These amendments shall be promulgated by publication in the Advance sheets of the Supreme Court and the Court of Appeals.

WHICHARD, J.
For the Court

RULE 13

FILING AND SERVICE OF BRIEFS

(a) Time for Filing and Service of Briefs.

(1) **Cases Other Than Death Penalty Cases.** Within 30 days after the clerk of the appellate court has mailed the printed record to the parties, the appellant shall file his brief in the office of the clerk of the appellate court, and serve copies thereof upon all other parties separately represented. In civil appeals in forma pauperis, no printed record is created; accordingly, appellant's 30 days for filing and serving the brief shall run from the date of docketing the record on appeal in the appellate court. Within 30 days after appellant's brief has been served on an appellee, the appellee shall similarly file and serve copies of his brief. The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee.

(2) **Death Penalty Cases.** Within 60 days after the Clerk of the Supreme Court has mailed the printed record to the parties, the defendant-appellant in a criminal appeal which includes a sentence of death shall file his brief in the office of the Clerk and serve copies thereof upon all other parties separately represented. Within 60 days after appellant's brief has been served, the State-appellee shall similarly file and serve copies of its brief. The appellant may serve and file a reply brief within 21 days after service of the brief of the State-appellee.

(b) **Copies Reproduced by Clerk.** A party need file but a single copy of his brief. At the time of filing the party may be required to pay to the clerk of the appellate court a deposit fixed by the clerk to cover the cost of reproducing copies of the brief. The clerk will reproduce and distribute copies of briefs as directed by the court.

In civil appeals in forma pauperis a party need not pay the deposit for reproducing copies, but at the time of filing his original brief shall also deliver to the clerk two legible photocopies thereof.

(c) **Consequence of Failure to File and Serve Briefs.** If an appellant fails to file and serve his brief within the time allowed, the appeal may be dismissed on motion of an appellee or on the court's own initiative. If an appellee fails to file and serve

his brief within the time allowed, he may not be heard in oral argument except by permission of the court.

Adopted: 13 June 1975.
Amended: 7 October 1980—13(a)—effective 1 January 1981;
27 November 1984—13(a) and (b)—effective 1 February 1985;
30 June 1988—13(a)—effective 1 September 1988.

RULE 14

APPEALS OF RIGHT FROM COURT OF APPEALS TO SUPREME COURT UNDER G.S. 7A-30

(a) **Notice of Appeal; Filing and Service.** Appeals of right from the Court of Appeals to the Supreme Court are taken by filing notices of appeal with the Clerk of the Court of Appeals and with the Clerk of the Supreme Court and serving notice of appeal upon all other parties within 15 days after the mandate of the Court of Appeals has been issued to the trial tribunal. The running of the time for filing and serving a notice of appeal is tolled as to all parties by the filing by any party within such time of a petition for rehearing under Rule 31 of these rules, and the full time for appeal thereafter commences to run and is computed as to all parties from the date of entry by the Court of Appeals of an order denying the petition for rehearing. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 10 days after the first notice of appeal was filed. A petition prepared in accordance with Rule 15(c) for discretionary review in the event the appeal is determined not to be of right or for issues in addition to those set out as the basis for a dissenting opinion may be filed with or contained in the notice of appeal.

(b) **Content of Notice of Appeal.**

(1) **Appeal Based Upon Dissent in Court of Appeals.** In an appeal which is based upon the existence of a dissenting opinion in the Court of Appeals the notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment of the Court of Appeals from which the appeal is taken; shall state the basis upon which it is asserted that appeal lies of right under G.S. 7A-30; and shall state the issue or issues which are the basis of the

dissenting opinion and which are to be presented to the Supreme Court for review.

(2) **Appeal Presenting Constitutional Question.** In an appeal which is asserted by the appellant to involve a substantial constitutional question, the notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment of the Court of Appeals from which the appeal is taken; shall state the issue or issues which are the basis of the constitutional claim and which are to be presented to the Supreme Court for review; shall specify the articles and sections of the Constitution asserted to be involved; shall state with particularity how appellant's rights thereunder have been violated; and shall affirmatively state that the constitutional issue was timely raised (in the trial tribunal if it could have been, in the Court of Appeals if not) and either not determined or determined erroneously.

(c) **Record on Appeal.**

(1) **Composition.** The record on appeal filed in the Court of Appeals constitutes the record on appeal for review by the Supreme Court. However, the Supreme Court may note de novo any deficiencies in the record on appeal and may take such action in respect thereto as it deems appropriate, including dismissal of the appeal.

(2) **Transmission; Docketing; Copies.** Upon the filing of a notice of appeal, the Clerk of the Court of Appeals will forthwith transmit the original record on appeal to the Clerk of the Supreme Court, who shall thereupon file the record and docket the appeal. The Clerk of the Supreme Court will procure or reproduce copies of the record on appeal for distribution as directed by the Court, and may require a deposit from appellant to cover the cost of reproduction. In appeals in forma pauperis, the Clerk of the Court of Appeals will transmit with the original record on appeal the copies filed by the appellant in that Court under Rule 12(c).

(d) **Briefs.**

(1) **Filing and Service; Copies.** Within 30 days after filing notice of appeal in the Supreme Court, the appellant shall file with the Clerk of the Supreme Court and serve upon all other parties copies of a new brief prepared in conformity with Rule 28, presenting only those questions upon which review by the Supreme Court is sought; provided,

however, that when the appeal is based upon the existence of a substantial constitutional question or when the appellant has filed a petition for discretionary review for issues in addition to those set out as the basis of a dissent in the Court of Appeals, the appellant shall file and serve a new brief within 30 days after entry of the order of the Supreme Court which determines for the purpose of retaining the appeal on the docket that a substantial constitutional question does exist or allows or denies the petition for discretionary review in an appeal based upon a dissent. Within 30 days after service of the appellant's brief upon him, the appellee shall similarly file and serve copies of a new brief. The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee.

The parties need file but single copies of their respective briefs. At the time of filing a brief, the party may be required to pay to the Clerk a deposit fixed by the Clerk to cover the cost of reproducing copies of the brief. The Clerk will reproduce and distribute copies as directed by the Court.

In civil appeals in forma pauperis a party need not pay the deposit for reproducing copies, but at the time of filing his original new brief shall also deliver to the Clerk two legible copies thereof.

(2) **Failure to File or Serve.** If an appellant fails to file and serve his brief within the time allowed, the appeal may be dismissed on motion of an appellee or on the court's own initiative. If an appellee fails to file and serve his brief within the time allowed, he may not be heard in oral argument except by permission of the Court.

Adopted: 13 June 1975.
Amended: 31 January 1977—14(d)(1);
7 October 1980—14(d)(1)—effective 1 January 1981;
27 November 1984—14(a), (b), and (d)—applicable to appeals in which the notice of appeal is filed on or after 1 February 1985;
30 June 1988—14(b)(2), (d)(1)—effective 1 September 1988.

RULE 15

DISCRETIONARY REVIEW ON CERTIFICATION BY SUPREME COURT UNDER G.S. 7A-31

(a) **Petition of Party.** Either prior to or following determination by the Court of Appeals of an appeal docketed in that court, any party to the appeal may in writing petition the Supreme Court upon any grounds specified in G.S. 7A-31 to certify the cause for discretionary review by the Supreme Court; except that a petition for discretionary review of an appeal from the Industrial Commission, the North Carolina State Bar, the Property Tax Commission, the Board of State Contract Appeals, or the Commissioner of Insurance may only be made following determination by the Court of Appeals; and except that no petition for discretionary review may be filed in any post-conviction proceeding under G.S. Chap. 15A, Art. 89, or in valuation of exempt property under G.S. Chap. 1C.

(b) **Same; Filing and Service.** A petition for review prior to determination by the Court of Appeals shall be filed with the Clerk of the Supreme Court and served on all other parties within 15 days after the appeal is docketed in the Court of Appeals. A petition for review following determination by the Court of Appeals shall be similarly filed and served within 15 days after the mandate of the Court of Appeals has been issued to the trial tribunal. Such a petition may be contained in or filed with a notice of appeal of right, to be considered by the Supreme Court in the event the appeal is determined not to be of right, as provided in Rule 14(a). The running of the time for filing and serving a petition for review following determination by the Court of Appeals is terminated as to all parties by the filing by any party within such time of a petition for rehearing under Rule 31 of these rules, and the full time for filing and serving such a petition for review thereafter commences to run and is computed as to all parties from the date of entry by the Court of Appeals of an order denying the petition for rehearing. If a timely petition for review is filed by a party, any other party may file a petition for review within 10 days after the first petition for review was filed.

(c) **Same; Content.** The petition shall designate the petitioner or petitioners and shall set forth plainly and concisely the factual and legal basis upon which it is asserted that grounds exist under G.S. 7A-31 for discretionary review. The petition shall state each question for which review is sought, and shall be

accompanied by a copy of the opinion of the Court of Appeals when filed after determination by that court. No supporting brief is required; but supporting authorities may be set forth briefly in the petition.

(d) **Response.** A response to the petition may be filed by any other party within 10 days after service of the petition upon him. No supporting brief is required, but supporting authorities may be set forth briefly in the response. If, in the event that the Supreme Court certifies the case for review, the respondent would seek to present questions in addition to those presented by the petitioner, those additional questions shall be stated in the response.

(e) **Certification by Supreme Court; How Determined and Ordered.**

(1) **On Petition of a Party.** The determination by the Supreme Court whether to certify for review upon petition of a party is made solely upon the petition and any response thereto and without oral argument.

(2) **On Initiative of the Court.** The determination by the Supreme Court whether to certify for review upon its own initiative pursuant to G.S. 7A-31 is made without prior notice to the parties and without oral argument.

(3) **Orders; Filing and Service.** Any determination to certify for review and any determination not to certify made in response to petition will be recorded by the Supreme Court in a written order. The Clerk of the Supreme Court will forthwith enter such order, deliver a copy thereof to the Clerk of the Court of Appeals, and mail copies to all parties. The cause is docketed in the Supreme Court upon entry of an order of certification by the Clerk of the Supreme Court.

(f) **Record on Appeal.**

(1) **Composition.** The record on appeal filed in the Court of Appeals constitutes the record on appeal for review by the Supreme Court. However, the Supreme Court may note de novo any deficiencies in the record on appeal and may take such action in respect thereto as it deems appropriate, including dismissal of the appeal.

(2) **Filing; Copies.** When an order of certification is filed with the Clerk of the Court of Appeals, he will forthwith

transmit the original record on appeal to the Clerk of the Supreme Court. The Clerk of the Supreme Court will procure or reproduce copies thereof for distribution as directed by the Court. If it is necessary to reproduce copies, the Clerk may require a deposit of the petitioner to cover the costs thereof.

(g) **Filing and Service of Briefs.**

(1) **Cases Certified Before Determination by Court of Appeals.** When a case is certified for review by the Supreme Court before being determined by the Court of Appeals, the times allowed the parties by Rule 13 to file their respective briefs are not thereby extended. If a party has filed his brief in the Court of Appeals and served copies before the case is certified, the Clerk of the Court of Appeals shall forthwith transmit to the Clerk of the Supreme Court the original brief and any copies already reproduced by him for distribution, and if filing was timely in the Court of Appeals this constitutes timely filing in the Supreme Court. If a party has not filed his brief in the Court of Appeals and served copies before the case is certified, he shall file his brief in the Supreme Court and serve copies within the time allowed and in the manner provided by Rule 13 for filing and serving in the Court of Appeals.

(2) **Cases Certified for Review of Court of Appeals Determinations.** When a case is certified for review by the Supreme Court of a determination made by the Court of Appeals, the appellant shall file a new brief prepared in conformity with Rule 28 in the Supreme Court and serve copies upon all other parties within 30 days after the case is docketed in the Supreme Court by entry of its order of certification. The appellee shall file a new brief in the Supreme Court and serve copies upon all other parties within 30 days after a copy of appellant's brief is served upon him. The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee.

(3) **Copies.** A party need file or the Clerk of the Court of Appeals transmit, but a single copy of any brief required by this Rule 15 to be filed in the Supreme Court upon certification for discretionary review. The Clerk of the Supreme Court will thereupon procure from the Court of Appeals or will himself reproduce copies for distribution as directed by the Supreme Court. The Clerk may require a

deposit of any party to cover the costs of reproducing copies of his brief.

In civil appeals in forma pauperis a party need not pay the deposit for reproducing copies, but at the time of filing his original new brief shall also deliver to the clerk two legible copies thereof reproduced by typewriter carbon or other means.

(4) **Failure to File or Serve.** If an appellant fails to file and serve his brief within the time allowed by this Rule 15, the appeal may be dismissed on motion of an appellee or upon the Court's own initiative. If an appellee fails to file and serve his brief within the time allowed by this Rule 15, he may not be heard in oral argument except by permission of the Court.

(h) **Discretionary Review of Interlocutory Orders.** An interlocutory order by the Court of Appeals, including an order for a new trial or for further proceedings in the trial tribunal, will be certified for review by the Supreme Court only upon a determination by the Court that failure to certify would cause a delay in final adjudication which would probably result in substantial harm to a party.

(i) **Appellant, Appellee Defined.** As used in this Rule 15, the terms "appellant" and "appellee" have the following meanings:

(1) With respect to the Supreme Court review prior to determination by the Court of Appeals, whether on petition of a party or on the Court's own initiative, "appellant" means a party who appealed from the trial tribunal; "appellee," a party who did not appeal from the trial tribunal.

(2) With respect to Supreme Court review of a determination of the Court of Appeals upon the Court's own initiative, "appellant" means the party aggrieved by the determination of the Court of Appeals; "appellee," the opposing party. Provided, that in its order of certification, the Supreme Court may designate either party appellant or appellee for purposes of proceeding under this Rule 15.

Adopted: 13 June 1975.

Amended: 7 October 1980—15(g)(2)—effective 1 January 1981;
18 November 1981—15(a);
30 June 1988—15(a), (c), (d), (g)(2)—effective 1 September 1988.

RULE 16

SCOPE OF REVIEW OF DECISIONS OF COURT OF APPEALS

(a) **How Determined.** Review by the Supreme Court after a determination by the Court of Appeals, whether by appeal of right or by discretionary review, is to determine whether there is error of law in the decision of the Court of Appeals. Except where the appeal is based solely upon the existence of a dissent in the Court of Appeals, review in the Supreme Court is limited to consideration of the questions stated in the notice of appeal or petition for discretionary review, unless further limited by the Supreme Court, and properly presented in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court.

(b) **Scope of Review in Appeal Based Solely Upon Dissent.** Where the sole ground of the appeal of right is the existence of a dissent in the Court of Appeals, review by the Supreme Court is limited to a consideration of those questions which are (1) specifically set out in the dissenting opinion as the basis for that dissent, (2) stated in the notice of appeal, and (3) properly presented in the new briefs required by Rule 14(d)(1) to be filed in the Supreme Court. Other questions in the case may properly be presented to the Supreme Court through a petition for discretionary review, pursuant to Rule 15, or by petition for writ of certiorari, pursuant to Rule 21.

(c) **Appellant, Appellee Defined.** As used in this Rule 16, the terms "appellant" and "appellee" have the following meanings when applied to discretionary review:

(1) With respect to Supreme Court review of a determination of the Court of Appeals upon petition of a party, "appellant" means the petitioner, "appellee" means the respondent.

(2) With respect to Supreme Court review upon the Court's own initiative, "appellant" means the party aggrieved by the decision of the Court of Appeals; "appellee" means the opposing party. Provided that in its order of certification the Supreme Court may designate either party "appellant" or "appellee" for purposes of proceeding under this Rule 16.

Adopted: 13 June 1975.

Amended: 3 November 1983—16(a) and (b)—applicable to all notices of appeal filed in the Supreme Court on and after 1 January 1984;
30 June 1988—16(a) and (b)—effective 1 September 1988.

RULE 26

FILING AND SERVICE

(a) **Filing.** Papers required or permitted by these rules to be filed in the trial or appellate divisions shall be filed with the clerk of the appropriate court. Filing may be accomplished by mail addressed to the clerk but is not timely unless the papers are received by the clerk within the time fixed for filing, except that notice of service of proposed records on appeal, motions, responses to petitions, and briefs shall be deemed filed on the date of mailing, as evidenced by the proof of service, if first class mail is utilized.

(b) **Service of All Papers Required.** Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served on all other parties to the appeal.

(c) **Manner of Service.** Service may be made in the manner provided for service and return of process in Rule 4 of the N.C. Rules of Civil Procedure, and may be so made upon a party or upon his attorney of record. Service may also be made upon a party or his attorney of record by delivering a copy to either or by mailing it to either at his last known address, or if no address is known, by filing it in the office of the clerk with whom the original paper is filed. Delivery of a copy within this Rule means handing it to the attorney or to the party, or leaving it at the attorney's office with a partner or employee. Service by mail is complete upon deposit of the paper enclosed in a postpaid, properly addressed wrapper in a Post Office or official depository under the exclusive care and custody of the United States Post Office Department, or, for those having access to such services, upon deposit with the State Courier Service or Inter-Office Mail.

(d) **Proof of Service.** Papers presented for filing shall contain an acknowledgment of service by the person served or proof of

service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. Proof of service shall appear on or be affixed to the papers filed.

(e) **Joint Appellants and Appellees.** Any paper required by these rules to be served on a party is properly served upon all parties joined in the appeal by service upon any one of them.

(f) **Numerous Parties to Appeal Proceeding Separately.** When there are unusually large numbers of appellees or appellants proceeding separately, the trial tribunal upon motion of any party or on its own initiative, may order that any papers required by these rules to be served by a party on all other parties need be served only upon parties designated in the order, and that the filing of such a paper and service thereof upon the parties designated constitutes due notice of it to all other parties. A copy of every such order shall be served upon all parties to the action in such manner and form as the court directs.

(g) **Form of Papers; Copies.** Papers presented to either appellate court for filing shall be letter size (8½ x 11") with the exception of wills and exhibits. Documents filed in the trial division prior to July 1, 1982, may be included in records on appeal whether they are letter size or legal size (8½ x 14"). All printed matter must appear in at least 11 point type on unglazed white paper of 16-20 pound substance so as to produce a clear, black image, leaving a margin of approximately one inch on each side. The body of text shall be presented with double spacing between each line of text. The format of all papers presented for filing shall follow the instructions found in the Appendixes to these Appellate Rules.

All documents presented to either appellate court other than records on appeal, which in this respect are governed by Appellate Rule 9, shall, unless they are less than 5 pages in length, be preceded by a subject index of the matter contained therein, with page references, and a table of authorities, i.e., cases (alphabetically arranged), constitutional provisions, statutes, and textbooks cited, with references to the pages where they are cited.

The body of the document shall at its close bear the printed name, post office address, and telephone number of counsel of record, and in addition, at the appropriate place, the manuscript signature of counsel of record.

Adopted: 13 June 1975.

Amended: 5 May 1981—26(g)—effective for all appeals arising from cases filed in the court of original jurisdiction after 1 July 1982;
11 February 1982—26(c);
7 December 1982—26(g)—effective for documents filed on and after 1 March 1983;
27 November 1984—26(a)—effective for documents filed on and after 1 February 1985;
30 June 1988—26(a) and (g)—effective 1 September 1988.

RULE 28

BRIEFS: FUNCTION AND CONTENT

(a) **Function.** The function of all briefs required or permitted by these rules is to define clearly the questions presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. Review is limited to questions so presented in the several briefs. Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned. Similarly, questions properly presented for review in the Court of Appeals but not then stated in the notice of appeal or the petition, accepted by the Supreme Court for review, and discussed in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court for review by that Court are deemed abandoned.

(b) **Content of Appellant's Brief.** An appellant's brief in any appeal shall contain, under appropriate headings, and in the form prescribed by Rule 26(g) and the Appendixes to these rules, in the following order:

(1) A cover page, followed by a table of contents and table of authorities required by Rule 26(g).

(2) A statement of the questions presented for review.

(3) A concise statement of the procedural history of the case. This shall indicate the nature of the case and summarize the course of proceedings up to the taking of the appeal before the court.

(4) A full and complete statement of the facts. This should be a non-argumentative summary of all material facts underlying the matter in controversy which are necessary to understand all questions presented for review, supported by references to pages in the transcript of proceedings, the record on appeal, or exhibits, as the case may be.

(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 pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal. Assignments of error 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.

The body of the argument shall contain citations of the authorities upon which the appellant relies. Evidence or other proceedings material to the question presented may be narrated or quoted in the body of the argument, with appropriate reference to the record on appeal or the transcript of proceedings, or the exhibits.

(6) A short conclusion stating the precise relief sought.

(7) Identification of counsel by signature, typed name, office address and telephone number.

(8) The proof of service required by Rule 26(d).

(9) The appendix required by Rule 28(d).

(c) **Content of Appellee's Brief; Presentation of Additional Questions.** An appellee's brief in any appeal shall contain a table of contents and table of authorities as required by Rule 26(g), an argument, a conclusion, identification of counsel and proof of service in the form provided in Rule 28(b) for an appellant's brief, and any appendix as may be required by Rule 28(d). It need contain no statement of the questions presented, statement of the procedural history of the case, or statement of the facts, unless the appellee disagrees with the appellant's statements and desires to make a restatement or unless the appellee desires to present questions in addition to those stated by the appellant.

Without having taken appeal, an appellee may present for review, by stating them in his brief, any questions raised by cross-assignments of error under Rule 10(d). Without having

taken appeal or made cross-assignments of error, an appellee may present the question, by statement and argument in his brief, whether a new trial should be granted to the appellee rather than a judgment n.o.v. awarded to the appellant when the latter relief is sought on appeal by the appellant.

If the appellee is entitled to present questions in addition to those stated by the appellant, the appellee's brief must contain a full, non-argumentative summary of all material facts necessary to understand the new questions supported by references to pages in the record on appeal, the transcript of proceedings, or the appendixes, as appropriate.

(d) **Appendixes to Briefs.** Whenever the transcript of proceedings is filed pursuant to Rule 9(c)(2), the parties must file verbatim portions of the transcript as appendixes to their briefs, if required by this Rule 28(d).

(1) **When Appendixes to Appellant's Brief Are Required.** Except as provided in Rule 28(d)(2), the appellant must reproduce as appendixes to its brief:

(i) those portions of the transcript of proceedings which must be reproduced verbatim in order to understand any question presented in the brief;

(ii) those portions of the transcript showing the pertinent questions and answers when a question presented in the brief involves the admission or exclusion of evidence;

(iii) relevant portions of statutes, rules, or regulations, the study of which is required to determine questions presented in the brief.

(2) **When Appendixes to Appellant's Brief Are Not Required.** Notwithstanding the requirements of Rule 28(d)(1), the appellant is not required to reproduce an appendix to its brief with respect to an assignment of error:

(i) whenever the portion of the transcript necessary to understand a question presented in the brief is reproduced verbatim in the body of the brief;

(ii) to show the absence or insufficiency of evidence unless there are discrete portions of the transcript where the subject matter of the alleged insufficiency of the evidence is located; or

(iii) to show the general nature of the evidence necessary to understand a question presented in the brief if such evidence has been fully summarized as required by Rule 28(b)(4) and (5).

(3) **When Appendixes to Appellee's Brief Are Required.** Appellee must reproduce appendixes to his brief in the following circumstances:

(i) Whenever the appellee believes that appellant's appendixes do not include portions of the transcript required by Rule 28(d)(1), the appellee shall reproduce those portions of the transcript he believes to be necessary to understand the question.

(ii) Whenever the appellee presents a new or additional question in his brief as permitted by Rule 28(c), the appellee shall reproduce portions of the transcript as if he were the appellant with respect to each such new or additional question.

(4) **Format of Appendixes.** The appendixes to the briefs of any party shall be in the format prescribed by Rule 26(g) and shall consist of clear photocopies of transcript pages which have been deemed necessary for inclusion in the appendix under this Rule 28(d). The pages of the appendix shall be consecutively numbered and an index to the appendix shall be placed at its beginning.

(e) **References in Briefs to the Record.** References in the briefs to assignments of error shall be by their numbers and to the pages of the printed record on appeal or of the transcript of proceedings, or both, as the case may be, at which they appear. Reference to parts of the printed record on appeal and to the verbatim transcript or documentary exhibits shall be to the pages where the parts appear.

(f) **Joinder of Multiple Parties in Briefs.** Any number of appellants or appellees in a single cause or in causes consolidated for appeal may join in a single brief although they are not formally joined on the appeal. Any party to any appeal may adopt by reference portions of the briefs of others.

(g) **Additional Authorities.** Additional authorities discovered by a party after filing his brief may be brought to the attention of the court by filing a memorandum thereof with the clerk of the court and serving copies upon all other parties. The memorandum may not be used as a reply brief or for additional

argument, but shall simply state the issue to which the additional authority applies and provide a full citation of the authority. Authorities not cited in the briefs nor in such a memorandum may not be cited and discussed in oral argument.

Before the Court of Appeals, the party shall file an original and three copies of the memorandum; in the Supreme Court, the party shall file an original and 14 copies of the memorandum.

(h) **Reply Briefs.** The appellant may file a brief in reply to the brief of the appellee and if the appellee has cross-appealed the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. No further briefs may be filed except with leave of the appellate court.

(i) **Amicus Curiae Briefs.** A brief of an amicus curiae may be filed only by leave of the appellate court wherein the appeal is docketed or in response to a request made by that Court on its own initiative.

A person desiring to file an amicus curiae brief shall present to the Court a motion for leave to file, served upon all parties, within ten days after the printed record is mailed by the Clerk and ten days after the record is docketed in pauper cases. The motion shall state concisely the nature of the applicant's interest, the reasons why an amicus curiae brief is believed desirable, the questions of law to be addressed in the amicus curiae brief and the applicant's position on those questions. The proposed amicus curiae brief may be conditionally filed with the motion for leave. Unless otherwise ordered by the Court, the application for leave will be determined solely upon the motion, and without responses thereto or oral argument.

The clerk of the appellate court will forthwith notify the applicant and all parties of the court's action upon the application. Unless other time limits are set out in the order of the Court permitting the brief, the amicus curiae shall file the brief within the time allowed for the filing of the brief of the party supported or, if in support of neither party, within the time allowed for filing appellant's brief. Reply briefs of the parties to an amicus curiae brief will be limited to points or authorities presented in the amicus curiae brief which are not presented in the main briefs of the parties. No reply brief of an amicus curiae will be received.

A motion of an amicus curiae to participate in oral argument will be allowed only for extraordinary reasons.

Adopted: 13 June 1975.

Amended: 27 January 1981—repeal 28(d)—effective 1 July 1981;
10 June 1981—28(b) and (c)—effective 1 October 1981;
12 January 1982—28(b)(4)—effective 15 March 1982;
7 December 1982—28(i)—effective 1 January 1983;
27 November 1984—28(b), (c), (d), (e), (g), and (h)—effective 1 February 1985;
30 June 1988—28(a), (b), (c), (d), (e), (h), and (i)—effective 1 September 1988.

AMENDMENT OF ORDER CONCERNING ELECTRONIC MEDIA AND STILL PHOTOGRAPHY COVERAGE OF PUBLIC JUDICIAL PROCEEDINGS

The ORDER CONCERNING ELECTRONIC MEDIA AND STILL PHOTOGRAPHY COVERAGE OF PUBLIC JUDICIAL PROCEEDINGS, adopted by this Court 21 September 1982, 306 N.C. 797, as amended 10 November 1982, 307 N.C. 741, and 24 June 1987, 319 N.C. 679, is hereby amended as follows:

Rewrite the proviso at the end of subsection 5(c) to read as follows:

> Provided, however, hand-held audio tape recorders or camera-mounted video-audio recorders may be used upon prior notification to, and with the approval of, the presiding judge; such approval may be withdrawn at any time.

As amended the Order adopted 21 September 1982 shall be in effect from 1 July 1988 to 30 June 1990 unless earlier amended, rescinded, or extended by order of the Court.

This order shall be published in the advance sheets of the Supreme Court and of the Court of Appeals.

ADOPTED BY THE COURT IN CONFERENCE this the 30th day of June 1988.

WHICHARD, J.
For the Court

CLIENT SECURITY FUND

On 10 October 1984, this Court, upon recommendation of the North Carolina State Bar, established the Client Security Fund. It now appears that it will not be necessary for contributions to be made to the fund for the calendar year 1989; therefore, the Court orders that the requirement of contribution to the Client Security Fund by the members of the North Carolina State Bar is waived for the calendar year 1989.

Done by Order of the Court in Conference, this 28th day of July, 1988.

s/WHICHARD, J.
For the Court

AMENDMENT TO NORTH CAROLINA SUPREME COURT LIBRARY RULES

Pursuant to Section 7A-13(d) of the General Statutes of North Carolina, the following amendment to the Supreme Court Library Rules as promulgated December 20, 1967 (275 N.C. 729) and amended November 28, 1972 (281 N.C. 772), April 14, 1975 (286 N.C. 731), July 24, 1980 (299 N.C. 745), July 19, 1982 (305 N.C. 784), November 8, 1983 (309 N.C. 829), June 21, 1984 (311 N.C. 773), and March 18, 1986 (313 N.C. 755) has been approved by the Library Committee and hereby is promulgated:

Section 1. Appendix I. Official Register, State of North Carolina, is amended by the following addition:

(13) The Chairman of the Administrative Review Commission.

Section 2. This amendment shall become effective September 12, 1988.

This the 12 day of September, 1988.

FRANCES H. HALL
Librarian

APPROVED:
LOUIS B. MEYER
Chairman
For the Library Committee

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N. C. Index 3d.

TOPICS COVERED IN THIS INDEX

ACCOUNTANTS

§ 1. Generally

A party cannot show justifiable reliance on information contained in audited financial statements without showing that he relied upon the actual financial statements themselves to obtain this information. *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 200.

Plaintiff's complaint was insufficient to state a claim against defendant accountants for negligent misrepresentation in its preparation of an audit report of the financial statements of a corporation where such plaintiff alleged that it got the financial information upon which it relied in extending credit to the audited corporation from a Dun & Bradstreet report rather than from the audited statements themselves, but a second plaintiff's complaint was sufficient to state a claim where it did not allege that plaintiff relied on sources other than the audited financial statements in extending credit to the audited corporation. *Ibid.*

The rule set forth in Restatement (Second) of Torts § 551 is adopted as the standard for determining the scope of an accountant's liability to persons other than the client for whom an audit was prepared. *Ibid.*

APPEAL AND ERROR

§ 62.2. Granting of Partial New Trial

The Supreme Court declined to order a new trial after holding that there was sufficient evidence of damages to support a jury award for unjust enrichment in a construction dispute where defendants alleged that they had not presented evidence of unjust enrichment after the trial court reserved a ruling on their motion for a directed verdict at the close of plaintiff's evidence for fear of making plaintiff's case for him. *Booe v. Shadrick*, 567.

§ 63. Remand for Misapprehension as to Law

When a trial court has failed to exercise its discretion regarding a discretionary matter and has ruled on it under the mistaken impression it is required to rule a particular way as a matter of law, its holding must be reversed and the matter remanded for the trial court to exercise its discretion. *Lemons v. Old Hickory Council*, 271.

§ 64. Affirmance

Where one member of the Supreme Court did not take part in the decision as to whether governmental immunity attached to the enforcement and investigative duties of local ABC boards, and the other members are equally divided on that issue, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *McNeill v. Durham County ABC Bd.*, 425.

§ 68. Law of the Case

A Supreme Court decision by an evenly divided Court which affirmed a decision of the Utilities Commission allowing Duke Power Company to recover from its ratepayers costs expended on two abandoned nuclear power stations is res judicata as to such issue in this rate case involving the same parties. *State ex rel. Utilities Comm. v. Public Staff*, 689.

ARCHITECTS

§ 3. Liability for Defective Conditions

In an action alleging negligence and breach of contract in providing architectural services for a hospital which collapsed during construction, the trial court

CONSTITUTIONAL LAW — Continued

§ 34. Double Jeopardy

It was not double jeopardy for a defendant to be punished for convictions for rape, incest, and taking indecent liberties with a minor. *S. v. Fletcher*, 415.

The trial court did not err in a prosecution for first degree rape, incest, and taking indecent liberties with a minor by denying defendant's motion for an examination of the victim by a psychologist. *Ibid.*

Defendant's convictions of first degree rape and taking indecent liberties with a minor did not violate the double jeopardy prohibitions of either the state or federal constitutions. *S. v. McNicholas*, 548.

Where the trial court grants defendant's motion for a mistrial because of prosecutorial misconduct, retrial is not barred by the law of the land clause of the N.C. Constitution unless the defendant shows that the prosecutor was motivated by the intent to provoke a mistrial instead of merely the intent to prejudice the defendant. *S. v. White*, 506.

Retrial of defendant for armed robbery after the trial court granted defendant's motion for a mistrial because of prosecutorial misconduct in asking defendant an improper question on cross-examination was not barred by double jeopardy provisions in the federal constitution or by the law of the land clause in the state constitution where the record shows that it is highly unlikely that the prosecutor intended to provoke defendant into moving for a mistrial. *Ibid.*

Defendant was not twice put in jeopardy by being sentenced for both first degree sexual offense and taking indecent liberties with a child. *S. v. Swann*, 666.

§ 45. Right to Appear Pro Se

The trial court erred in permitting defendant to discharge his appointed counsel and represent himself at trial where the court failed to make any inquiry of defendant concerning whether he understood and appreciated the dangers and disadvantages of self-representation or whether he understood the nature of the charges and proceedings and the range of permissible punishments he faced. *S. v. Pruitt*, 600.

§ 48. Effective Assistance of Counsel

The trial court's refusal to allow defendant's brother to sit at counsel's table during the jury selection process did not deprive defendant of the effective assistance of counsel. *S. v. Shaw*, 797.

Defendant in a prosecution for first degree sexual offense and taking indecent liberties with a child did not show that his trial counsel failed to render effective assistance of counsel to his prejudice. *S. v. Swann*, 666.

§ 50. Speedy Trial Generally

There was no violation of defendant's Sixth Amendment right to a speedy trial in a first degree murder prosecution because defendant's trial was eleven months after his original arrest. *S. v. Crandell*, 487.

§ 51. Speedy Trial; Delays in Arrest and Trial

The defendant in a prosecution for first degree sexual offense and taking indecent liberties with a child was not denied his constitutional right to a speedy trial. *S. v. Swann*, 666.

CONSTITUTIONAL LAW — Continued

§ 60. Racial Discrimination in Jury Selection Process

A black defendant's equal protection rights were not violated by the State's exercise of peremptory challenges of black jurors where the prosecution articulated racially neutral reasons for exercising its challenges. *S. v. Jackson*, 251.

A defendant does not have the right to examine the prosecuting attorney in a hearing at trial or post trial to determine if there has been a *Batson* violation by the prosecution's use of peremptory challenges to exclude members of defendant's race from the petit jury. *Ibid.*

Defendant failed to make a prima facie showing of racial discrimination by the State's exercise of its peremptory challenges. *S. v. Gray*, 457.

§ 80. Death Sentences

The *Enmund* rule was not violated by the imposition of the death penalty for first degree murder after the court instructed on acting in concert where the evidence shows that defendant struck the fatal blow to the victim. *S. v. Wilson*, 117.

CONTRACTS

§ 7.1. Contracts Restricting Business Competition between Employers and Employees

The mere fact that plaintiff may have been inconvenienced because defendant hired its employees does not give rise to a claim against defendant for breaching the covenant contained in his own terminable at will employment contract with plaintiff not to solicit or service plaintiff's policyholders or interfere with its existing policies for one year after termination. *Peoples Security Life Ins. Co. v. Hooks*, 316.

A territorial restriction in a noncompetition clause was reasonable under Illinois law. *United Laboratories, Inc. v. Kuykendall*, 643.

§ 27.1. Sufficiency of Evidence of Existence of Contract

The evidence was sufficient to permit the jury to find that plaintiff and the individual defendants entered into a valid oral contract to form a new corporation capitalized by the individual defendants which would have the exclusive right to sell plaintiff's factory automation systems. *Williams v. Jones*, 42.

§ 33. Action for Interference; Sufficiency of Plaintiff's Allegations

Plaintiff insurance company's allegations that defendant, a former employee of plaintiff, induced plaintiff's employees to terminate their terminable at will contracts with plaintiff and to breach the non-competition clauses in their contracts with plaintiff were insufficient to state a claim for tortious interference with contract because the hiring and placing of plaintiff's former employees by defendant for the purposes of developing the territory assigned to him by a company competing with plaintiff amounted to justifiable interference. *Peoples Security Life Ins. Co. v. Hooks*, 316.

§ 34. Actions for Interference; Sufficiency of Evidence

The trial court erred by granting plaintiff's motion for a directed verdict on a tortious interference with contract claim. *United Laboratories, Inc. v. Kuykendall*, 643.

COUNTIES

§ 5. County Zoning

The practice of conditional use zoning is an approved practice in North Carolina. *Chrismon v. Guilford County*, 611.

§ 5.1. Validity of Zoning Ordinances

It is not necessary that property rezoned to a conditional use district be available for all of the uses allowed under the corresponding general use district. *Chrismon v. Guilford County*, 611.

The rezoning by a board of county commissioners of two tracts consisting of 8.24 acres from A-1 Agricultural to Conditional Use Industrial did not constitute illegal contract zoning but was valid conditional use zoning. *Ibid.*

COURTS

§ 21.5. Conflict of Laws in Tort Actions

Statutes of repose will be treated as substantive provisions for choice of law purposes, and the twelve-year Florida statute of repose applied to plaintiff's products liabilities claims where the sale, delivery and use of the product and the injury itself took place in Florida. *Boudreau v. Baughman*, 331.

§ 21.6. Conflict of Laws in Products Liability Actions

The U.C.C. provision stating that North Carolina law will be applied to transactions bearing an "appropriate relation" to this state means "most significant relationship," and thus the law of Florida applied to plaintiff's claims for breach of warranty of a chair where Florida was the state with the most significant relationship to the warranty claims since it was the place of sale, distribution, delivery and use of the chair as well as the place of injury. *Boudreau v. Baughman*, 331.

CRIMINAL LAW

§ 26.5. Plea of Former Jeopardy; Same Acts Violating Different Statutes

Defendant's convictions of first degree rape and taking indecent liberties with a minor did not violate the double jeopardy prohibitions of either the state or federal constitutions. *S. v. McNicholas*, 548.

§ 26.8 Former Jeopardy; Mistrial

Where the trial court grants defendant's motion for a mistrial because of prosecutorial misconduct, retrial is not barred by the law of the land clause of the N.C. Constitution unless the defendant shows that the prosecutor was motivated by the intent to provoke a mistrial instead of merely the intent to prejudice the defendant. *S. v. White*, 506.

Retrial of defendant for armed robbery after the trial court granted defendant's motion for a mistrial because of prosecutorial misconduct in asking defendant an improper question on cross-examination was not barred by the double jeopardy provisions in the federal constitution or by the law of the land clause in the state constitution where the record shows that it is highly unlikely that the prosecutor intended to provoke defendant into moving for a mistrial. *Ibid.*

§ 33. Facts in Issue

Defendant's evidence that she, her husband and her oldest stepson consulted a lawyer for the purpose of bringing an action to obtain custody of her stepsons from their natural mother shortly before the mother accused defendant of sexual of-

CRIMINAL LAW — Continued

fenses against them was admissible under Rule of Evidence 401 to support defendant's evidence that the natural mother suborned the boys' testimony against her. *S. v. Helms*, 315.

§ 34.1. Evidence of Defendant's Guilt of other Offenses; Inadmissibility to Show Defendant's Character and Disposition to Commit Offense

In a prosecution for two first degree murders, testimony by a fellow inmate that defendant told him he was in jail for the attempted murder of his girlfriend and by a detective that defendant was in jail for assaulting his girlfriend with a deadly weapon with intent to kill was not relevant to any fact in issue in the murder charges and was improperly admitted. *S. v. Cashwell*, 574.

§ 34.2. Defendant's Guilt of other Offenses; Admission of Inadmissible Evidence as Harmless Error

The trial court did not err in a prosecution for rape, sexual offenses, and burglary by allowing the prosecutor to ask defendant's character witness whether he knew that defendant had been selling drugs in jail. *S. v. Martin*, 229.

§ 34.3. Evidence of Defendant's Guilt of other Offenses; Error Cured by Court's Admonition or other Action

Any prejudice to defendant from a statement by a witness that he and defendant had "done time together" was cured by the prompt corrective action by the trial court. *S. v. Wilson*, 117.

§ 34.8. Admissibility of Evidence of other Offenses to Show Common Plan or Scheme

The trial court in a prosecution for first degree rape and taking indecent liberties erred in permitting a witness to testify for the purpose of showing a common plan or scheme that she was sexually assaulted by defendant on numerous occasions some seven to twelve years earlier in much the same manner as the prosecutrix since the prior acts were too remote in time to be admissible. *S. v. Jones*, 585.

The trial court did not err in a prosecution for first degree sexual offense involving a seven-year-old girl by admitting testimony that defendant had admitted fondling the private parts of two other children. *S. v. Rosier*, 826.

§ 35. Evidence that Offense Was Committed by Another

The trial court erred in a prosecution for first degree murder by excluding a drawing found by law enforcement officers among the victim's personal effects which included a rough map of the area surrounding the victim's North Carolina home and written notations indicating a possible larceny scheme. *S. v. McElrath*, 1.

The trial court in a first degree murder case did not err in restricting defendant's cross-examination of a State's witness concerning a motive by the witness and others to kill the victim because the victim knew about a break-in they had committed. *S. v. Wilson*, 117.

§ 42.1. Articles other than Clothing Used in Commission of Crime or Found at Scene

The trial court in a first degree murder case did not err in admitting insulation particles found in the victim's apartment. *S. v. Crandell*, 487.

§ 42.4. Weapons Connected with Crime; Identification

The trial court did not err in a prosecution for rape, sexual offense, kidnapping, and common law robbery by introducing an officer's testimony about a rifle

found in defendant's car when he was arrested or another officer's testimony about her identification of a photograph of defendant. *S. v. Herring*, 733.

§ 43.4. Gruesome, Inflammatory, or othewise Prejudicial Photographs

The trial court did not err in admitting photographs of a murder victim's body as it was found in the trunk of a car in an Atlanta parking lot. *S. v. Crandell*, 487.

§ 50. Expert and Opinion Testimony in General

The trial court did not err in a prosecution for first degree rape, incest, and taking indecent liberties with a child by excluding the testimony of a psychologist who had not examined the victim. *S. v. Fletcher*, 415.

§ 50.1. Admissibility of Expert Opinion Testimony

The trial court erred in a first degree murder prosecution in which defendant did not plead insanity by not allowing defendant's expert to testify that in his opinion defendant's diminished mental capacity affected his ability to make and carry out plans or as to whether defendant was under the influence of mental or emotional disturbance at the time of the offense. *S. v. Shank*, 243.

§ 50.2. Opinion of Nonexpert

Testimony from two law enforcement officers in a first degree sexual offense case that the victim's statements to them were consistent with the victim's accounts to other people constituted admissible lay opinions. *S. v. Rhinehart*, 53.

The trial court did not err in a prosecution for first degree rape of a nine-year-old stepdaughter by admitting the testimony of two witnesses concerning the characteristics of sexually abused children. *S. v. Aguallo*, 818.

An officer's testimony that tennis shoes measured a certain length and that each pair showed signs of wearing on the heel and ball areas constituted proper lay opinion testimony which required no expertise. *S. v. Shaw*, 797.

§ 53. Medical Expert Testimony in General

There was no plain error in a prosecution for first degree sexual offense, attempted first degree sexual offense, and armed robbery where defendant challenged the admissibility of a doctor's opinion that some event had happened which led to the mental state of the victim after the prosecutor had asked the doctor for his opinion, the doctor had responded, and the prosecutor had proceeded to the next question. *S. v. Reid*, 309.

§ 60.1. Photographs of Fingerprints

There was no error in the introduction of fingerprint evidence from an SBI agent where a local police captain had not also made a positive identification and where photographs of the fingerprints were not used to illustrate the testimony. *S. v. Short*, 783.

§ 60.3. Fingerprints; Qualification and Testimony of Expert

The trial court properly admitted a fingerprint identification opinion rendered by an expert who did not testify at trial for the purpose of revealing one basis underlying a testifying expert's opinion given under Rule of Evidence 703. *S. v. Jones*, 406.

§ 66.2. Identification of Defendant; Effect of Uncertainty of Witness

Assuming that a kidnapping and rape victim's tentative in-court identification of defendant was affected by improperly suggestive identification procedures, ad-

CRIMINAL LAW — Continued

mission of the victim's in-court identification was harmless error where it appears beyond a reasonable doubt that the jury relied upon an officer's unequivocal identification of defendant rather than the victim's uncertain identification. *S. v. Parker*, 559.

§ 67.1. Identity by Voice; Demonstrations

The trial court properly denied defendant's request for a voir dire hearing to determine whether in-court voice identification testimony was tainted by an illegal pretrial identification where there was no evidence of any pretrial identification. *S. v. Shaw*, 797.

§ 68. Other Evidence of Identity

Expert testimony that a hair found in a rape victim's pubic area was microscopically consistent with one belonging to defendant was relevant and admissible on the issue of whether the victim was sexually assaulted by defendant even though identity was not in question in the case. *S. v. McNicholas*, 548.

§ 72. Evidence as to Age

The trial court in a prosecution for sexual offenses and taking indecent liberties with minors did not err in allowing a deputy to testify that in his opinion defendant appeared to be between 29 and 30 years of age. *S. v. Banks*, 753.

§ 73. Hearsay Testimony in General

The trial court did not err in a murder prosecution by refusing to admit evidence of the mental status of the victim. *S. v. Weeks*, 152.

§ 73.2. Statements not within Hearsay Rule

The trial court did not err in a first degree murder prosecution by admitting into evidence a telephone message written by the victim's next-door neighbor to the victim's roommate. *S. v. McElrath*, 1.

An affidavit for a search warrant that identified a murder victim as the source of information concerning stolen property on a farm owned by defendant's brother was not inadmissible hearsay. *S. v. Wilson*, 117.

The trial court did not err in a murder prosecution by admitting a copy of a newspaper containing a story about the death of the victim and a photograph of investigating officers making casts of tire prints at the crime scene. *S. v. Locklear*, 349.

There was no prejudice in a prosectuion for conspiracy to commit burglary upon the introduction without a limiting instruction of testimony concerning a conversation between co-conspirators relating to defendant and one of the co-conspirators. *S. v. Short*, 783.

§ 73.4. Statement as Part of Res Gestae

The trial court did not err in a prosecution for first degree sexual offense, attempted first degree sexual offense, and armed robbery by admitting a detective's testimony as to what the captain of the identification bureau had said while destroying the rape kit. *S. v. Reid*, 309.

§ 75.1. Voluntariness of Confession; Effect of Fact that Defendant Is in Custody

The trial court erred in a murder prosecution by finding that an inculpatory statement on March 6 was the result of a custodial interrogation, so that another statement on March 7 was not tainted and was admissible. *S. v. Allen*, 176.

CRIMINAL LAW — Continued

§ 75.2. Voluntariness of Confession; Effect of Promises, Threats, or other Statements of Officers

The trial court did not err in a prosecution for first degree rape by denying defendant's motion to suppress inculpatory statements. *S. v. Wilson*, 91.

The trial court's findings of fact and conclusion that defendant's inculpatory statement was voluntary was supported by competent evidence. *S. v. Herring*, 733.

§ 75.7. Confession; Requirement that Defendant Be Warned of Constitutional Rights

Miranda warnings were not required as a prerequisite to the admissibility of information as to defendant's birthdate routinely obtained during the booking process even though such information incidentally helped establish an essential element of sexual offense and indecent liberties charges for which defendant was booked. *S. v. Banks*, 753.

§ 75.14. Voluntariness of Confession; Defendant's Mental Capacity to Confess or Waive Rights Generally

There was an adequate basis in a murder prosecution for the judge's findings as to defendant's capacity to understand and waive her constitutional rights. *S. v. Allen*, 176.

The finding of the trial judge in a murder prosecution that defendant's confession was voluntarily given was supported by the evidence and was conclusive on appeal. *Ibid.*

The trial court in a first degree murder prosecution did not err in finding that defendant was not depressed and in concluding that defendant freely, knowingly and intelligently waived his constitutional rights. *S. v. Johnson*, 288.

§ 77.2. Self-Serving Declarations

The trial court in a murder prosecution did not err by excluding a written statement by defendant where the written statement was not made at the same time as an earlier oral statement and was not a part of the whole confession. *S. v. Weeks*, 152.

§ 77.3. Declarations Implicating Others

Statements made by a murder victim to a deputy sheriff that he participated in stealing property from a farm, that defendant also participated, and that defendant and others had threatened to kill him if he told anyone were admissible under Rule 804(b)(3) as statements against penal interest, although only the statement that defendant participated in the crime was a disserving statement. *S. v. Wilson*, 117.

§ 84. Evidence Obtained by Unlawful Means

There is no good faith exception under Art. I, § 20 of the N.C. Constitution to the exclusion of evidence obtained by an unreasonable search and seizure, and Art. I, § 20 thus required the exclusion of evidence derived from a blood sample obtained by officers from defendant in reliance upon a nontestimonial identification order which was improperly issued because defendant was in custody. *S. v. Carter*, 709.

§ 86.8. Credibility of State's Witnesses

The trial court did not err in a prosecution for the first degree rape of a nine-year-old girl by admitting a pediatrician's testimony that the results of a physical

CRIMINAL LAW — Continued

examination were consistent with the victim's preexamination statement. *S. v. Aguallo*, 818.

§ 87.2. Leading Questions

The trial court did not abuse its discretion by allowing leading questions to be asked of a nine-year-old rape victim. *S. v. Wilson*, 91.

§ 88. Cross-examination Generally

The trial court did not erroneously limit defendant's right of cross-examination by granting the State's motion to prevent discussion of certain items which were not relevant to this case. *S. v. Crandell*, 487.

§ 88.1. Conduct and Scope of Cross-examination

There was no prejudice in a prosecution for murder, armed robbery, burglary, and conspiracy to commit burglary from the trial court's refusal to allow counsel to examine a co-conspirator who testified under a plea bargain on recross-examination with respect to statements read into the record on direct and redirect examination by the State. *S. v. Short*, 783.

§ 88.4. Cross-examination of Defendant

Where defendant testified at some length about his absence from the state for two years while rape, incest and sexual offense charges were pending against him, defendant opened the door to cross-examination about whether he knew that an order for his arrest had been issued. *S. v. Weathers*, 97.

The trial court did not abuse its discretion in a prosecution for the first degree rape of defendant's nine-year-old stepdaughter in ruling on the State's cross-examination of defendant. *S. v. Aguallo*, 818.

§ 89.3. Corroboration; Prior Statements of Witness; Generally; Consistent Statements

The trial court did not err in a prosecution for the rape of defendant's nine-year-old stepdaughter by admitting as corroborative testimony a written statement made by the victim which contained a statement which went beyond the victim's earlier testimony where the additional fact added weight or credibility to the child's earlier testimony. *S. v. Aguallo*, 818.

§ 89.4 Corroboration; Prior Inconsistent Statements

The trial court erred in a prosecution for murder and assault with a deadly weapon with intent to kill inflicting serious injury by admitting as corroborative evidence a witness's recorded statement to an officer which was inconsistent with the witness's trial testimony. *S. v. Burton*, 447.

Where a defense witness denied that defendant had told him that he raped the victim and denied that he told his probation officer and an employee of the officer that defendant told him he had raped the victim, the trial court erred in allowing the State to call the probation officer and the employee to testify that the witness had told them of defendant's statement, since the State may not impeach a defense witness by use of extrinsic evidence of prior inconsistent statements. *S. v. Williams*, 452.

§ 89.6. Impeachment

Where defendant's mother remained in the courtroom during an accomplice's testimony and thereafter offered testimony directly contradicting the accomplice, it was appropriate for the prosecution to impeach the credibility of defendant's

CRIMINAL LAW — Continued

mother by asking her whether she knew that the witnesses in the case were being sequestered. *S. v. Wilson*, 117.

§ 89.7. Impeachment; Mental Capacity of Witness

The trial court properly denied defendant's motion for a psychiatric evaluation of a State's witness. *S. v. Wilson*, 117.

§ 89.8. Impeachment; Promise of Leniency

The trial court did not err in refusing to permit defense counsel to ask a witness who had already stated that he was motivated to testify for the State because of a plea bargain whether he was "aware that a life sentence would mean that you could get out in less time than a fifty-year sentence." *S. v. Wilson*, 117.

§ 89.10. Impeachment; Witness's Prior Criminal Conduct

Any error in the trial court's limitation of defendant's right to impeach two State's witnesses by cross-examining them concerning criminal activities or pending charges was harmless beyond a reasonable doubt. *S. v. Crandell*, 487.

§ 90. Rule that Party May not Discredit own Witness

There was no prejudice in a murder prosecution from the trial judge's refusal to allow defendant to be impeached by defense counsel with evidence of prior convictions. *S. v. Locklear*, 349.

§ 91.1. Continuance

The trial court did not err during defendant's second trial for rape, burglary, and sexual offenses by allowing the State to impeach him by asking questions based on an erroneous transcript of the first trial. *S. v. Martin*, 229.

The trial court did not err in a murder prosecution by not acting ex mero motu to continue a hearing on certain pretrial motions in order to provide defendant's court-appointed counsel adequate time to confer with retained counsel. *S. v. Locklear*, 349.

§ 91.2. Continuance on Ground of Pretrial Publicity

The trial court in a first degree murder case did not err in denying defendant's motion for a continuance based upon local publicity arising from the arrest of a suspect in a different murder case three and a half weeks prior to defendant's trial. *S. v. Crandell*, 487.

§ 91.6. Continuance on Ground that Certain Evidence Has not Been Provided by State

The trial court did not err by denying defendant's motion for a continuance where defense counsel learned of a tape recording of defendant's statement three days prior to its introduction at trial. *S. v. Herring*, 733.

§ 91.7. Continuance on Ground of Absence of Witness

Defendant was not denied his right of a fair opportunity to present a defense by the denial of his oral motion for a continuance until two witnesses for the defense could be present where the proposed testimony was tangential to the central issue in the case. *S. v. Gardner*, 591.

The trial court did not abuse its discretion in a prosecution for first degree sexual offense and taking indecent liberties with a child by denying defendant's motion to continue based on the absence of two witnesses. *S. v. Swann*, 666.

CRIMINAL LAW — Continued

§ 91.12. Speedy Trial; Periods Excluded from Time Computation; Pretrial Motions

Defendant's statutory right to a speedy trial in a prosecution for first degree sexual offense and taking indecent liberties with a child was not violated by the passage of 155 days between indictment and the beginning of trial where 35 days were excludable for pretrial motions. *S. v. Swann*, 666.

§ 91.14. Speedy Trial; Periods Excluded from Time Computation; Continuance Granted

There was no violation of the Speedy Trial Act in a first degree murder prosecution where 134 days elapsed from defendant's indictment to his motion to dismiss because all but 70 days were excluded by continuances granted by the court. *S. v. Crandell*, 487.

§ 92.1. Consolidation of Charges against Multiple Defendants Proper

The trial court did not abuse its discretion in overruling an objection to the joinder of the cases against both defendants for trial. *S. v. Short*, 783.

§ 92.4. Consolidation of Multiple Charges against Same Defendant Proper

The trial court did not err by consolidating two counts of first degree sexual offense and two counts of taking indecent liberties with a child. *S. v. Swann*, 666.

§ 98.1. Misconduct of Witnesses

The trial court did not err in a murder prosecution by failing to instruct the jury ex mero motu to disregard a display of emotion by the victim's widow. *S. v. Locklear*, 349.

§ 99.2. Questions, Remarks and other Conduct of the Court during Trial

The defendant in a murder prosecution failed by lack of contemporaneous objection to preserve her argument regarding a comment by the judge. *S. v. Allen*, 176.

§ 99.3. Court's Conduct in Connection with Admission of Evidence

Defendant failed to establish prejudice from the court's limiting instruction concerning admissions made by a co-conspirator testifying pursuant to a plea bargain. *S. v. Short*, 783.

§ 99.4. Court's Conduct in Connection with Objections and Rulings Thereon

The trial court's remarks when ruling on defendant's objections, "Well, as phrased, sustained," and "Well, sustained for the moment," did not constitute improper expressions of opinion on the evidence. *S. v. Shaw*, 797.

§ 101.4. Custody of Jury; Conduct Affecting or During Deliberation

The trial court did not err in denying defendant's request to sequester the impaneled jurors in his first degree murder trial because his trial occurred at the time of executions in this and other states. *S. v. Wilson*, 117.

The trial court properly denied a mistrial in a rape and burglary case where a conversation took place between the bailiff and the jury foreman after the verdict was reached but before it was announced in open court. *S. v. Gardner*, 591.

§ 102. Jury Argument; Opening and Closing Arguments

A defendant in a first degree murder prosecution was not improperly denied the right to opening and closing arguments to the jury, despite having the burden of proof as to insanity. *S. v. Battle*, 69.

CRIMINAL LAW — Continued

There was no prejudice in a prosecution for rape, kidnapping, sexual offenses, and common law robbery from statements made by the prosecutor. *S. v. Herring*, 733.

§ 102.4. Conduct of Prosecutor during Trial Generally

The trial court in a murder prosecution did not fail to adequately control the district attorney's conduct or err by denying defendant a new trial. *S. v. Allen*, 176.

§ 102.6. Particular Conduct and Comments in Jury Argument

The prosecutor's jury arguments in an obscenity case that if the items in question "are not obscene, I don't know what it would take to be" and stating that an exhibit contained picture after picture of anal intercourse and asking what is more unhealthy than anal intercourse and how it can be anything but obscene were within the latitude allowed counsel in stating contentions and drawing inferences from the evidence. *S. v. Anderson*, 22.

The district attorney's closing argument in a murder prosecution was not so grossly improper as to require the trial court to intervene *ex mero motu*. *S. v. Allen*, 176.

The prosecutor's closing argument in a prosecution for rape, burglary, and sexual offenses was not so grossly improper as to require the trial court to intervene *ex mero motu*. *S. v. Martin*, 229.

The prosecutor's jury argument that the State failed to examine defendant's car for evidence of a kidnapping and murder victim's fingerprints because the car had been in defendant's possession for some time after the crimes and defendant had had opportunities to remove any fingerprints was not improper. *S. v. Wilson*, 117.

The trial court did not err in a murder prosecution by not intervening ex mero motu to instruct the jury as to a misstatement of evidence by the district attorney in his closing argument. *S. v. Locklear*, 349; *S. v. Shaw*, 797.

The prosecutor's jury argument comparing the function of the jury to that of a computer was not so grossly improper as to require the trial court to intervene *ex mero motu*. *Ibid.*

There was no prejudice in a prosecution for first degree sexual offense and taking indecent liberties with a child where the prosecutor argued that man's law is based on God's law. *S. v. Swann*, 666.

§ 102.7. Jury Argument; Comment on Credibility of Witnesses

The prosecutor's jury argument in an obscenity case that, based on the testimony of a State's witness, the jury should disbelieve the testimony of defendant's expert witness was a proper contention based on the evidence and not an improper attack on the credibility of the expert witness. *S. v. Anderson*, 22.

There was no prejudice in a prosecution for first degree sexual offense involving a seven-year-old girl from the prosecutor's comment in his closing argument on the payment of a medical witness where there was no evidence as to what the doctor had been paid. *S. v. Rosier*, 826.

§ 102.8. Jury Argument; Comment on Failure to Testify

The prosecutor's jury argument that no defense witnesses impeached the State's evidence was not an improper comment on defendant's failure to testify. *S. v. Wilson*, 117.

Defense counsel should have been permitted in closing argument to read to the jury the privilege against self-incrimination clause of the Fifth Amendment and to

CRIMINAL LAW — Continued

CRIMINAL LAW — Continued

§ 122.1. Jury's Request for Additional Instructions

The trial court did not abuse its discretion by not giving defendant's special instructions verbatim where the court instructed the jury in substantial conformity with defense counsel's request. *S. v. Herring*, 733.

§ 122.2. Additional Instructions upon Jury's Failure to Reach Verdict

The trial court did not coerce a jury into reaching a verdict in a prosecution for first degree rape, first degree sexual offense, and first degree kidnapping. *S. v. Beaver*, 462.

§ 126.3. Impeachment of Verdict

The trial court did not err by denying defendant's motion for appropriate relief after the verdict based on affidavits from four members of the jury where the matters improperly reported to the jury by the foreman did not deal with defendant or with the evidence introduced in this case, and other matters contained in the affidavits dealt with deliberations in the jury room. *S. v. Rosier*, 826.

§ 128.2. Mistrial

The trial court did not err in refusing to declare a mistrial when one juror left the jury room because of a conflict with other jurors about smoking where the court appealed to the jurors to work together to reach a verdict and the jurors complied. *S. v. Banks*, 753.

§ 134.4. Youthful Offenders

The trial court in a prosecution for first degree sexual offense was without discretion to sentence defendant as a committed youthful offender because the first degree sexual offense statute calls for a mandatory life term. N.C.G.S. § 14-27.4, N.C.G.S. § 148-49.14. *S. v. Rhinehart*, 53.

§ 135. Judgment and Sentence in Capital Cases

The trial court did not err in refusing to give defendant's requested instructions to prospective jurors on the nature of capital sentencing. *S. v. Wilson*, 117.

§ 135.4. Separate Sentencing Proceeding in Capital Cases

Judgment on defendant's conviction for second degree murder was arrested where defendant was also found guilty of felony murder for a second murder, using the second degree murder as the underlying felony. *S. v. Weeks*, 152.

§ 135.9. Sentencing in Capital Cases; Mitigating Circumstances

The trial court in a first degree murder case erred in refusing to submit the mitigating circumstance that defendant has no "significant" history of prior criminal activity where the State presented evidence that defendant had a prior felony conviction for the second degree kidnapping of his wife, that defendant had stored illegal drugs in his shed, and that he had participated in the theft of farm machinery. *S. v. Wilson*, 117.

The three-prong test set forth in *State v. Pinch* for determining whether the trial court's failure in a capital case to submit a statutory mitigating circumstance supported by the evidence is harmless beyond a reasonable doubt will no longer be used since that test improperly shifts the burden from the State to defendant. *Ibid.*

The State failed to carry its burden of proving that the trial court's erroneous failure in a capital case to submit the statutory mitigating circumstance as to whether defendant had no significant history of prior criminal activity was harmless beyond a reasonable doubt, and the death penalty is vacated and the case remanded for a new sentencing hearing. *Ibid.*

CRIMINAL LAW — Continued

§ 138. Severity of Sentence and Determination Thereof

The trial court did not err when sentencing defendant for incest and taking indecent liberties with a minor by using only one form to find factors in aggravation and mitigation for both convictions. *S. v. Fletcher*, 415.

§ 138.21. Fair Sentencing Act; Aggravating Factor of Especially Heinous, Atrocious, or Cruel Offense

The evidence did not support a finding that a murder was especially heinous, atrocious or cruel. *S. v. Torres*, 440.

§ 138.23. Fair Sentencing Act; Aggravating Factor of Use of or Armed with Deadly Weapon

The trial judge's statement that he found that defendant was "armed" with a hammer and that he "used it horribly," together with the judge's reference to "those statutory items," did not amount to findings of both possession and use of the weapon as two distinct aggravating factors. *S. v. Taylor*, 280.

The trial court did not violate G.S. 15A-1340.4(a)(1) by using an element of a joined felonious assault offense—that defendant was armed with a deadly weapon—as a factor in aggravation of defendant's sentence for first degree burglary. *Ibid.*

The evidence supported the trial court's finding in aggravation that defendant was armed with a deadly weapon at the time he broke or entered the victim's dwelling house. *S. v. Rios*, 596.

§ 138.24. Fair Sentencing Act; Aggravating Factor of Age of Victim

The trial court did not err when sentencing defendant for first degree arson by finding in aggravation that the victim was very young where defendant was also convicted of the child's murder. *S. v. Allen*, 176.

The trial court properly found as an aggravating factor that the victim of a breaking or entering was very old even though the victim was not at home at the time of the crime. *S. v. Rios*, 596.

§ 138.28. Fair Sentencing Act; Aggravating Factor of Prior Convictions

The trial court did not err by sentencing defendant to terms in excess of the presumptive term for indecent liberties convictions based upon the aggravating factor of prior convictions. *S. v. Swann*, 666.

§ 138.29. Fair Sentencing Act; Other Aggravating Factors

The trial court did not err in finding as a nonstatutory aggravating factor for first degree burglary that defendant "had inside information, knowing when that lady was alone in a rural area and took advantage of it with the keys." *S. v. Taylor*, 280.

§ 168. Harmless Error in Instructions

The trial court's erroneous failure to instruct the jury on the defense of accident in a first degree murder case was not plain error. *S. v. Loftin*, 375.

§ 168.2. Harmless Error in Statement of Law

Any error by the trial court in instructing on self-defense in a murder case was favorable to defendant. *S. v. Loftin*, 375.

§ 169. Harmless Error in Admission of Evidence; Absence of Objection

There was no plain error where a prosecutor was allowed to rephrase a question following an objection and defendant did not object to the rephrased question. *S. v. Short*, 783.

CRIMINAL LAW — Continued

§ 169.3. Error Cured by Introduction of other Evidence

Assuming the court in a first degree rape case erred in admitting defendant's statement to an officer as to his birthdate because defendant had not been given the Miranda warnings, such error was harmless beyond a reasonable doubt in view of other testimony as to defendant's age. *S. v. Degree*, 302.

Defendant was not prejudiced by the court's exclusion of a statement made by the victim two weeks before his death concerning his intent to buy a gun and kill defendant where similar evidence was admitted by the court. *S. v. Torres*, 440.

§ 170.3. Harmless and Prejudicial Error in Incidents during Trial; Argument of Prosecutor

The trial court's proper instructions on the applicable law in an obscenity case cured any prejudice to defendant resulting from possible misstatements of law in the prosecutors' jury arguments. *S. v. Anderson*, 22.

The trial court's curative instructions removed any possible prejudice that may have resulted when the prosecutors in an obscenity case went outside the record to express personal opinions several times during their jury arguments. *Ibid.*

DIVORCE AND ALIMONY

§ 30. Equitable Distribution

Defendant in an equitable distribution action lacked standing to argue that Art. X, § 4 of the North Carolina Constitution violates the federally protected rights of married men to equal protection and due process. *Armstrong v. Armstrong*, 396.

A defendant in an equitable distribution action was not denied due process and equal protection in that subjecting his military pension to equitable distribution amounted to a retroactive taking or a taking without compensation. *Ibid.*

Written findings of fact are required in every case in which a distribution of marital property is ordered under the Equitable Distribution Act. *Ibid.*

The trial court did not make sufficient findings of fact in an equitable distribution action involving a military pension. *Ibid.*

ELECTRICITY

§ 3. Rates

The Utilities Commission's conclusion that 13.4% is a fair rate of return on Duke Power Company's common equity was not supported by adequate factual findings concerning adjustments for down markets and financing costs of issuing stock. *State ex rel. Utilities Comm. v. Public Staff*, 689.

The Utilities Commission's decision that Duke Power Company's capital structure should include a common equity ratio of 46.3% was supported by substantial evidence. *Ibid.*

The Utilities Commission was not required as a matter of law to reduce the common equity component of a power company's capital structure by an amount equal to the company's investment in its wholly owned, nonregulated subsidiaries in determining the appropriate capital structure for rate-making purposes. *Ibid.*

HOMICIDE

§ 7. Defense of Insanity

The trial court did not err in a first degree murder prosecution by not directing a verdict of not guilty by reason of insanity where the State did not introduce evidence as to defendant's sanity. *S. v. Battle*, 69.

The State was not improperly relieved of proving all of the elements of the crime by the placing of the burden of proof on defendant on the insanity issue. *Ibid.*

§ 8.1. Evidence of Intoxication

The trial court did not err by denying defendant's motions to dismiss a charge of murder on the ground that he was impaired by intoxication. *S. v. Locklear*, 349.

§ 15.4. Expert and Opinion Evidence

The trial court did not err in a first degree murder prosecution in which malice was an issue by not permitting defendant's experts to testify that at the time of the killings defendant did not act in a cool state of mind, that he was acting under a suddenly aroused violent passion, that he did not act with deliberation, and that his ability to conform his behavior to the requirements of the law was impaired. *S. v. Weeks*, 152.

§ 21.5. Sufficiency of Evidence of First Degree Murder

The State's trial evidence identifying defendant as the person who committed the victim's murder, albeit circumstantial, was sufficiently substantial to warrant sending the case to the jury. *S. v. McElrath*, 1.

There was sufficient evidence of a deliberate and premeditated killing so as to support a judgment of first degree murder. *S. v. Battle*, 69.

There was sufficient evidence of premeditation and deliberation to support defendant's conviction for first degree murder by choking the victim to death. *S. v. Wilson*, 117.

The trial court did not err in a murder prosecution by denying defendant's motion to dismiss. *S. v. Locklear*, 349.

§ 21.6. Sufficiency of Evidence of First Degree Murder; Lying in Wait

The evidence in a first degree murder prosecution clearly supported submitting murder by lying in wait to the jury. *S. v. Battle*, 69.

§ 25.1. Instructions on Felony Murder Rule

The trial court did not err by submitting felony murder to the jury where the underlying felony was a second murder. *S. v. Weeks*, 152.

§ 28. Instructions on Self-defense

Any error by the trial court in instructing on self-defense in a murder case was favorable to defendant. *S. v. Loftin*, 375.

§ 28.1. Duty to Instruct on Self-defense

The trial court did not err in a prosecution for first degree murder by not giving an instruction on voluntary manslaughter based on imperfect self-defense. *S. v. Battle*, 69.

§ 28.8. Instruction on Defense of Accidental Death

The trial court's erroneous failure to instruct the jury on the defense of accident in a first degree murder case was not plain error. *S. v. Loftin*, 375.

HOMICIDE — Continued

§ 30.2. Submission of Lesser Offense of Manslaughter

The trial court did not err in a murder prosecution by failing to submit the possible verdict of voluntary manslaughter. *S. v. Weeks*, 152.

JUDGMENTS

§ 37. Res Judicata; Finality and Validity of Judgment

A Supreme Court decision by an evenly divided Court which affirmed a decision of the Utilities Commission allowing Duke Power Company to recover from its ratepayers costs expended on two abandoned nuclear power stations is res judicata as to such issue in this rate case involving the same parties. *State ex rel. Utilities Comm. v. Public Staff*, 689.

JURY

§ 5. Excusing of Jurors

There was no error in a murder prosecution where the judge excused a prospective juror for cause, then admonished her for taking a position against the death penalty based solely upon her apparent desire to avoid jury duty. *S. v. Weeks*, 152.

§ 6. Voir Dire Examination Generally; Practice and Procedure

The trial court did not abuse its discretion in a murder prosecution by denying defendant's motion for individual voir dire and sequestration of potential jurors. *S. v. Weeks*, 152; *S. v. Crandell*, 487.

The trial court did not err in refusing to allow defense counsel to ask individual prospective jurors questions concerning racial bias which could be addressed to the whole panel. *S. v. Gray*, 457.

The trial court in a murder prosecution did not err by denying defendant's motion for individual voir dire and sequestration of jurors during voir dire. *S. v. Locklear*, 349.

§ 6.1. Voir Dire Examination; Discretion of Court

The trial court did not abuse its discretion in a prosecution for murder and other crimes by denying defendant's motion for sequestration and individual voir dire of prospective jurors. *S. v. Short*, 783.

§ 6.3. Propriety and Scope of Voir Dire Examination

A defendant in a murder prosecution was not denied an equal opportunity to form a basis on which to exercise her peremptory challenges where the trial judge required defense counsel to direct certain questions concerning the insanity defense to the jury panel as a whole. *S. v. Allen*, 176.

There was no prejudice in a murder prosecution from the trial court's refusal to allow defendant to examine a pregnant potential juror about her medical condition. *S. v. Weeks*, 152.

§ 6.4. Voir Dire; Questions as to Belief in Capital Punishment

The trial court did not abuse its discretion in a murder prosecution by not permitting prospective jurors to answer defendant's questions as to the death penalty. *S. v. Weeks*, 152.

When a prospective juror in a capital case asked the court whether it had responsibility for parole from life sentences, the trial court properly instructed all

the jurors that "life means life" and they should not concern themselves with any other definition of the term, and the court's refusal to permit defense counsel to question the prospective juror further about her views of parole was not error. *S. v. Wilson*, 117.

§ 7.11. Challenge for Cause; Scruples against Capital Punishment

The trial court did not err in a murder prosecution by permitting the district attorney to death qualify the jury. *S. v. Weeks*, 152.

The trial court did not err in refusing to give defendant's requested instructions to prospective jurors on the nature of capital sentencing. *S. v. Wilson*, 117.

§ 7.14. Manner, Order, and Time of Exercising Peremptory Challenge

A black defendant's equal protection rights were not violated by the State's exercise of peremptory challenges of black jurors where the prosecution articulated racially neutral reasons for exercising its challenges. *S. v. Jackson*, 251.

A defendant does not have the right to examine the prosecuting attorney in a hearing at trial or post trial to determine if there has been a *Batson* violation by the prosecution's use of peremptory challenges to exclude members of defendant's race from the petit jury. *Ibid.*

Defendant failed to make a prima facie showing of racial discrimination by the State's exercise of its peremptory challenges. *S. v. Gray*, 457.

A first degree murder defendant failed to carry his initial burden of establishing an inference of purposeful discrimination in a prosecutor's use of peremptory challenges. *S. v. Crandell*, 487.

KIDNAPPING

§ 1. Definitions

The evidence was sufficient to permit a jury reasonably to infer that the victim was not released by defendant in a safe place. *S. v. Sutcliff*, 85.

§ 1.2. Sufficiency of Evidence

Defendant was not entitled to have a charge of first degree kidnapping dismissed on the ground that there was insufficient evidence of restraint and serious injury separate from the evidence used for a charge of premeditated and deliberated murder. *S. v. Wilson*, 117.

LARCENY

§ 1. Definitions

The Supreme Court reverts to its former rule that larceny is a lesser included offense of armed robbery and overrules the contrary decision of *State v. Hurst*. *S. v. White*, 506.

LIMITATION OF ACTIONS

§ 4.1. Accrual of Tort Cause of Action

Statutes of repose will be treated as substantive provisions for choice of law purposes, and the twelve-year Florida statute of repose applied to plaintiff's products liabilities claims where the sale, delivery and use of the product and the injury itself took place in Florida. *Boudreau v. Baughman*, 331.

MASTER AND SERVANT

§ 11.1. Competition with Former Employer; Covenants not to Compete

The mere fact that plaintiff may have been inconvenienced because defendant hired its employees does not give rise to a claim against defendant for breaching the covenant contained in his own terminable at will employment contract with plaintiff not to solicit or service plaintiff's policyholders or interfere with its existing policies for one year after termination. *Peoples Security Life Ins. Co. v. Hooks*, 316.

A noncompetition clause in a sales representative agreement was valid and enforceable. *United Laboratories, Inc. v. Kuykendall*, 643.

§ 56. Workers' Compensation; Causal Relation between Employment and Injury

Where the undisputed evidence indicated that decedent died while acting within the course and scope of his employment, and no evidence indicated decedent died other than by accident, plaintiff could rely on a presumption that decedent's death occurred by a work-related cause, thereby making the death compensable, whether the medical reason for death was known or unknown. *Pickrell v. Motor Convoy, Inc.*, 363.

§ 108.1. Right to Unemployment Compensation; Effect of Misconduct

The Employment Security Commission's holding that appellant's prior disqualification for unemployment benefits was not removed by his earning a new entitlement where he was at fault for his second discharge did not violate federal law. *In the Matter of Josey v. E.S.C.*, 295.

§ 108.2. Right to Unemployment Compensation; Availability for Work

The Employment Security Commission did not err by ruling that appellant's permanent disqualification in 1984 was not removed by his earning a new entitlement to unemployment compensation in 1987 where claimant was at fault for the 1987 discharge. *In the Matter of Josey v. E.S.C.*, 295.

§ 111. Unemployment Compensation; Conclusiveness and Review of Findings by Employment Security Commission

An appeal from a superior court review of an Employment Security Commission decision was properly before the Supreme Court. *In the Matter of Josey v. E.S.C.*, 295.

MUNICIPAL CORPORATIONS

§ 30.6. Zoning Ordinances; Special Permits and Variances

The practice of conditional use zoning is an approved practice in North Carolina. *Chrismon v. Guilford County*, 611.

It is not necessary that property rezoned to a conditional use district be available for all of the uses allowed under the corresponding general use district. *Ibid.*

§ 30.9. Spot Zoning

The rezoning of two tracts consisting of 8.24 acres from A-1 Agricultural to Conditional Use Industrial, which permitted the owner to store and sell agricultural chemicals on the tracts, constituted legal spot zoning. *Chrismon v. Guilford County*, 611.

The rezoning by a board of county commissioners of two tracts consisting of 8.24 acres from A-1 Agricultural to Conditional Use Industrial did not constitute illegal contract zoning but was valid conditional use zoning. *Ibid.*

NEGLIGENCE

§ 29.1. Particular Cases where Evidence of Negligence Is Sufficient

Gross negligence is the standard for determining the liability of a police officer for injuries caused by the object of a high-speed chase and not by a collision involving the police vehicle, and officers were not grossly negligent in this case in their pursuit of an apparently drunk driver whose car collided with a car driven by plaintiff's intestate. *Bullins v. Schmidt*, 580.

§ 29.3. Sufficiency of Evidence of Proximate Cause; Foreseeability

The record presented genuine issues of material fact as to whether defendant chair designers were negligent in specifying the use of chrome veneer for a tub style chair and failing to include some type of edge guard in the chair design and whether dangerously sharp edges were a reasonably foreseeable consequence of a design lacking an edge guard. *Boudreau v. Baughman*, 331.

OBSCENITY

§ 1. Statutes Proscribing Dissemination of Obscenity

Statute prohibiting the dissemination of obscenity is not unconstitutional on the ground that its incorporation of the *Miller* test for obscenity adopted by the U.S. Supreme Court is unfair in a criminal context or on the ground that it fails to specify the geographic area intended by the term "community standards." *S. v. Anderson*, 22.

§ 3. Prosecutions for Disseminating Obscenity

The trial court in an obscenity case did not err in excluding opinion testimony by defendant's expert witness, based on a study he performed, that the average adult in the community would not find the four magazines in question to be patently offensive on the ground that the witness was no better qualified than the jury to address this question. *S. v. Anderson*, 22.

The trial court did not err in refusing to permit defendant's expert sociologist to testify concerning the cumulative responses to questions in a survey he conducted of county residents pertaining to the views of those interviewed as to when, where and how adults should be able to obtain and view materials portraying nudity and sex. *Ibid.*

The trial court's instructions sufficiently required the jury to find that defendant possessed the requisite intent and guilty knowledge to support a conviction for disseminating obscenity. *Ibid.*

Failure of the trial court to instruct the jury in an obscenity case that it must apply a reasonable person standard in determining the value of the magazines in question was not prejudicial error where the court did not erroneously instruct the jury that they should apply contemporary community standards in determining value. *Ibid.*

PROCESS

§ 3. Time of Service

Rule 6(b) gives trial courts the discretion, upon a finding of excusable neglect, retroactively to extend the time provided in Rule 4(c) for serving a summons after it has become functus officio. *Lemons v. Old Hickory Council*, 271.

QUASI CONTRACTS AND RESTITUTION

§ 2.2. Measure and Items of Recovery

There was sufficient evidence to support an award of damages by the jury in a claim for unjust enrichment arising from a construction dispute. *Booe v. Shadrick*, 567.

RAPE AND ALLIED OFFENSES

§ 4. Relevancy of Evidence

The trial court did not err in a prosecution for rape, incest, and taking indecent liberties with a child by allowing the child to use anatomical dolls to illustrate her testimony. *S. v. Fletcher*, 415.

Expert testimony that a hair found in a rape victim's pubic area was microscopically consistent with one belonging to defendant was relevant and admissible on the issue of whether the victim was sexually assaulted by defendant even though identity was not in question in the case. *S. v. McNicholas*, 548.

The trial court in a prosecution for sexual offenses and taking indecent liberties with minors did not err in allowing a deputy to testify that in his opinion defendant appeared to be between 29 and 30 years of age. *S. v. Banks*, 753.

§ 4.3. Competency of Evidence; Character or Reputation of Prosecutrix

Even though the State may have opened the door to defendant's introduction of evidence for impeachment purposes regarding a rape victim's sexual behavior, mere expeditionary questions which defendant asked the victim on cross-examination were properly excluded by the trial court under the rape shield statute. *S. v. Degree*, 302.

The trial court did not err in a prosecution for sexual offenses and rape by not admitting testimony from the victim regarding an incident in which she was allegedly making out with a defense witness. *S. v. Herring*, 733.

§ 5. Sufficiency of Evidence

Testimony by the six-year-old victim that defendant placed his hand between her legs and put his finger in her "private spot," "cootie" and "pee-pee" constituted sufficient evidence of penetration of the victim's genital opening to support defendant's conviction of a first degree sexual offense. *S. v. Rogers*, 102.

Testimony by the nine-year-old victim that defendant "had his tongue—not in [her] vagina, but he was going around it" constituted sufficient evidence of cunnilingus to support a conviction for a first degree sexual offense. *S. v. Weathers*, 97.

The trial court did not err by denying defendant's motions to dismiss charges of first degree rape, incest, and taking indecent liberties with a child. *S. v. Fletcher*, 415.

There was sufficient evidence that defendant engaged in vaginal intercourse with the victim to support his conviction of first degree rape based on the victim's testimony that defendant "put his thing in mine" and a physician's testimony that the physical evidence was consistent with a penis having been forced through the victim's labia. *S. v. McNicholas*, 548.

There was sufficient evidence to establish the serious personal injury element of first degree rape and first degree sexual offense. *S. v. Herring*, 733.

Evidence of first degree sexual offense and taking indecent liberties with a child was sufficient to be submitted to the jury. *S. v. Swann*, 666.

RAPE AND ALLIED OFFENSES — Continued

§ 6. Instructions

There was no prejudice in a prosecution for first degree rape, incest, and taking indecent liberties with a child where the court instructed the jury that at least one of the sentences carried a mandatory life sentence but that the jury's concern was not that of punishment. *S. v. Fletcher*, 415.

The trial court did not err in a prosecution for first degree rape, incest, and taking indecent liberties with a child by instructing the jury that it was not necessary for the vagina to be entered or that the hymen be ruptured. *Ibid.*

The trial court did not err in its instructions on the element of serious injury in a prosecution for rape and sexual offenses. *S. v. Herring*, 733.

§ 6.1. Instructions on Lesser Degrees of Crime

The trial court did not err in a first degree sexual offense prosecution by refusing to instruct the jury on the lesser-included offense of attempted first degree sexual offense. *S. v. Rhinehart*, 53.

Evidence in a first degree rape case that the victim told a physician that defendant "put his thing against her" did not require the trial court to instruct on the lesser included offense of attempted first degree rape. *S. v. McNicholas*, 548.

The trial court did not err by denying defendant's request for an instruction on the offense of assault on a female as a lesser-included offense of rape. *S. v. Herring*, 733.

The trial court did not err in a prosecution for first degree sexual offense and taking indecent liberties with a child by failing to submit second degree sexual offense as a lesser-included offense. *S. v. Swann*, 666.

§ 11. Carnal Knowledge of Female under Twelve; Sufficiency of Evidence

The evidence was sufficient to support defendant's conviction of first degree rape of a child under the age of thirteen. *S. v. Degree*, 302.

§ 19. Taking Indecent Liberties with Child

The trial court did not err in instructing the jury that the kissing of a child involving the insertion of an adult's tongue into the child's mouth would constitute an "immoral, improper, or indecent" act within the meaning of subsection (1) of the indecent liberties statute and a "lewd or lascivious" act within the meaning of subsection (2) of that statute. *S. v. Banks*, 753.

Evidence of taking indecent liberties with a child and first degree sexual offense was sufficient to be submitted to the jury. *S. v. Swann*, 666.

RECEIVING STOLEN GOODS

§ 4. Relevancy and Competency of Evidence

The trial court erred in a prosecution for possession of stolen property by admitting into evidence property which was not listed on a search warrant but which was seized during a search of defendant's house where county police could not establish that the items constituted evidence of a crime until after the search and seizure had occurred. *S. v. White*, 770.

§ 5.1. Sufficiency of Evidence

The trial court did not err in a prosecution for felonious possession of stolen property by denying defendant's motion at the close of all of the evidence to dismiss the charges. *S. v. White*, 770.

RECEIVING STOLEN GOODS — Continued

§ 7. Verdict and Judgment

The trial court did not err when sentencing defendant for six counts of felonious possession of stolen property and two counts of misdemeanor possession of stolen property by not arresting judgment as to all but one of the offenses. *S. v. White*, 770.

ROBBERY

§ 1.2. Relation to other Crimes

The Supreme Court reverts to its former rule that larceny is a lesser included offense of armed robbery and overrules the contrary decision of *State v. Hurst. S. v. White*, 506.

§ 4.2. Common Law Robbery Cases where Evidence Held Sufficient

The trial court properly denied defendant's motions to dismiss the charge of common law robbery based on an alleged lack of substantial evidence of felonious intent. *S. v. Herring*, 733.

§ 4.3. Armed Robbery Cases where Evidence Held Sufficient

The trial court did not err by denying defendant's motions to dismiss an armed robbery charge despite evidence that, after defendant initially dragged the victim to his truck, the victim said to defendant, "Do you want to get the money? You can get the money and go." *S. v. Sutcliff*, 85.

§ 4.7. Cases where Evidence Was Insufficient

The State's evidence was insufficient to support defendant's conviction of common law robbery where defendant kidnapped, raped and took a watch from his victim, and the victim obtained money from her dorm room which she gave defendant in exchange for her watch. *S. v. Parker*, 559.

§ 5.4. Instructions on Lesser Included Offenses and Degrees

Defendant's evidence in an armed robbery case required the trial court to instruct the jury on the lesser included offense of misdemeanor larceny. *S. v. White*, 506.

RULES OF CIVIL PROCEDURE

§ 6. Time for Service of Process

Rule 6(b) gives trial courts the discretion, upon a finding of excusable neglect, retroactively to extend the time provided in Rule 4(c) for serving a summons after it has become functus officio. *Lemons v. Old Hickory Council*, 271.

§ 50.5. Motions for Directed Verdicts; Appeal

The Supreme Court declined to order a new trial after holding that there was sufficient evidence of damages to support a jury award for unjust enrichment in a construction dispute where defendants alleged that they had not presented evidence of unjust enrichment after the trial court reserved a ruling on their motion for a directed verdict at the close of plaintiff's evidence for fear of making plaintiff's case for him. *Booe v. Shadrick*, 567.

SALES

§ 17.2. Sufficiency of Evidence of Breach of Warranties of Merchantability and Fitness

Summary judgment was properly granted for defendants on plaintiff's claims for breach of implied warranty of merchantability and breach of implied warranty of fitness of a chair for a particular purpose since implied warranty was not available under Florida law absent privity. *Boudreau v. Baughman*, 331.

§ 22. Actions for Personal Injuries from Defective Goods

In an action to recover for injuries sustained by plaintiff when he cut his foot on the base of a chrome-plated tub style swivel chair designed by defendants, the forecast of evidence was sufficient to raise jury questions on the elements of strict liability under Florida law. *Boudreau v. Baughman*, 331.

SEARCHES AND SEIZURES

§ 3. Searches at Particular Places

The district attorney could properly examine a defendant regarding a letter written by defendant to his brother asking the brother to commit perjury where the letter was in a notebook seized during a search of defendant's cell before trial. *S. v. Martin*, 229.

§ 4. Particular Methods of Search; Physical Examination or Tests

There is no good faith exception under Art. I, § 20 of the N.C. Constitution to the exclusion of evidence obtained by an unreasonable search and seizure, and Art. I, § 20 thus required the exclusion of evidence derived from a blood sample obtained by officers from defendant in reliance upon a nontestimonial identification order which was improperly issued because defendant was in custody. *S. v. Carter*, 709.

§ 17. Search and Seizure by Consent; Consent Given by Owner of Premises

The trial court did not err in a prosecution for burglary, rape, and sexual offenses by admitting into evidence tennis shoes found in defendant's bedroom where the detective was in a place where he had a right to be. *S. v. Martin*, 229.

§ 25. Application for Warrant; Cases where Evidence Is Insufficient to Show Probable Cause

The decision of the U.S. Supreme Court in *U.S. v. Dunn*, 480 U.S. ---, does not require a reversal of the trial court's decision to grant defendant's motion to suppress evidence taken from a building where a deputy observed marijuana by shining a flashlight through cracks in the back wall of the building. *S. v. Tarantino*, 386.

§ 33. Plain View Rule

The trial court in a prosecution for possession of stolen property did not err when it denied defendant's motion to suppress items which had not been specifically identified in a search warrant application and which were seized during a search of defendant's home. *S. v. White*, 770.

SHERIFFS AND CONSTABLES

§ 4. Civil Liabilities to Individuals

Gross negligence is the standard for determining the liability of a police officer for injuries caused by the object of a high-speed chase and not by a collision involving the police vehicle, and officers were not grossly negligent in this case in their

UTILITIES COMMISSION — Continued

§ 42. Fair Return; Sufficiency of Return to Induce Investment

The Utilities Commission's conclusion that 13.4% is a fair rate of return on Duke Power Company's common equity was not supported by adequate factual findings concerning adjustments for down markets and financing costs of issuing stock. *State ex rel. Utilities Comm. v. Public Staff*, 689.

WATERS AND WATERCOURSES

§ 6. Title and Rights in Navigable Waters

Defendant was not entitled to a jury trial to determine if he acquired an exclusive right by prescription to harvest oysters from an oyster bottom in navigable waters. *State ex rel. Rohrer v. Credle*, 522.

WITNESSES

§ 1. Competency of Witness

The trial court properly denied defendant's motion for a psychiatric evaluation of a State's witness. *S. v. Wilson*, 117.

§ 1.2. Competency of Children to Testify

The trial court did not err in a prosecution for first degree rape, incest, and taking indecent liberties with a child by allowing testimony from the victim where the child had testified at voir dire that she had told a lie in the past and was uncertain about some times and dates. *S. v. Fletcher*, 415.

The trial court did not err during a voir dire to determine competency of a child rape victim to testify by sustaining an objection to a question asked of the child as to why she wasn't telling the truth. *Ibid.*

WORD AND PHRASE INDEX

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