NORTH CAROLINA REPORTS

VOLUME 324

SUPREME COURT OF NORTH CAROLINA

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OF
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1. Appointed Chief Judge 12-1-89.
2. Appointed and sworn in 12-15-89.
3. Appointed Chief Judge 9-1-89.

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CASES REPORTED

ORDER OF THE COURT

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

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

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

PETITION TO REHEAR

GENERAL STATUTES CITED AND CONSTRUED

RULES OF EVIDENCE CITED AND CONSTRUED

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

RULES OF APPELLATE PROCEDURE CITED AND CONSTRUED

LICENSED ATTORNEYS

I, FRED P. PARKER, III, Executive Director 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 18th day of August 1989 and said persons have been issued license certificates.

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ROBERT MATHIAS ZIELINSKI ..... Clemson, South Carolina
SCOTT DAVID ZIMMERMAN ..... Chapel Hill
BRIAN KENT ZUERCHER ..... Chapel Hill

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BRENDA BERGERON ..... Durham
ALISON LOUISE BOYETTE ..... Tarboro
MARY MARGARET BUGG ..... Durham
LARRY BRUCE COFFEY ..... Charlotte
MARSHALL LAWRENCE DAYAN ..... Raleigh
MARK EVERETTE EDWARDS ..... Jensen Beach, Florida
ELIZABETH BARNES FUSSELL ..... Cary

CHRISTINE CALBERT GATES	Charlotte
TIMOTHY BRIAN GAVIGAN	Raleigh
CAROL LAVERNE GOINS	Raleigh
WENDY JOANNE GRUBBS	Tampa, Florida
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EDWIN MITCHELL HARDY	Winston-Salem
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JOHN THOMAS HUNN	Charlotte
JOHN ANDERSON KEIGER	Winston-Salem
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ROBERT FORREST WALDON	Wilmington
KEITH ELLIS WERNER	Rocky Mount
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Given over my hand and seal of the Board of Law Examiners this the 5th day of October, 1989.

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

I, FRED P. PARKER III, Executive Director 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 and said persons were issued certificates of this Board:

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ROBERT SANFORD ADLER . Chapel Hill, applied from the District of Columbia
STEPHEN BURTON GOAD .. Charlotte, applied from the State of West Virginia
HAROLD HAMMAN MARTIN ..... Raleigh, applied from the State of New York
ELIZABETH ALRICKS HANSEN . Greensboro, applied from the State of Virginia
B. FREDERICK WILLIAMS, JR. ..... Charlotte
applied from the District of Columbia
STEVEN CARL SCHNEDLER ..... Asheville, applied from the State of Virginia
THOMAS NORFLEET GRIFFIN, III ..... Charlotte
applied from the State of Virginia and the District of Columbia
M. ELIZABETH GEE .... Winston-Salem, applied from the District of Columbia
PATRICK DAUGHERTY ..... Charlotte
applied from the State of New York and the District of Columbia

Given over my hand and seal of the Board of Law Examiners this the 5th day of October, 1989.

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

I, FRED P. PARKER III, Executive Director 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 15th day of September 1989 and said person has been issued a license certificate.

MICHAEL N. TOUSEY ..... Mars Hill

I further certify that the following named person duly passed the examinations of the Board of law Examiners as of the 25th day of September 1989 and said person has been issued a license certificate.

RICHARD MAURICE DAILEY, JR. ..... Greensboro

Given over my hand and seal of the Board of Law Examiners this the 1st day of November, 1989.

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

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MARK STEVEN CALVERT ..... Raleigh, applied from the District of Columbia
GARY STEPHEN OWENS ..... Charlotte
applied from the State of New York, 3rd Dept.

Given over my hand and seal of the Board of Law Examiners this the 9th day of November, 1989.

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Executive Director
Board of Law Examiners of
The State of North Carolina

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GEORGE C. BROMALL, II ..... Pittsburgh, Pennsylvania
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RONALD ESTES CARDWELL ..... Greer, South Carolina
applied from the State of Tennessee
GARY R. DIESING ..... Toledo, Ohio
applied from the State of Ohio
RANDOLPH C. DUVALL ..... Virginia Beach, Virginia
applied from the State of Virginia
DANIEL KALISH ..... Minneola, New York
applied from the State of New York
P. M. LEWIS-PIERSON ..... Newport, applied from the State of Pennsylvania
GERHARD A. MILLER ..... Durham, applied from the State of Connecticut
ROBERT E. SKIVER ..... Cary, applied from the State of New York

Given over my hand and seal of the Board of Law Examiners this the 14th day of December, 1989.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 15th day of December, 1989 and said persons have been issued license certificates.

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JEFFREY GERARD DALRYMPLE ..... Greensboro

NEVILLE S. FULEIHAN ..... Brevard
KARLA BREITWEISER KING ..... Andrews Air Force Base
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TERRIE JEAN GALE ..... Chapel Hill, applied from the District of Columbia
License Date: December 15, 1989

Given over my hand and seal of the Board of Law Examiners this the 21st day of December, 1989.

FRED P. PARKER III
Executive Director
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. GARY DEAN GREENE

No. 456A87

(Filed 9 February 1989)

1. Searches and Seizures § 20— probable cause for search warrant—totality of circumstances test

In applying the totality of the circumstances test for determining whether probable cause exists for issuance of a search warrant, the magistrate must consider all the evidence contained in the affidavit submitted to determine whether there exists a fair probability that evidence of a crime can be found in a particular place. The veracity and basis of knowledge of persons supplying hearsay information remain relevant but are no longer accorded independent status, as they were under the two-prong test of *Aguilar v. Texas* and *Spinelli v. United States.*

2. Searches and Seizures § 24— confidential informant—probable cause for issuance of search warrant

An officer's affidavit was sufficient under the totality of the circumstances to establish probable cause for the issuance of a warrant authorizing a search of defendant's trailer and car and the performance of luminol tests for traces of blood where the affidavit stated: a homicide victim appeared to have been beaten to death, resulting in a large amount of blood at the scene; a confidential informant had observed defendant on the day of the murder wearing clothing covered with what appeared to be blood and carrying what appeared to be the barrel of a long gun; the splintered stock of a gun was found at the crime scene; and the confidential informant was a "reliable citizen." The affidavit was not rendered insufficient to establish probable cause by the fact that the stock of the gun found at the crime scene ultimately proved to be unrelated to the murder or by failure of the affiant to reveal that the confidential informant had previously denied any knowledge of the victim's death and had been indicted eleven times for obtaining property by false pretenses. Assuming arguendo that the search was unlawful, admission of the luminol

test results was harmless beyond a reasonable doubt where defendant was convicted largely upon the testimony of his girlfriend and the luminol tests did little to corroborate her testimony. N.C.G.S. § 15A-1443(b) (1988).

3. **Criminal Law § 75.4— in-custody statement without counsel—admission as harmless error**

Assuming error in the admission of defendant's in-custody statement without counsel that he did not know why his girlfriend turned the car around in a friend's driveway and drove off while the friend was being interviewed by an S.B.I. agent, admission of the statement in defendant's murder trial was harmless since the statement does nothing to inculpate defendant and is not probative of his guilt or innocence.

4. **Criminal Law § 173— in-custody statement—invited error**

Where a statement made by defendant during in-custody interrogation was elicited by defense counsel on cross-examination of an S.B.I. agent, any error in the admission of the statement was invited, and defendant cannot complain of such error on appeal. N.C.G.S. § 15A-1443(c) (1988).

5. **Criminal Law § 89.4— reasons for prior inconsistent statements**

Where evidence of a witness's prior inconsistent statements regarding defendant's involvement in the victim's death was introduced in defendant's murder trial, the witness's testimony that she "felt that he (defendant) had killed once and that he would kill again" and that "I told them that I believe if he was not locked up that he would kill me" was admissible to explain her reason for making the inconsistent statements.

6. **Criminal Law §§ 73.2, 73.3— victim's statement of intent to disinherit defendant—admissibility for nonhearsay purposes—state of mind exception to hearsay rule**

In a prosecution of defendant for the murder of his father, testimony by defendant's brother concerning a statement by the victim expressing an intent to disinherit defendant was admissible for the nonhearsay purpose of showing that ill will existed between defendant and his father. Even if the statement was hearsay, it was admissible under the state of mind exception to the hearsay rule. N.C.G.S. § 8C-1, Rule 803(3) (1988).

7. **Criminal Law § 112.1— reasonable doubt—failure to give tendered instruction**

The trial court's instructions on reasonable doubt were sufficient, and the trial court did not err in failing to give defendant's requested instruction that "proof beyond a reasonable doubt is proof that satisfies or entirely convinces you of the defendant's guilt."

8. **Criminal Law § 119— tendered instructions—omitted portions—failure to inform counsel—no material prejudice**

The trial court's failure to inform defense counsel that it would not use the full tendered instruction on reasonable doubt did not materially prejudice defendant's case because counsel relied on the omitted language in his closing argument to the jury where the court gave, in essence, the instruction defendant requested, and there was substantial evidence of defendant's guilt. N.C.G.S. § 15A-1231(b).

9. Criminal Law § 132— credibility of witness—jury question—refusal to set aside verdict

The trial court did not abuse its discretion in the denial of defendant's motion to set aside guilty verdicts of first degree murder and armed robbery on the basis of the credibility of the State's principal witness, although the witness had made prior inconsistent statements about defendant's involvement in the crimes and had been indicted eleven times for obtaining property by false pretenses, where the witness's version of the events was corroborated in part by other witnesses and by the location of the murder weapon, and the credibility of the witness thus was for the jury to determine.

10. Criminal Law § 135.9— brain damage—poor impulse control—alcoholism—failure to submit as separate mitigating circumstances

The trial court in a first degree murder case did not err in failing to submit defendant's alleged brain damage, poor impulse control and alcoholism as separate and independent mitigating circumstances where the court incorporated these factors into its instructions on the mental or emotional disturbance and impaired capacity mitigating circumstances set forth in N.C.G.S. §§ 15A-2000(f)(2) and (6), and where the court submitted the mitigating circumstance of "any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value."

11. Criminal Law § 135.9— mitigating circumstances—unanimity required

Jury unanimity is required for a finding of a mitigating circumstance in a first degree murder case.

12. Criminal Law § 135.8— first degree murder—armed robbery as aggravating circumstance—sufficiency of evidence

The evidence supported the jury's finding of the aggravating circumstance that defendant was engaged in the commission of an armed robbery when he murdered his father where defendant's girlfriend testified: defendant went to his father's house carrying a shotgun; he returned with "a good-sized wad of money," belonging to his father, which he later counted as fourteen hundred dollars; and defendant returned from his father's house covered with blood and told her he had beaten his father to death using the shotgun.

13. Criminal Law § 135.10— first degree murder—death penalty not disproportionate

A sentence of death imposed on defendant for first degree murder was not disproportionate to the penalty imposed in similar cases where the victim was defendant's father; defendant was thirty-seven years old at the time of the crime; defendant brutally beat the victim to death to steal his money and secure an inheritance; the jury found premeditation and deliberation on defendant's part; and the case required the jury to weigh the aggravating circumstance that the murder was committed during an armed robbery against three nonstatutory mitigating circumstances and the statutory "catch-all" mitigating circumstance.

Chief Justice EXUM concurring.

Justice FRYE dissenting as to sentence.

APPEAL of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing the sentence of death entered by *Ferrell, J.*, at the 10 August 1987 Criminal Session of Superior Court, CALDWELL County. Heard in the Supreme Court 10 October 1988.

Lacy H. Thornburg, Attorney General, by Thomas J. Ziko, Assistant Attorney General, and Edwin M. Speas, Jr., Special Deputy Attorney General, for the State.

David S. Lackey, Nancy Einstein, and David A. Swanson for defendant-appellant.

WHICHARD, Justice.

Defendant was convicted of first degree murder and robbery with a dangerous weapon. The jury recommended the death sentence for the murder, and the trial court sentenced accordingly. The trial court also sentenced defendant to forty years imprisonment for the armed robbery. We find no prejudicial error.

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

The victim, defendant's father, was a vigorous seventy-four-year-old male. Defendant's mother worked the second shift at a factory. She arrived home after work at 9:15 p.m. on 1 May 1986 and found her husband's dead body at the bottom of the basement steps.

Detective Barlow from the Caldwell County Sheriff's Department investigated the scene. He noted that the basement floor was wet. Two freezers were sprayed with blood. There was a broken piece of gunstock in a paper bag in the middle of the basement. The gunstock was not wet or bloody.

The pathologist who performed an autopsy on the victim's body testified that there were a variety of lacerations and bruises about the face, chest, mid-back and shoulders. The victim's arms were bruised and abraded in several places and his little finger was broken. His breastbone and jaw were also broken. Internal examination of organs revealed diffuse hemorrhaging around the brain. In the pathologist's opinion, the trauma to the brain was the actual cause of death. The pathologist thought at the time that the victim had been beaten to death, but the police thought

it possible that he had died after falling in the well in the basement and climbing back out, then falling on the stairs. The doctor listed the cause of death as multiple traumatic injuries of undetermined cause because he felt he could not conclusively determine that the injuries were sustained by a beating rather than a fall.

The case remained under investigation for approximately a month while Detective Barlow interviewed family, friends, and neighbors of the victim. Both defendant and his girlfriend denied any knowledge of the death. The detective then closed the case because he could not prove that the death was not accidental.

In August 1986 the State Bureau of Investigation reopened the investigation and assigned Agent Knowles to the case. On 27 October 1986 Agent Knowles interviewed Ms. Newton, a friend of defendant's girlfriend, Ms. Hopson. As Agent Knowles was interviewing Ms. Newton, defendant and Ms. Hopson drove into Ms. Newton's driveway, then turned around and drove off. Agent Knowles left Ms. Newton's trailer and pursued them. Defendant ducked down in the car so that he was not visible from the outside. Agent Knowles stopped Ms. Hopson and asked her to come to the police station to answer some questions. She complied, but when questioned she reiterated that she knew nothing about the victim's death. Agent Knowles had seen defendant in Ms. Hopson's car as he and Ms. Hopson got out of their cars at the station. He asked Ms. Hopson to ask defendant to come inside for questioning. Ms. Hopson went outside but returned and reported that defendant had left.

When Agent Knowles returned home that evening, he received a message asking him to call Ms. Newton. Ms. Newton told Agent Knowles over the telephone that Ms. Hopson had told her that defendant had killed his father.

Two days later Ms. Hopson gave officers a statement implicating defendant in the death of his father. Based on that statement the officers secured an arrest warrant and a warrant to search defendant's residence and conduct luminol examinations to reveal traces of blood.

Ms. Hopson testified at trial that she had lived with defendant from the summer of 1984 until July of 1986. She was living with defendant in a trailer behind his parents' house on 1 May

1986. Ms. Hopson testified that defendant was drinking beer on 1 May 1986. He complained that he did not have any money and told her he was going to kill his father because, if his mother died before his father, his father would give everything to defendant's brothers and defendant would not inherit anything. Defendant said he would make it look like an accident. He took an old shotgun from his trailer and walked off toward his father's house shortly after 7:00 p.m.

Ms. Hopson testified that she could not believe defendant would kill his father. She went inside the trailer and watched television. Defendant returned an hour later covered with blood and holding the shotgun. Defendant told Ms. Hopson he had beaten his father to death and to get him a complete change of clothes. After bathing and changing clothes, defendant placed his bloody clothes and the shotgun in a grocery bag. Ms. Hopson saw that defendant had a "good-sized wad of money in his hand."

The two went in defendant's car to Ms. Hopson's mother's house to return her dogs. Ms. Hopson told her mother that defendant had killed his father. Along the way defendant threw the bag containing his clothes and the gun into a river. A gun was later recovered from the river in the area where Ms. Hopson said defendant had thrown the clothes and gun.

Ms. Hopson lived with defendant until July 1986, when defendant's mother asked her to move out of defendant's trailer. She moved out but was still seeing defendant about twice a week at the time of his arrest. Ms. Hopson moved in with Ms. Newton. Both Ms. Hopson and Ms. Newton testified that Ms. Hopson told Ms. Newton one night when she was drinking that defendant had killed his father.

The State presented several witnesses who corroborated Ms. Hopson's version of the events, including Ms. Hopson's mother, Ms. Newton, and Ms. Newton's boyfriend. Defendant did not offer evidence. Defense counsel moved for a directed verdict at the close of the State's evidence, arguing that only Ms. Hopson's testimony tied defendant to the death of his father and attacking her credibility. The trial court denied the motion.

The jury found defendant guilty of first degree murder based on both premeditation and deliberation and the felony-murder rule. It also found him guilty of armed robbery.

Following a capital sentencing hearing, the jury found as the sole aggravating circumstance that defendant was engaged in the commission of a robbery with a dangerous weapon when he committed the murder. The State submitted as an aggravating circumstance that the murder was especially heinous, atrocious or cruel, but the jury rejected this circumstance.

The jury found the following four mitigating circumstances: that defendant's intelligence quotient of eighty-one placed him in the lowest ten percent of the population; that defendant was a model prisoner in jail while awaiting trial; that defendant was a person of good behavior except when he was drinking alcohol; and the catch-all provision of "[a]ny other circumstance arising from the evidence which the jury deems to have mitigating value." N.C.G.S. § 15A-2000(f)(9) (1988). It did not specify what additional circumstance(s) it found to have mitigating value.

Upon finding that the mitigating circumstances were insufficient to outweigh the aggravating circumstance, and that the aggravating circumstance was sufficiently substantial to call for the death penalty, the jury recommended a sentence of death.

GUILT PHASE

Defendant first contends that the affidavits used to obtain the warrants authorizing a search of defendant's trailer and car and the performance of luminol tests were insufficient in that they showed no probable cause and provided no information as to the veracity of the "confidential informant" supplying the information. Defendant argues that the trial court thus erred in denying defendant's motion to suppress evidence seized from his home pursuant to the search warrant.

Defendant objects only to the admission of evidence resulting from the luminol examination for traces of blood. The affidavit in question stated:

> On or about May 1, 1986, [the victim] was found dead in the basement of his residence. Death appeared to have been from a severe beating. A large amount of blood was found around the body and on the opposite side of the basement in a spray pattern on the walls and appliances.

> The autopsy report listed the cause of death as multiple traumatic injuries, including several fractures, lacerations, contusions, and abrasions. A separate report from the Chief Medical Examiner's Office in Chapel Hill stated that the injuries were consistant [sic] with a severe beating. A severe beating could result in a spray pattern of blood such as those observed at the scene.
>
> On October 29, 1986 this applicant received information from a confidential informant that on May 1, 1986 the confidential informant observed [defendant] enter his residence wearing clothing covered with what appeared to be blood and carrying what appeared to be the barrel of a long gun. [Defendant] left his residence after only a short period of time wearing different clothing. The confidential informant observed a bag and the long gun barrel be placed in a Pontiac Firebird parked at the residence of [defendant]. The informant knows the car as belonging to [defendant]. That [defendant] and a white female then left the residence in the Firebird.
>
> The stock of a long gun was found in the basement of the victim's residence on the night of the incident. The stock was splintered and appeared to have been broken by force.

Defendant contends this affidavit does not contain sufficient facts for a magistrate to find probable cause for a search. We disagree.

[1] Whether an applicant has submitted sufficient evidence to establish probable cause to issue a search warrant is a "nontechnical, common-sense [judgment] of laymen applying a standard less demanding than those used in more formal legal proceedings." *Illinois v. Gates*, 462 U.S. 213, 235-36, 76 L.Ed. 2d 527, 546 (1983). This Court has adopted the *Gates* totality of the circumstances test for determining whether probable cause exists for issuance of a search warrant under the state constitution. *State v. Arrington*, 311 N.C. 633, 643, 319 S.E. 2d 254, 261 (1984). In applying this test, the magistrate must consider all the evidence contained in the affidavit submitted to determine whether there exists a fair probability that evidence of a crime can be found in a particular place. The veracity and basis of knowledge of persons supplying hearsay information remain relevant but are no longer accorded independent status, as they were under the two-prong test of

Aguilar v. Texas and *Spinelli v. United States. See Spinelli*, 393 U.S. 410, 21 L.Ed. 2d 637 (1969); *Aguilar*, 378 U.S. 108, 12 L.Ed. 2d 723 (1964). Reviewing courts should give great deference to the magistrate's determination of probable cause and should not conduct a de novo review of the evidence to determine whether probable cause existed at the time the warrant was issued. *State v. Williams*, 319 N.C. 73, 81, 352 S.E. 2d 428, 434 (1987); *State v. Arrington*, 311 N.C. at 638, 319 S.E. 2d at 258.

[2] The affidavit in this case stated that the victim appeared to have been beaten to death, resulting in a large amount of blood at the scene. The confidential informant—Ms. Hopson—stated to the affiant that she had observed the defendant on the day of the murder "wearing clothing covered with what appeared to be blood and carrying what appeared to be the barrel of a long gun." The stock of a gun was found at the scene of the crime. The incriminating information given by the confidential informant was based upon the informant's personal observations. Further, the fact that a splintered stock of a long gun was found in the basement of the victim's home on the night of the killing provided independent corroboration for the informant's statement that the defendant was carrying what appeared to be the barrel of a long gun. In an accompanying affidavit supporting the application for the search warrant, the applicant described the confidential informant as a "reliable citizen." Taken as a whole, and giving due deference to the magistrate's determination, we conclude that the affidavit contains sufficient information to support a finding of probable cause.

Defendant argues that the splintered stock of the gun found in the victim's basement ultimately proved to be unrelated to the crime and that this fact should have some bearing on the propriety of the magistrate's determination of probable cause. This argument is without merit. The magistrate must consider the evidence presented at the time of the warrant application. The splintered gunstock was found in the basement on 1 May 1986. Ms. Hopson stated on 29 October 1986 that when defendant came back to the trailer from his father's house, the shotgun was broken. The warrant was issued on 5 November 1986. Until the gun was recovered from the river on 12 November 1986, neither the affiant nor the magistrate would have had reason to believe the alleged murder weapon was not splintered or broken and thus to

conclude that the presence of the splintered gunstock in the basement failed to corroborate Ms. Hopson's statement. Reviewing courts must not conduct a de novo review but must view the evidence as presented to the magistrate at the time of the warrant application. *Arrington*, 311 N.C. at 638, 319 S.E. 2d at 258.

Defendant also argues that the affiant deliberately withheld from the magistrate information concerning the informant's veracity. Specifically, the affiant did not reveal that the informant, Ms. Hopson, previously had denied any knowledge of the victim's death and had told police defendant had been with her the entire evening of 1 May 1986. In addition, the informant had been indicted eleven times for obtaining property by false pretenses. However, no evidence was presented at trial that the affiant knew of Ms. Hopson's past record when he applied for the search warrant. The affiant described the informant as a "reliable citizen" and did not vouch for her reputation for truthfulness. Under the totality of the circumstances test, the affidavit contains sufficient facts to support the magistrate's finding of probable cause.

Finally, assuming arguendo that the search was unlawful, admission of the fruits of the search was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988); *State v. Autry*, 321 N.C. 392, 399-401, 364 S.E. 2d 341, 346-47 (1988). The luminol tests conducted in defendant's trailer revealed traces of blood, but those traces fit no distinctive pattern from which investigating officers could reconstruct an incriminating scenario. An expert witness in forensic serology testified that luminol tests will react to substances other than human blood, including animal blood. In addition, the expert witness testified that luminol will react with traces of blood up to ten years after blood is spilled or placed on a surface. Evidence was presented that many persons other than defendant had lived in the trailer during the last five years, and that defendant was a hunter. In this factual context, the mere fact that chemical tests revealed traces of blood in no distinct pattern is not particularly probative of defendant's guilt or innocence. Defendant was convicted largely upon the testimony of Ms. Hopson, and the luminol tests did little to corroborate her testimony.

Defendant next assigns error to the denial of his motion to suppress an in-custody statement he made outside the presence of

counsel. During the in-custody interrogation defendant made several statements, two of which were introduced into evidence. One was elicited by defense counsel on cross-examination and thus its admission, if error, was invited error. N.C.G.S. § 15A-1443(c) (1988). For reasons that follow, admission of the other statement, assuming error, was harmless.

On the night of 27 October 1986 Agent Knowles was interviewing Ms. Newton in her home. During the interview a car pulled into the driveway, turned around, and left. Agent Knowles got into his car and followed the other vehicle until it stopped some distance down the road. The female driver of the other car approached Agent Knowles in his car and identified herself as Ms. Hopson. She followed Agent Knowles to the police station at his request and answered questions there. Defendant was also in Ms. Hopson's car but left while Ms. Hopson was inside the police station.

The next evening Agent Knowles interviewed defendant at the home of his ex-wife, who was present during the interview. Defendant denied that he had been with Ms. Hopson the previous night. The next day Ms. Hopson gave the investigators a statement implicating defendant in the murder. The investigators arrested defendant late that night. The following day, 30 October 1986, defendant appeared in district court. The court appointed counsel for defendant at his request. Following his appearance, the court remanded defendant to the custody of the Caldwell County Sheriff.

Agent Knowles interviewed defendant's ex-wife. She told him that she and a number of defendant's relatives had bought ceiling fans from defendant "at a very cheap price." This information led Agent Knowles to suspect that defendant was fencing stolen property. On 10 November 1986 Agent Knowles and Detective Barlow visited defendant in his jail cell. They did not notify defendant's counsel before interviewing defendant. The officers advised defendant they were there to talk to him about the ceiling fans, not the death of his father. Before they began their questioning, they advised defendant of all his *Miranda* rights. Defendant signed a waiver of rights form.

Agent Knowles and Detective Barlow began to question defendant regarding the ceiling fans. After about fifteen to thirty

minutes defendant stated that he wanted to talk to the officers about the death of his father. The officers advised defendant that they were not there to talk to him about his father's death, that he had the right to remain silent, and that he was not required to talk to them about his father's death. Detective Barlow testified at trial that defendant stated "that he wanted to get something straight and talk about the death of his father. . . . [He] stated that on the date that he and Cindy Jones [Ms. Hopson] turned around at Susan Newton's residence, that Cindy had said that she was going to see Susan and he did not know why she had turned around."

[3] Admission of this statement implicates defendant's rights under the Sixth Amendment of the United States Constitution. Therefore, "[t]he burden is upon the State to demonstrate, beyond a reasonable doubt, that [any] error was harmless." N.C.G.S. § 15A-1443(b) (1988). Even under that exacting standard, we find admission of defendant's statement that he did not know why Ms. Hopson turned the car around in the driveway to be harmless beyond a reasonable doubt. The statement does nothing to inculpate defendant and is not probative of his guilt or innocence. Assuming error, arguendo, we hold it harmless beyond a reasonable doubt. *See State v. Detter*, 298 N.C. 604, 626-27, 260 S.E. 2d 567, 583 (1979).

[4] Agent Knowles also testified regarding the interrogation concerning the ceiling fans. On cross-examination, he testified that during the interrogation defendant explained why he denied being with Ms. Hopson on 27 October when questioned at his ex-wife's house. Defendant told Agent Knowles he was "wanting to have two women" and did not want his ex-wife to know he had been with Ms. Hopson the evening before. Defense counsel elicited this latter statement on cross-examination and did not object to its admission at trial. Any error thus was invited and defendant cannot complain of such error on appeal. N.C.G.S. § 15A-1443(c) (1988). "Defendant cannot invalidate a trial by . . . eliciting evidence on cross-examination which he might have rightfully excluded if the same evidence had been offered by the State. . . . Neither is invited error ground for a new trial." *State v. Chatman*, 308 N.C. 169, 177, 301 S.E. 2d 71, 76 (1983) (quoting *State v. Waddell*, 289 N.C. 19, 25, 220 S.E. 2d 293, 298 (1975),

death sentence vacated, 428 U.S. 904, 49 L.Ed. 2d 1210 (1976) (citations omitted)).

[5] Defendant assigns error to the denial of his motion to strike Ms. Hopson's testimony that she "felt that he (defendant) had killed once and he would kill again." Defendant also assigns error to the admission of, and denial of his motion to strike, the following testimony by Ms. Hopson: "I told them that I believe if he was not locked up that he would kill me. There is no doubt in my mind that he would kill me." Defendant argues that these statements were inadmissible under N.C.G.S. § 8C-1, Rules 602 and 701, as opinions or conclusions of a lay witness not based on personal knowledge.

On the night of the crime and again on 27 October 1986, Ms. Hopson told investigating officers she was with defendant the night of 1 May 1986. She denied any knowledge of defendant's involvement in the death. On 29 October she recanted and gave the officers a statement implicating defendant in the murder. Defense counsel brought out these inconsistencies in Ms. Hopson's statements during cross-examination of Detective Barlow, which preceded Ms. Hopson's testimony.

During its direct examination of Ms. Hopson, the State elicited her reasons for lying to the police prior to 29 October 1986. The following exchange took place:

> Q: Did you have a reason for not telling them what you knew?
>
> Mr. Lackey: Objection.
>
> Court: Overruled.
>
> A: Gary told me . . . .
>
> Mr. Lackey: Objection.
>
> Court: Overruled.
>
> A: He told me that he would kill me if I ever breathed a word to anybody and after what he done, I believed him.

When questioned regarding her failure to inform the police of defendant's involvement in his father's death during her interview with Agent Knowles on 27 October 1986, Ms. Hopson testified as follows:

Q: Did you ever have a reason for telling that story?

A: *I felt that he had killed once and that he would kill again.*

Mr. Lackey: Object and move to strike that.

Court: Overruled.

Later, during direct examination, the following exchange took place:

Q: When you talked to the officers at your mother's house, what did you tell them, if anything, before you told them about Gary killing his father?

A: I was assured by them if I told them what I knew that Gary would be picked up and locked up.

During cross-examination Ms. Hopson admitted that she had had several opportunities to speak to law enforcement officers outside the presence of defendant. On redirect examination, the State again questioned Ms. Hopson's motive for withholding evidence of defendant's involvement in his father's death. The prosecutor asked:

Q: What, if anything, did you tell the officers about your fear of [defendant] before you made any statement to them?

Mr. Lackey: Objection.

Court: Overruled.

A: *I told them that I believe if he was not locked up that he would kill me. There is no doubt in my mind that he would kill me.*

Mr. Lackey: Move to strike the answer.

Court: Motion is denied.

Once a witness's prior inconsistent statements have been introduced into evidence, the witness is entitled to explain the inconsistency. *State v. Carey*, 285 N.C. 509, 518-19, 206 S.E. 2d 222, 228 (1974), *death sentence vacated*, 428 U.S. 904, 49 L.Ed. 2d 1209 (1976); *State v. Mosley*, 33 N.C. App. 337, 235 S.E. 2d 261, *disc. rev. denied*, 293 N.C. 162, 236 S.E. 2d 706 (1977); 1 Brandis on North Carolina Evidence § 46, at 221 (3d ed. 1988) ("After the

witness is shown to have made an apparently inconsistent statement he is entitled to explain it away, if he can, by showing that it was not in fact inconsistent or by giving his reasons for making it."). Because evidence of Ms. Hopson's prior inconsistent statements regarding defendant's involvement in his father's death was introduced at trial, she was entitled to explain her reasons for giving the conflicting accounts of her and defendant's activities on the night of the murder. These assignments of error are therefore overruled.

[6] Defendant next contends the trial court erred in admitting the following testimony by defendant's brother:

> Q. What, if anything, else did he [*i.e.*, the victim] say about the land?
>
> [Objection on hearsay grounds overruled.]
>
> A. He told me that [defendant] wanted the place where the trailer was at and if he didn't straight up [sic] that he was not giving it to him.

Defendant argues that this statement was hearsay that prejudiced him by tending to show his motive for killing his father.[1]

The statement was admissible on either of two grounds:

First, it was admissible to show that ill will existed between defendant and his father. " '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) (1988) (emphasis added). "[W]henever an extrajudicial statement is offered for a purpose other than proving the truth of the matter asserted, it is not hearsay." *State v. Maynard*, 311 N.C. 1, 15-16, 316 S.E. 2d 197, 205, *cert. denied*, 469 U.S. 963, 83 L.Ed. 2d 299 (1984). *See also* 1 Brandis on North Carolina Evidence § 141, at 643 (3d ed. 1988).

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1. The State's theory of defendant's motive also was supported by Ms. Hopson's testimony that defendant told her

> that [defendant's mother] would die before his daddy and if she died before his daddy then he would not get nothing, that he would give everything away to [defendant's brothers] so they would have control of it all.

The testimony in question was probative of something other than the truth of the matter asserted. It tended to show that the victim intended to disinherit defendant and to show ill will between defendant and the victim. It thus supported the State's theory concerning defendant's motive for murdering his father, and it was therefore admissible for a nonhearsay purpose.

Second, if it was hearsay the testimony was admissible under the state of mind exception to the hearsay rule.

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (3) Then Existing Mental, Emotional, or Physical Condition.—A statement of the declarant's then existing state of mind, . . . (such as intent, plan, motive, design, . . .), but not including a statement of memory or belief to prove the fact remembered or believed . . . .

N.C.G.S. § 8C-1, Rule 803(3) (1988). "Evidence tending to show a presently existing state of mind is admissible if the state of mind sought to be proved is relevant and the prejudicial effect of the evidence does not outweigh its probative value." *State v. Locklear*, 320 N.C. 754, 760, 360 S.E. 2d 682, 685 (1987). Under the state of mind exception, when intent is directly in issue a declarant's statements "relative to his then existing intention are admitted without question." 1 Brandis on North Carolina Evidence § 162, at 733 (3d ed. 1988). *See Maynard*, 311 N.C. 1, 316 S.E. 2d 197 (pre-Rules case, murder victim's statement that he would testify against defendant properly admitted as evidence of defendant's motive). Here, the victim's state of mind regarding his intention to disinherit defendant was relevant to the issue of defendant's motive. The testimony in question thus was admissible under the state of mind exception to the hearsay rule.

[7] Defendant next assigns error to the charge on reasonable doubt. Prior to closing arguments, defendant requested in writing the following instruction:

> A reasonable doubt is a doubt based on reason and common sense, arising out of some or all of the evidence that has been presented, or lack or insufficiency of the evidence, as

> the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt.

See N.C.P.I.—Crim. 101.10. The trial court charged instead:

> A reasonable doubt, members of the jury, is not a mere possible doubt, for most things that relate to human affairs are open to some possible or imaginary doubt. But rather a reasonable doubt is a fair doubt based on reason and common sense growing out of some evidence or lack of evidence in the case.

After the court completed its charge, defense counsel specifically requested the instruction that "proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt," stating that he had told the jury in closing arguments it would hear that definition from the court. The court declined to give the additional instruction.

Defendant first argues that the instruction given did not substantially comply with definitions of reasonable doubt previously approved by this Court. "Absent request, the trial court is not required to define reasonable doubt, but if it undertakes to do so, the definition must be substantially correct." *State v. Wells*, 290 N.C. 485, 492, 226 S.E. 2d 325, 330 (1976). However, the court is not required to read the requested instruction verbatim. "The law does not require any set formula in defining reasonable doubt." *State v. Withers*, 271 N.C. 364, 368, 156 S.E. 2d 733, 736 (1967) (quoting *State v. Hammonds*, 241 N.C. 226, 232, 85 S.E. 2d 133, 138 (1954)). While the language defendant requested was appropriate, it was not essential to an accurate definition of reasonable doubt, and the refusal to give the requested instruction verbatim was not error. "Brevity makes for clarity and we think the jury fully understood the meaning of reasonable doubt as that term is employed in the administration of the criminal laws." *Wells*, 290 N.C. at 492, 226 S.E. 2d at 330. *See also State v. Oliver*, 85 N.C. App. 1, 354 S.E. 2d 527 (instruction on reasonable doubt omitting phrase "convinced to a moral certainty" not error), *disc. rev. denied*, 320 N.C. 174, 358 S.E. 2d 64 (1987).

[8] Defendant further argues that the court erred by failing to notify defense counsel that it would not give the complete requested instruction. N.C.G.S. § 15A-1231(b) provides:

> Before the arguments to the jury, the judge must hold a recorded conference on instructions . . . . At the conference the judge must inform the parties . . . of what, if any, parts of tendered instructions will be given. . . . The failure of the judge to comply fully with the provisions of this subsection does not constitute grounds for appeal unless his failure . . . materially prejudiced the case of the defendant.

N.C.G.S. § 15A-1231(b) (1988). Defendant contends the court's failure to inform counsel that it would not use the full tendered instruction materially prejudiced his case because counsel relied on the omitted language in his closing argument to the jury. We disagree. The court gave, in essence, the instruction defendant requested. In light of this, and of the substantial evidence of defendant's guilt, we are satisfied that defendant's case was not materially prejudiced by the instruction given.

[9] Defendant assigns error to the denial of his motion to set aside the verdicts on the grounds that they are the result of passion and prejudice and are contrary to the greater weight of the evidence. He attacks the credibility of the State's chief witness, Ms. Hopson, pointing to the statements she gave police which conflicted with her statements at trial. He argues that her changed account coincided with his resumption of his relationship with his ex-wife. He points to Ms. Hopson's past record of eleven indictments for false pretenses. Finally, he calls attention to the testimony of two neighbors of the victim, who stated that they saw the victim alive after defendant left the trailer park the night of the murder.

The trial court must exercise its sound discretion when ruling on a motion to set aside the verdict as being against the greater weight of the evidence. *State v. Wilson*, 313 N.C. 516, 538, 330 S.E. 2d 450, 465 (1985). This decision is not reviewable absent an abuse of discretion. *Id.* We find no abuse of discretion in the denial of the motion here. Ms. Hopson's version of the events was corroborated in part by other witnesses and by the location of the murder weapon. Defendant attacked her credibility on cross-examination, and the jury was left to weigh her testimony in light of her prior inconsistent statements and record of untruthfulness. The trial court properly concluded that the credibility of the State's principal witness was for the jury to determine.

We conclude that the guilt phase of defendant's trial was fair and free of prejudicial error.

SENTENCING PHASE

[10] Prior to arguments on sentencing, defendant submitted a list of ten mitigating circumstances. He assigns error to the court's refusal to submit three of the proposed circumstances to the jury as independent mitigating circumstances.

In pertinent part, the list was as follows:

> 1. The capital felony was committed while the Defendant was under the influence of mental or emotional disturbance. G.S. 15A-2000(f)(2).
>
> 2. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired. G.S. 15A-2000(6).
>
> . . .
>
> 4. The Defendant suffers from brain damage which impairs his judgment.
>
> 5. The Defendant suffers from poor impulse control.
>
> . . .
>
> 7. The Defendant has a significant drinking problem.
>
> . . .
>
> 10. Any other circumstance arising from the evidence which the jury deems to have mitigating value.

The court refused to submit numbers 4, 5, and 7 as separate mitigating circumstances, but instead incorporated their content into its instructions on numbers 1 and 2. When instructing on the statutory mitigating circumstance of commission while under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2), the court stated:

> You would find this mitigating circumstance if you find that the defendant suffered from brain damage which impaired his judgment, if you find that he had poor impulse control, if you find that he was under the influence of alcoholic beverages

> and that as a result that the defendant was under the influence of mental and/or emotional disturbance when he killed [the victim] . . . .

The court next instructed regarding the statutory mitigating circumstance of impaired capacity to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law. N.C.G.S. § 15A-2000(f)(6) (1988). The court stated:

> [T]he defendant need not wholly lack all capacity to conform. It is enough that such capacity as he might otherwise have had in the absence of brain damage which impaired his judgment or poor impulse control or under the influence of alcoholic beverages, is lessened or diminished because of such causes. You would find this mitigating circumstance if you find that the defendant suffered from brain damage which impaired his judgment, suffered from poor impulse control, suffered from alcoholic influence and that this impaired his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law . . . .

In addition, the court instructed the jury that it could find "any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value."

The sentencer in capital cases must "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Skipper v. South Carolina*, 476 U.S. 1, 4, 90 L.Ed. 2d 1, 6 (1986) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 110, 71 L.Ed. 2d 1, 8 (1982) (emphasis in original)). Here, the jury was not precluded from considering evidence of defendant's alleged brain damage, poor impulse control, and alcoholism. It heard testimony from a clinical psychologist regarding all three of these factors. Defendant's ex-wife testified that defendant had a drinking problem which was the source of their marital discord, but that defendant was a kind and generous man when not drinking. The trial court instructed that if the jury found that defendant suffered from either brain damage, poor impulse control, or a significant drinking problem, it should find that he committed the murder while under the influence of a mental or emotional disturbance and that his capacity to appreciate the criminality of his

conduct, or to conform his conduct to the requirements of law, was impaired. In addition, the court submitted to the jury the mitigating circumstance of "any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value." The court thus not only allowed—but actually instructed—the jury to consider evidence of defendant's alleged brain damage, poor impulse control, and drinking problem.

Defendant's argument is rooted in the notion that the jury would have been more impressed with the mitigating value of the proffered evidence if it had been categorized into three separate mitigating circumstances rather than consolidated into the two statutory mitigating circumstances and the "catch-all" circumstance. We reject this "mechanical[,] mathematical approach" to capital sentencing. *See State v. McDougall*, 308 N.C. 1, 32, 301 S.E. 2d 308, 326, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 173 (1983). The trial court recognized the danger of a numerical approach when it instructed the jury:

> After considering the totality of the aggravating circumstances and mitigating circumstances, you must be convinced beyond a reasonable doubt that the imposition of the death penalty is justified and appropriate in this case before you can answer this issue, yes. In so doing, you are not applying a mathematical formula. For example, three circumstances of one kind do not automatically and of necessity outweigh one circumstance of another kind. The number of circumstances found is only one consideration in determining which circumstances outweigh others. You may very properly emphasize one circumstance more than another in a particular case. You must consider the relative substantiality and persuasiveness of the existing aggravating and mitigating circumstances in making this determination.

This partial instruction correctly states the law. The refusal to submit the proposed circumstances separately and independently was within the dictates of constitutional precedent and was not error. *See State v. Fullwood*, 323 N.C. 371, 393, 373 S.E. 2d 518, 531 (1988); *State v. Lloyd*, 321 N.C. 301, 313-14, 364 S.E. 2d 316, 324-25, *vacated on other grounds*, --- U.S. ---, 102 L.Ed. 2d 18, *judgment reinstated*, 323 N.C. 622, 374 S.E. 2d 277 (1988).

[11] Defendant next argues that the court erred in denying his motion to set aside the sentencing recommendation and the death sentence on the ground that the jury did not answer two of the mitigating circumstances unanimously. In answer to the question, "Was this murder committed while the defendant was under the influence of mental or emotional disturbance?" the jury responded, "No. Not unanimous." The jury gave an identical response to the proposed mitigating circumstance, "Did the defendant have a good relationship with the deceased prior to May 1, 1986?" We have previously rejected the argument that *Mills v. Maryland*, 486 U.S. ---, 100 L.Ed. 2d 384 (1988), requires us to overrule our case law holding that jury unanimity is required for a finding of a mitigating circumstance. *State v. McKoy*, 323 N.C. 1, 44, 372 S.E. 2d 12, 35-36 (1988). For the reasons stated in *McKoy*, this assignment of error is overruled.

We conclude that the sentencing phase of defendant's trial was fair and free of prejudicial error.

PROPORTIONALITY REVIEW

Statutory provisions governing capital sentencing direct this Court to review the record and determine (1) whether it supports the jury's finding of the aggravating circumstance(s) upon which the sentencing court based the sentence of death, (2) whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, and (3) whether the sentence is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2) (1988).

[12] We first consider whether the record supports the jury's finding of the aggravating circumstance. The prosecution submitted two aggravating circumstances to the jury: was the murder committed while the defendant was engaged in the commission of robbery with a dangerous weapon, and was the murder especially heinous, atrocious or cruel. The jury found the former but rejected the latter.

"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." *State v. Rasor*, 319 N.C. 577, 587, 356 S.E. 2d 328,

334 (1987); N.C.G.S. § 14-87(a) (1986). Ms. Hopson testified that defendant went to his father's house carrying a shotgun. He returned with "a good-sized wad of money," belonging to his father, which he later counted as fourteen hundred dollars. Ms. Hopson testified that defendant returned from his father's house covered with blood and told her he had beaten his father to death using the shotgun. This evidence is sufficient to support a finding of the aggravating circumstance of commission of the murder while defendant was engaged in an armed robbery.

After reviewing the transcript, record on appeal, briefs, and oral arguments, we conclude that nothing in the record suggests that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.

[13] We turn next to the task of proportionality review, wherein we "compare the case at bar with other cases in the pool which are roughly similar with regard to the crime and the defendant, such as, for example, the manner in which the crime was committed and defendant's character, background, and physical and mental condition." *State v. Lawson*, 310 N.C. 632, 648, 314 S.E. 2d 493, 503 (1984), *cert. denied*, 471 U.S. 1120, 86 L.Ed. 2d 267 (1985). A finding that juries consistently have returned life sentences in similar cases will provide us with "a strong basis for concluding that a death sentence in the case under review is excessive or disproportionate." *Id.*

The pool of similar cases includes all cases tried as capital cases since the passage of our capital punishment statute, 1 June 1977, which have been reviewed on direct appeal by this Court, and in which the jury recommended death or life imprisonment or the trial court imposed life imprisonment after the jury failed to agree upon a sentencing recommendation. *State v. Williams*, 308 N.C. 47, 79, 301 S.E. 2d 335, 355, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L.Ed. 2d 704 (1983). The pool is further restricted to cases found by this Court to be free from error in both phases of the trial. *State v. Goodman*, 298 N.C. 1, 35, 257 S.E. 2d 569, 591 (1979).

The sole aggravating circumstance found in this case was commission of the murder during a robbery with a dangerous weapon. The jury found the following mitigating circumstances: that defendant's I.Q. of eighty-one placed him in the lowest ten

percent of the population; that defendant was a model prisoner in jail while awaiting trial; that defendant was a person of good behavior except when he was drinking alcohol; and the catch-all exception of "any other circumstance or circumstances which you the jury deem to have mitigating value."[2]

Defendant characterizes this crime as a robbery-murder. He argues that because this Court vacated the death sentence in *State v. Young*, 312 N.C. 669, 325 S.E. 2d 181 (1985), it is bound to do the same in his case. In *Young* the nineteen-year-old defendant, along with two companions, went to the victim's house intending to rob and murder the victim. Defendant stabbed the victim in the chest twice, then handed the knife to his companion, ordering the companion to "finish him." The companion stabbed the victim several more times. The three perpetrators then stole the victim's money and coin collection and fled.

The jury in *Young* found as aggravating circumstances that the murder was committed while defendant was engaged in the commission of armed robbery and that it was committed for pecuniary gain. N.C.G.S. § 15A-2000(e)(5), (6) (1988). At that time, we counted twenty-eight robbery-murder cases in the pool and noted that in twenty-three of those cases juries imposed sentences of life imprisonment rather than death. *Young*, 312 N.C. at 687, 325 S.E. 2d at 192. We then stated:

> While we wish to make it *abundantly clear* that we do not consider this numerical disparity dispositive of our proportionality review, our careful examination of these cases has led us to the conclusion that although the crime here committed was a tragic killing, "it does not rise to the level of

2. Defendant submitted, and the jury refused to find, the following mitigating circumstances:

> 1. Was this murder committed while the defendant was under the influence of mental or emotional disturbance? (Answer: No, not unanimous.)
>
> 2. Was the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law impaired? (Answer: No—The jury was unanimous—[illegible] his capacity was not impaired.
>
> . . .
>
> 6. Did the defendant have a good relationship with the deceased prior to May 1, 1986? (No, not unanimous.)

> those murders in which we have approved the death sentence upon proportionality review." . . . The facts presented by this appeal more closely resemble those cases in which the jury recommended life imprisonment than those in which the defendant was sentenced to death.

Id. at 688, 325 S.E. 2d at 193 (quoting *State v. Jackson*, 309 N.C. 26, 46, 305 S.E. 2d 703, 717 (1983) (emphasis in original)).

In addition to *Young*, defendant cites the following robbery-murder cases in which juries recommended life sentences: *State v. Penley*, 318 N.C. 30, 347 S.E. 2d 783 (1986); *State v. Sumpter*, 318 N.C. 102, 347 S.E. 2d 396 (1986); *State v. Murray*, 310 N.C. 541, 313 S.E. 2d 523 (1984). Defendant calls our attention to *State v. Stokes*, 319 N.C. 1, 352 S.E. 2d 653 (1987), the companion case to *Murray*, in which defendant Murray's codefendant, Stokes, was sentenced to death. This Court vacated the Stokes sentence, relying in part on the fact that Stokes' codefendant, Murray, received a life sentence for the same crime.

We repeat our warning in *Young* that numerical disparity is not dispositive on proportionality review. Our conclusion that the death sentence in *Young* was disproportionate was based on the finding that the murder did not rise to the level of the crimes committed in death-affirmed cases, not on mere numerical disproportion. We also note that many of the robbery-murder cases included in defendant's brief are pure felony-murder cases. The jury in the present case also found premeditation and deliberation on defendant's part. While the *Penley* and *Sumpter* juries found premeditation and deliberation by defendants there, the *Stokes* and *Murray* juries did not.

In addition, the defendants in *Young*, *Murray*, and *Stokes* were considerably younger than the thirty-seven-year-old defendant in this case. Young was nineteen, Stokes was seventeen, and Murray was in his "early twenties."

None of the above-cited cases involved a victim related to the defendant. That fact alone distinguishes the present case from the standard robbery-murder case involving an unknown victim or casual acquaintance. In the final analysis, the present case is distinguishable from other robbery-murder cases primarily because the victim was defendant's father. This relationship be-

tween defendant and victim "in itself rendered the offense dehumanizing beyond the normal." *State v. Blalock*, 77 N.C. App. 201, 205, 334 S.E. 2d 441, 444 (1985) (Fair Sentencing Act case wherein father assaulted son). Our research reveals no other case in the pool with similar facts. Defendant beat the victim to death to steal his money and secure an inheritance. The victim was in a position of enhanced vulnerability because the victim and defendant were closely related, defendant lived nearby, the two frequently spent time together, and the victim thus had no reason to be on guard against harm at defendant's hand. Defendant told Ms. Hopson, and she testified, that the victim had his back to defendant when defendant struck him in the head with the shotgun, saying, "You done me wrong, you son of a bitch." The pathologist testified that the blow to the head was the cause of death. Thus, defendant killed his father for a pecuniary motive while his father had his back turned. The evidence showed that defendant inflicted further blows on the victim, then dragged the body to the stairs, attempting to make the murder look like an accident. These actions show a meanness on the part of a mature, calculating adult without remorse for his crime or mercy towards his victim.

Defendant attempts to portray his case as a typical robbery-murder. We disagree with this characterization; the crime is more accurately described as a premeditated and deliberated robbery-murder of a parent by a child, executed by a brutal beating until death resulted. The pool contains few cases involving the murder of a parent. In *State v. Clark*, 300 N.C. 116, 265 S.E. 2d 204 (1980), defendant stabbed his father to death. The jury recommended life imprisonment. However, there a psychiatrist testified that defendant might have committed the murder while suffering from a psychotic break. In addition, several witnesses testified regarding defendant's unusual behavior. Finally, defendant testified that he was an F.B.I. agent with badge number zero, that he was born in Africa on "the first year, the first day, the first month, three-one-one-one," and that he had come to investigate the stabbing of his "son." Further testimony by defendant was equally bizarre. Thus, the substantial evidence of insanity there distinguishes *Clark* from the present case.

We next compare this case to others in which this Court has affirmed a sentence of death, in order to determine whether this

case "rise[s] to the level of those murders in which we have approved the death sentence upon proportionality review." *State v. Jackson*, 309 N.C. at 46, 305 S.E. 2d at 717. Defendant maintains that the death penalty is disproportionate in this regard, emphasizing that this penalty has never been imposed in North Carolina in a case in which the only aggravating circumstance was that the murder was committed while the defendant was engaged in the commission of an armed robbery. We rejected a similar argument in *State v. Zuniga*, 320 N.C. 233, 357 S.E. 2d 898, *cert. denied*, --- U.S. ---, 98 L.Ed. 2d 384 (1987). In that case, defendant argued that the death penalty was disproportionate because the single aggravating circumstance of an accompanying felony was submitted to the jury. We stated that "a single aggravating factor may outweigh a number of mitigating factors and may be sufficient to support a death sentence." *Id.* at 274, 357 S.E. 2d at 923. The present case required the jury to weigh one statutory aggravating circumstance against three nonstatutory mitigating circumstances and the statutory "catch-all" circumstance. We consistently have rejected a "mechanical[,] mathematical approach" to weighing aggravating and mitigating circumstances. *State v. McDougall*, 308 N.C. at 32, 301 S.E. 2d at 326. We cannot say as a matter of law that the jury recommended a disproportionate sentence merely because the sentence was based on a single aggravating circumstance.

Defendant argues that one of three aggravating circumstances is almost always present in North Carolina cases in which the jury recommends a death sentence and this Court affirms the death sentence on appeal. These three circumstances are:

> (1) The defendant had been previously convicted of a felony involving the use or threat of violence to the person. N.C.G.S. § 15A-2000(e)(3) (1988).
>
> (2) The capital felony was especially heinous, atrocious or cruel. N.C.G.S. § 15A-2000(e)(9) (1988).
>
> (3) The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons. N.C.G.S. § 15A-2000(e)(11) (1988).

Defendant states that in the thirty "death-affirmed" cases in the pool, juries found at least one of the above three aggravating circumstances in twenty-nine cases.[3] The exception was *Zuniga*,

3. In eight of the thirty cases, the jury found that the defendant previously had been convicted of a violent felony. *State v. Green*, 321 N.C. 594, 365 S.E. 2d 587, *cert. denied*, --- U.S. ---, 102 L.Ed. 2d 235 (1988); *State v. Holden*, 321 N.C. 125, 362 S.E. 2d 513 (1987), *cert. denied*, --- U.S. ---, 100 L.Ed. 2d 935 (1988); *State v. Brown*, 320 N.C. 179, 358 S.E. 2d 1, *cert. denied*, --- U.S. ---, 98 L.Ed. 2d 406 (1987); *State v. Robbins*, 319 N.C. 465, 356 S.E. 2d 279, *cert. denied*, --- U.S. ---, 98 L.Ed. 2d 226 (1987); *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); *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. McDougall*, 308 N.C. 1, 301 S.E. 2d 308, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 173 (1983); *State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761 (1981), *cert. denied*, 463 U.S. 1213, 77 L.Ed. 2d 1398, *reh'g denied*, 463 U.S. 1249, 77 L.Ed. 2d 1456 (1983). In seventeen of the thirty cases, the jury found that the murder was especially heinous, atrocious, or cruel. *State v. Lloyd*, 321 N.C. 301, 364 S.E. 2d 316, *judgment vacated and remanded*, --- U.S. ---, 102 L.Ed. 2d 18, *judgment reinstated*, 323 N.C. 622, 374 S.E. 2d 277 (1988); *State v. Spruill*, 320 N.C. 688, 360 S.E. 2d 667 (1987), *cert. denied*, --- U.S. ---, 100 L.Ed. 2d 934 (1988); *State v. Gladden*, 315 N.C. 398, 340 S.E. 2d 673, *cert. denied*, 479 U.S. 871, 93 L.Ed. 2d 166 (1986); *Brown*, 315 N.C. 40, 337 S.E. 2d 808; *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); *Boyd*, 311 N.C. 408, 319 S.E. 2d 189; *State v. Maynard*, 311 N.C. 1, 316 S.E. 2d 197, *cert. denied*, 469 U.S. 963, 83 L.Ed. 2d 299 (1984); *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983); *State v. Craig and State v. Anthony*, 308 N.C. 446, 302 S.E. 2d 740, *cert. denied*, 464 U.S. 908, 78 L.Ed. 2d 247 (1983); *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L.Ed. 2d 704 (1983); *McDougall*, 308 N.C. 1, 301 S.E. 2d 308; *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569, *cert. denied*, 459 U.S. 1080, 74 L.Ed. 2d 642 (1982); *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982), *reh'g denied*, 459 U.S. 1189, 74 L.Ed. 2d 1031 (1983); *State v. Smith*, 305 N.C. 691, 292 S.E. 2d 264, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982); *State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981), *cert. denied*, 455 U.S. 1038, 72 L.Ed. 2d 155 (1982); *State v. Martin*, 303 N.C. 246, 278 S.E. 2d 214, *cert. denied*, 454 U.S. 933, 70 L.Ed. 2d 240, *reh'g denied*, 454 U.S. 1117, 70 L.Ed. 2d 655 (1981); *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979), *cert. denied*, 448 U.S. 907, 65 L.Ed. 2d 1137, *reh'g denied*, 448 U.S. 918, 65 L.Ed. 2d 1181 (1980). In eleven of the cases, the jury found that the murder was part of a course of conduct in which the defendant committed a violent crime against another person. *Green*, 321 N.C. 594, 365 S.E. 2d 587; *State v. Vereen*, 312 N.C. 499, 324 S.E. 2d 250, *cert. denied*, 471 U.S. 1094, 85 L.Ed. 2d 526 (1985); *State v. Noland*, 312 N.C. 1, 320 S.E. 2d 642 (1984), *cert. denied*, 469 U.S. 1230, 84 L.Ed. 2d 369, *reh'g denied*, 471 U.S. 1050, 85 L.Ed. 2d 342 (1985); *State v. Gardner*, 311 N.C. 489, 319 S.E. 2d 591 (1984), *cert. denied*, 469 U.S. 1230, 84 L.Ed. 2d 369 (1985); *State v. Lawson*, 310 N.C. 632, 314 S.E. 2d 493 (1984), *cert. denied*, 471 U.S. 1120, 86 L.Ed. 2d 267 (1985); *Craig and Anthony*, 308 N.C. 446, 302 S.E. 2d 740; *McDougall*, 308 N.C. 1, 301 S.E. 2d 308; *Brown*, 306 N.C. 151, 293 S.E. 2d 569; *Pinch*, 306 N.C. 1, 292 S.E. 2d 203; *State v. Williams*, 305 N.C. 656, 292 S.E. 2d 243, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982); *State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788 (1981); *cert. denied*, 464 U.S. 1065, 79 L.Ed. 2d 207 (1984). In his

which involved the rape and murder of a seven-year-old girl.[4] Since defendant submitted his brief, seven death-affirmed cases have been added to the pool. These additional cases support defendant's observation regarding the prevalence of these three aggravating circumstances.[5]

We recognize that certain aggravating circumstances usually are present in death-affirmed cases, but we do not consider their presence crucial to affirmation of a jury's recommendation of a death sentence. *See State v. Brown*, 320 N.C. 179, 230, 358 S.E. 2d 1, 33 (not all death-affirmed cases involve a finding of heinous, atrocious, or cruel murder), *cert. denied*, --- U.S. ---, 98 L.Ed. 2d 406 (1987). While comparison of the relevant aggravating circumstance(s) provides an important method for comparative proportionality review, our capital sentencing statute directs us to consider whether the death sentence in a given case is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2) (1988). Our review of the sentence is therefore not so

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brief, defendant included a thirtieth case, *State v. McDowell*, 301 N.C. 279, 271 S.E. 2d 286 (1980), *cert. denied*, 450 U.S. 1025, 68 L.Ed. 2d 220, *reh'g denied*, 451 U.S. 1012, 68 L.Ed. 2d 865 (1981), in which the jury found all three of these aggravating circumstances. Because the United States Court of Appeals for the Fourth Circuit has ordered release of the defendant there on habeas corpus unless he is retried within a reasonable time to be set by the federal district court, *McDowell v. Dixon*, 858 F. 2d 945 (4th Cir. 1988), this case has been eliminated from the pool.

4. The only aggravating circumstance submitted to the jury in *Zuniga* was commission of the murder while defendant was engaged in an accompanying felony. N.C.G.S. § 15A-2000(e)(5) (1988).

5. *See State v. Hunt and Barnes*, 323 N.C. 407, 373 S.E. 2d 400 (1988) (prior violent felony or prior capital felony); *State v. Fullwood*, 323 N.C. 371, 373 S.E. 2d 518 (1988) (heinous, atrocious, or cruel); *State v. Allen*, 323 N.C. 208, 372 S.E. 2d 855 (1988) (course of conduct); *State v. Cummings*, 323 N.C. 181, 372 S.E. 2d 541 (1988) (prior capital offense); *State v. McLaughlin*, 323 N.C. 68, 372 S.E. 2d 49 (1988) (heinous, atrocious, or cruel); *State v. McKoy*, 323 N.C. 1, 372 S.E. 2d 12 (1988) (prior violent felony); and *State v. Lloyd*, 321 N.C. 301, 364 S.E. 2d 316 (heinous, atrocious, or cruel), *judgment vacated and remanded*, --- U.S. ---, 102 L.Ed. 2d 18 (1988), *judgment reinstated*, 323 N.C. 622, 374 S.E. 2d 277 (1988). We note that *Hunt and Barnes* and *Cummings* involve prior capital offenses rather than prior violent felonies, but consider the two aggravating circumstances to be sufficiently analogous for purposes of this discussion, as both circumstances "reflect upon the defendant's character as a recidivist." *State v. Brown*, 320 N.C. 179, 224, 358 S.E. 2d 1, 30, *cert. denied*, --- U.S. ---, 98 L.Ed. 2d 406 (1987).

cursory as considering only cases involving identical aggravating circumstances. Rather, our task is more complicated, as it involves examining both the crime and the defendant.

Although none of the death-affirmed cases involve circumstances similar to defendant's case, we nonetheless conclude that this case does rise to the level of certain other death-affirmed cases. In *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), the defendant beat his sixty-five-year-old mother-in-law to death with an iron skillet. The attack on the victim there essentially was unprovoked, as was the attack on this defendant's victim. Neither victim had reason to guard against aggression by either defendant, as the defendant was well known to the victim in both cases. Both victims were beaten to death. The jury did find the murder in *Huffstetler* to be especially heinous, atrocious, or cruel, a factor rejected by the jury here. However, the jury in *Huffstetler* found that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. This statutory mitigating circumstance was rejected by the jury here. Thus, the assault in *Huffstetler* may have been more brutal, but the defendant there may have been less culpable. We declined to overrule the jury's recommendation of death in *Huffstetler*, and we decline to do so here.

In *Brown*, the defendant shot the victim in the head after lying in wait outside the victim's home. *Brown*, 320 N.C. 179, 358 S.E. 2d 1. We recognized in *Brown* the special status of the home, and stated that the murder there "shocks the conscience, not only because a life was senselessly taken, but because it was taken by the surreptitious invasion of an especially private place, one in which a person has a right to feel secure." *Id.* at 231, 358 S.E. 2d at 34. Perhaps at no time does a person feel safer and more secure than when in his or her home with a family member. By murdering his father in his "castle," defendant violated not only the bonds of family, but the sanctity the law accords to the victim's abode.

Like the defendant in *Brown*, defendant displayed no remorse for his act. He pretended to join his family in grieving for his father, but threatened to kill Ms. Hopson if she ever told anyone of his responsibility for the murder. *Cf. State v. Bon-*

durant, 309 N.C. 674, 694, 309 S.E. 2d 170, 182-83 (1983) (defendant's remorse and concern for victim's life immediately following the shooting a significant factor in Court's vacating death sentence as disproportionate). Another similarity between this case and *Brown* was the lack of opportunity for the victim to defend himself. Defendant hit his father over the head while his back was turned. "Unlike the victim felled in a face-to-face confrontation, this victim had no chance to fight for his life." *Brown*, 320 N.C. at 232, 358 S.E. 2d at 34. These cases parallel one another in the cowardly nature of the assaults.

The defendant in *State v. Lloyd*, 321 N.C. 301, 364 S.E. 2d 316, *judgment vacated and remanded*, --- U.S. ---, 102 L.Ed. 2d 18, *judgment reinstated*, 323 N.C. 622, 374 S.E. 2d 277 (1988), murdered and robbed his former employer. The victim was beaten and stabbed to death; his body had thirty-six wounds. The jury returned a verdict of guilty of first degree murder based on both felony murder and premeditation and deliberation. Aggravating circumstances found by the jury included especially heinous, atrocious, or cruel and commission during an armed robbery. Except for the especially heinous nature of the assault in *Lloyd*, the crime there and the crime here bear some resemblance. Both involved a premeditated robbery-murder by an assailant known to the victim. In addition, the mitigating circumstances found by the respective juries are somewhat similar. The *Lloyd* jury found four mitigating circumstances: (1) since his arrest, defendant had shown no tendencies of violence toward others; (2) since his arrest, defendant had abided by the rules and regulations of the jail; (3) defendant had adapted well to life as a prisoner; and (4) defendant had suffered from episodic alcohol abuse since 1973. Two of these circumstances reflect on defendant Lloyd's behavior in jail; one of the mitigating circumstances found by the jury in defendant's case was that defendant had been a model prisoner in jail while awaiting trial. Defendant Lloyd was found to suffer from episodic alcohol abuse; defendant in the present case was found to be a person of good behavior except when he was drinking alcohol. The juries in both cases concluded the mitigating circumstances were insufficient to outweigh the aggravating circumstances. We did not find the penalty imposed disproportionate in *Lloyd*, and neither do we so find here.

Having compared this case to other death-affirmed cases, "[w]e cannot say that it does not fall within the class of first

degree murders in which we have previously upheld the death penalty." *State v. Brown*, 315 N.C. 40, 71, 337 S.E. 2d 808, 830 (1985), *cert. denied*, 476 U.S. 1165, 90 L.Ed. 2d 733 (1986). We find no error in the guilt or sentencing phases of defendant's trial. Considering the pool cases, the crime, and the defendant, we cannot hold as a matter of law that the death sentence was disproportionate or excessive. We thus decline to set aside the penalty recommended by the jury, to which "great deference should be accorded." *State v. Goodman*, 298 N.C. at 35, 257 S.E. 2d at 591.

No error.

Chief Justice EXUM concurring.

I concur with the majority's treatment of all issues in the guilt and sentencing phases of this trial.

If in the sentencing phase the Court were addressing for the first time the mitigating circumstance unanimity instruction issue, I would agree with defendant's position that these instructions violate the Eighth Amendment to the federal constitution as that amendment was interpreted in *Mills v. Maryland*, 486 U.S. ---, 100 L.Ed. 2d 384 (1988), for the reasons stated in my dissenting opinions in *State v. McKoy*, 323 N.C. 1, 372 S.E. 2d 12 (1988), and *State v. Allen*, 323 N.C. 208, 372 S.E. 2d 855 (1988). The majority's position on this issue is, as a result of the Court's decisions in *McKoy* and *Allen*, the law of this state to which I am now bound. For this reason I concur with the majority's treatment of this issue.

Justice FRYE dissenting as to sentence.

I agree with the majority that the guilt phase of defendant's trial was free of prejudicial error. In view of the decision of the United States Supreme Court in *Mills v. Maryland*, 486 U.S. ---, 100 L.Ed. 2d 384 (1988), and the action of that Court in remanding to this Court our decision in *State v. Lloyd*, 321 N.C. 301, 364 S.E. 2d 316 (1988), *vacated sub nom. Oscar Lloyd v. North Carolina*, --- U.S. ---, 102 L.Ed. 2d 18 (1988), *mandate reinstated by order*, *State v. Lloyd*, 323 N.C. 622, 374 S.E. 2d 277 (1988) (Exum, C.J., and Frye, J., dissenting), for consideration in light of *Mills*, I cannot join the majority's conclusion that the sentencing phase of

defendant's trial was free of prejudicial error. While in some cases we have to speculate as to whether the jurors' decision not to find a particular mitigating circumstance is unanimous, we have no such question in this case. As the majority notes, in answer to the question, "Was this murder committed while the defendant was under the influence of mental or emotional disturbance?" the jury responded, "No, not unanimous." Although some of the jurors were willing to find that the murder was committed while the defendant was under the influence of mental or emotional disturbance, they were not permitted to consider this mitigating circumstance in the final weighing process to determine whether defendant should live or die as the punishment for the crime he committed. This alone, in my opinion, brings the case within the ambit of *Mills*. Accordingly, I vote to give defendant a new sentencing hearing.

STATE OF NORTH CAROLINA v. LEROY McNEIL

No. 37A87

(Filed 9 February 1989)

1. **Criminal Law § 92.4— murder—two charges against same defendant—joinder proper**

The trial court did not err by allowing two murder charges to be joined for trial where there was sufficient evidence of a transactional connection to support joinder of the offenses in that defendant's need for money was a common thread which motivated him to begin his search for victims and led to the eventual robberies and murders of both victims. N.C.G.S. § 15A-926(a).

2. **Homicide § 18.1— premeditation and deliberation—evidence sufficient**

There was sufficient evidence of premeditation and deliberation to deny defendant's motion to dismiss a charge of first degree murder where the State's evidence tended to show that defendant needed money to pay rent and other bills; decided that his victim might have some money; called her and persuaded her to go out with him and Ms. McNeil; went to her house and picked her up; had a pistol under the seat which he put in his belt before he got out of the car; shot his victim in the head when she got out of the car; took her keys and money; and left her body by the side of the road.

3. **Jury § 6.3— understanding of parole—defendant not allowed to question potential jurors—no error**

There was no error in a prosecution for two first degree murders in denying defendant's request to question potential jurors as to their understanding

of the length of time a person would serve if sentenced to life imprisonment for first degree murder because parole procedures are irrelevant to a sentencing determination.

4. **Jury § 7.11— murder—jurors excused for cause—no opportunity for rehabilitation**

There was no error in a prosecution for two first degree murders in excusing three prospective jurors for cause due to their feelings about the death penalty without inquiry as to their ability to follow the law and without giving defendant the opportunity to question those prospective jurors where it was evident that those jurors' views on capital punishment would impair their ability to perform their duties as jurors and nothing in the record indicated that any of the prospective jurors would have been rehabilitated by defendant.

5. **Jury § 7.7— murder—denial of challenges for cause—peremptory challenges not exhausted**

Defendant did not preserve his right to appeal the denial of his challenges for cause of three prospective jurors in a murder prosecution where he used peremptory challenges to excuse two of the jurors and the record reveals he had one remaining peremptory challenge which he could have used. N.C.G.S. § 15A-1214(h) and (i).

6. **Criminal Law § 102.6— murder—prosecutor's closing argument—failure to intervene ex mero motu**

The trial court did not err in a prosecution for two first degree murders by failing to intervene *ex mero motu* in the prosecutor's closing argument where the prosecutor argued that he represented the victims, but did not mention any of the personal characteristics of the victims, nor did he discuss the impact of their deaths on their families; there was a reasonable inference from the evidence that, before defendant killed one victim, he removed her clothes and she begged for her life; and the prosecutor's argument concerning what the victim must have thought as she died, which was based on facts in evidence and on reasonable inferences from those facts, was not so grossly improper as to require the court to intervene.

7. **Criminal Law § 135.9— murder—nonstatutory mitigating circumstance of remorse—refusal to submit to jury—no error**

The trial court did not err in two murder prosecutions by refusing to submit the nonstatutory mitigating circumstance of remorse based on defendant's confession shortly after the murders took place where the Supreme Court could find no expression of remorse in the statement and defendant's statement to the jury was made in allocution while he was not under oath or subject to cross-examination.

8. **Criminal Law § 102.6— murder—sentencing—failure to intervene ex mero motu in prosecutor's argument—no error**

The trial court did not err in the sentencing portion of a prosecution for two first degree murders by failing to intervene *ex mero motu* in the prosecutor's closing argument because it was not improper for the prosecutor to refer to defendant's prior conviction for involuntary manslaughter, which was in evi-

dence; the prosecutor's question, "Is three not enough?" did not require intervention; the prosecutor's address to the women of the jury did not require intervention because the prosecutor did not make a personal plea to each female juror, rather, he called them by name and then spoke to them collectively; although the prosecutor asked the jury what message it would send to the community, he did not go outside the record and appeal to the jury to convict defendant because other murderers had killed other victims, nor did he encourage the jury to base its determination on sentiment; asking the jury to consider other cases in which death sentences were imposed was not so grossly improper as to require intervention *ex mero motu*; and telling the jury that defendant, not the jury, would be responsible for his execution was also not so grossly improper as to require intervention *ex mero motu*.

9. Criminal Law § 135.8— murder—instruction on previous felony involving violence

There was no plain error in a prosecution for two first degree murders in the court's instruction that the aggravating factor of a previous felony conviction involving the use of violence to the person would apply to both murders, if it applied at all, and that voluntary manslaughter is a crime involving the use of violence to the person where the State introduced evidence of defendant's prior conviction for the voluntary manslaughter of his former wife and defendant did not offer evidence that the killing of his former wife did not involve violence. This case involves one defendant on trial for two murders in which the evidence supporting the aggravating circumstance was identical in both cases.

10. Criminal Law § 135.8— murder—especially heinous, atrocious or cruel

There was no error in a prosecution for two first degree murders by submitting the aggravating circumstance that the murder of one victim was especially heinous, atrocious or cruel where the evidence tended to show that the defendant not only choked and shot the victim, but that he beat her, stabbed her, hit her in the face with a wooden frame which had nails sticking out of it, and pushed feces into her vagina.

11. Criminal Law § 135.8— murder—aggravating circumstance—committed while defendant engaged in commission of robbery

There was no error in the prosecution of defendant for two first degree murders by submitting as an aggravating circumstance that each murder was committed while defendant was engaged in the commission of a robbery because defendant was convicted of both first degree murders based on premeditation and deliberation as well as on felony murder.

12. Constitutional Law § 80— death penalty issues—not unconstitutional

Death qualification of a jury is not unconstitutional; N.C.G.S. § 15A-2000 is not unconstitutionally vague and overbroad, either facially or as applied; and N.C.G.S. § 15A-2000(e)(9), the heinous, atrocious, or cruel aggravating circumstance, has not been applied unconstitutionally.

13. Criminal Law § 135— death penalty—sentencing issues—no error

There was no error in the sentencing portion of a first degree murder prosecution in instructing the jury that it had a duty to return a recommenda-

tion of death if it found that the mitigating circumstances were insufficient to outweigh the aggravating circumstances and that the aggravating circumstances were sufficiently substantial to call for the death penalty; there was no error in failing to instruct the jury that the State had the burden of proving the nonexistence of each mitigating circumstance beyond a reasonable doubt and in placing the burden on defendant to prove each mitigating circumstance by a preponderance of the evidence; and there was no error in instructing the jurors that they must be unanimous before they could find the existence of a mitigating circumstance.

14. Weapons and Firearms § 1— murder—instruction that rifle and pistol are deadly weapons—no error

The trial court did not err in a murder prosecution by instructing the jury that a rifle and a pistol are deadly weapons as a matter of law.

15. Criminal Law § 135.10— death penalty—not disproportionate

Death penalty recommendations were not excessive or disproportionate to the penalty in similar cases where the case involved two premeditated and deliberated first degree murders; the evidence showed that defendant killed one victim to get money after spending his money on alcohol; defendant persuaded the victim to get into his car, planned to rob her, drove her to an isolated area, then robbed and brutally murdered her; defendant continued to reside next door to the building where her body lay after the murder; he planned to rob his next victim two days later, after another drinking spree; defendant called her and invited her to go out with him; and he then drove her to an isolated area, shot her, and stole several things from her apartment. Furthermore, the jury found that defendant had previously been convicted of a felony involving the use of violence to the person.

Chief Justice EXUM concurring.

Justice FRYE dissenting as to sentence.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from judgments imposing death sentences entered by *Brewer, Jr., J.*, at the 30 April 1984 Criminal Session of Superior Court, WAKE County. Heard in the Supreme Court 9 May 1988; additional arguments heard 22 August 1988.

Lacy H. Thornburg, Attorney General, by Ellen B. Scouten, Assistant Attorney General, for the State (original brief and argument); Lacy H. Thornburg, Attorney General, James J. Coman, Senior Deputy Attorney General, William N. Farrell, Jr., Special Deputy Attorney General, Joan H. Byers, Special Deputy Attorney General, Barry S. McNeill, Assistant Attorney General, and Ellen B. Scouten, Assistant Attorney General, for the State (supplemental brief and argument).

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

lant (original brief and argument); Malcolm Ray Hunter, Jr., Appellate Defender, Louis D. Bilionis, Assistant Appellate Defender, and Gordon Widenhouse, Assistant Appellate Defender, for defendant-appellant (supplemental brief and argument).

E. Ann Christian and Robert E. Zaytoun for North Carolina Academy of Trial Lawyers, amicus curiae.

John A. Dusenbury, Jr. for North Carolina Association of Black Lawyers, amicus curiae.

WHICHARD, Justice.

Defendant was convicted of two counts of first degree murder on the basis of premeditation and deliberation and under the felony murder rule. The court submitted and the jury found three aggravating circumstances in the murder of Elizabeth Stallings: defendant previously had been convicted of a felony involving the use of violence to the person, the murder took place during the commission of robbery with a firearm, and the murder was especially heinous, atrocious or cruel. The court submitted and the jury found two aggravating circumstances in the murder of Deborah Fore: defendant previously had been convicted of a felony involving the use of violence to the person, and the murder took place during the commission of robbery with a firearm. In both cases, the court submitted the following possible mitigating circumstances: defendant has no significant history of prior criminal activity; defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired; defendant confessed to the crime shortly after the crimes were committed; defendant has an I.Q. of seventy-eight and is borderline mentally retarded; defendant had been a good and useful employee of Rea Construction Company prior to the events of April 1983; and any other circumstance or circumstances arising from the evidence which the jury deems to have mitigating value. The jury found one or more of those mitigating circumstances, without specifying which ones. Upon the jury's recommendation, the trial court sentenced defendant to death in both cases. We find no error.

The evidence presented by the State tended to show that on 8 April 1983 defendant and Penny Faye McNeil[1] had been drinking alcoholic beverages and discussing their need for money to pay rent. They went out driving around Raleigh. While driving, defendant saw Elizabeth Stallings, whom neither he nor Ms. McNeil knew, walking down the street. Defendant asked her if she wanted a ride. She got in the car and told defendant that she was going to the post office to get food stamps. Defendant drove her there and told her he would wait for her. After Ms. Stallings got out of the car, defendant told Ms. McNeil that he was going to rob Ms. Stallings. When Ms. Stallings came back out, defendant convinced her to go with them to have a beer and get some cocaine.

Defendant drove to a vacant house next door to his home. Defendant, Ms. McNeil, and Ms. Stallings went in the vacant house. Defendant grabbed Ms. Stallings around the neck, flipped out a knife, and forced her into the bedroom to the closet. He asked her for the food stamps. She gave them to defendant, then he gave them to Ms. McNeil. He choked Ms. Stallings until she was unconscious. Defendant asked Ms. McNeil to go next door and get his rifle, which she did; then he told her to leave the room. After she left the room, she heard a shot. Defendant took off some of Ms. Stallings' clothes so it would look like someone had raped and robbed her. Defendant later sold the food stamps for around $109.00. He also sold a ring he took from her finger.

Dr. Gordon LeGrand, the pathologist who performed the autopsy on Ms. Stallings' body, testified that, in his opinion, she died as a result of the bullet wound to her head. He testified that she also had a stab wound in her chest, penetrating her diaphragm, liver and stomach, and an abdominal wound caused, in his opinion, by blunt trauma such as the impact of a fist or foot. There were bruises and abrasions on her left arm, left hand, left shoulder, right shoulder, right buttock, and left eyebrow. There was a wound below the left eye. A broken window frame with

1. In this appeal, both parties have referred to Ms. McNeil as defendant's wife. However, upon hearing a motion in limine, the trial court found that defendant's marriage to Linda Faye Harrington had not been legally dissolved when defendant purported to marry Penny Faye Pharr (McNeil) in Dillon, South Carolina in December 1982. The court concluded that defendant was not legally married to Ms. McNeil.

nails sticking out was found at the crime scene; Dr. LeGrand testified that the wound under the eye could have been caused by a blow with the window frame. Dr. LeGrand testified that, in his opinion, the stab wound, the abdominal wound, and the wounds around the left eye were premortem wounds. There was fecal matter around the anal orifice and inside the vagina. Dr. LeGrand testified that feces are "often present in the agonal phase, just prior to death, if there's any kind of struggle, or stress, or whatever, loss of continent [sic] of the bowel." In his opinion it would have taken a probing force to insert feces into the vagina.

After the murder of Ms. Stallings, defendant and Ms. McNeil went to several places and drank alcoholic beverages. On 9 April 1983, the next day, they drank most of the day. On 10 April 1983 they continued to drink. Defendant told Ms. McNeil that they would need money to pay the rent because they had "rode around and drinked up the money." Defendant said that they might get money from Deborah Fore. Defendant called Ms. Fore and talked her into going out with them.

Defendant and Ms. McNeil went to Ms. Fore's home. She went with them to a store. Defendant then drove out into the country. He stopped the car, got his pistol from under the seat, put it in his belt, and got out of the car. He told the women that they had a flat tire. Ms. Fore got out of the car. Defendant shot her in the head. He took her keys and a dollar bill, then left her body by the side of the road. Defendant and Ms. McNeil went to Ms. Fore's apartment, used her key to get inside, and stole her television, her pocketbook, and a set of rings. Defendant drove to a teller machine and tried unsuccessfully to get money with Ms. Fore's teller card. He later dropped her pocketbook into an abandoned well in his back yard and sold for $90.00 the pistol he had used to kill Ms. Fore and the rifle he had used to kill Ms. Stallings.

Defendant presented no evidence during the guilt-innocence phase of the trial. During the sentencing phase, he called two witnesses. Dr. Selwyn Rose, a psychiatrist, testified that defendant is an alcoholic and, prior to the time of the murders, defendant and Ms. McNeil spent most of their money drinking heavily on the weekends. Al Peace testified that defendant was a good employee who worked well with others, but that he was often late to work or absent from work, particularly on Fridays.

GUILT PHASE

[1] Defendant first contends that the trial court erred in allowing the two murder charges to be joined for trial. He argues that the murders were not related transactionally. We disagree.

The State made a pretrial motion to consolidate for trial three first degree murder charges against defendant. The three crimes with which defendant was charged occurred within a period of eight days. The court allowed the State's motion to join the Stallings and Fore cases, but denied the State's motion to join the third case.

The statute allowing joinder of offenses provides:

> (a) Joinder of Offenses.—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.

N.C.G.S. § 15A-926(a) (1988). The decision to consolidate for trial cases having a transactional connection is within the discretion of the trial court and, absent a showing of abuse of discretion, will not be disturbed on appeal. *State v. Kornegay*, 313 N.C. 1, 23-24, 326 S.E. 2d 881, 898 (1985).

Defendant argues that consolidation of the two cases for trial was improper because the cases had no "transactional connection" necessary for proper joinder under N.C.G.S. § 15A-926(a). Our review of the evidence, however, shows ample support for the trial court's decision to join the two cases. The evidence showed that defendant, on the weekend of the murders, needed money to pay his rent and other bills. He apparently went out to find someone to rob on 8 April 1983. He got Ms. Stallings to ride in the car with him and Ms. McNeil, then he drove to an empty house, where he robbed and murdered her. On 10 April 1983, defendant told Ms. McNeil that they still needed money because they had spent what they had on alcohol. He apparently planned to rob Ms. Fore. He got her to ride in the car with him and Ms. McNeil. He drove out in the country, killed her, then stole several items from her apartment. These two robberies and murders were acts constituting parts of defendant's plan to obtain money for rent and

other bills. He carried out his plan by getting each woman into his car, then driving to another location and killing her.

In *Kornegay*, the trial court consolidated for trial a charge of obtaining property by false pretenses, a charge of embezzlement, and a charge of malfeasance of a corporate agent. *Kornegay*, 313 N.C. at 23, 326 S.E. 2d at 898. The evidence there showed that the defendant's act of obtaining funds by false pretenses from a client was part of his scheme to embezzle funds from his law firm. *Id.* at 24, 326 S.E. 2d at 898. We held that the trial court did not abuse its discretion in joining the offenses because "[t]he common thread connecting the crimes is defendant's shortage of ready cash in April of 1982." *Id.* In the case before us, the "common thread" connecting the crimes was defendant's need for cash to pay his rent and other bills. This need for money motivated him to begin his search for victims and led to the eventual robberies and murders of Ms. Stallings and Ms. Fore two days apart. We hold that there is sufficient evidence of a "transactional connection" to support joinder of the offenses. Therefore, the trial court did not abuse its discretion in consolidating the two cases for trial.

[2] Defendant next contends that the trial court erred in denying his motion to dismiss the charge of first degree murder of Ms. Fore. He argues that there was insufficient evidence to prove premeditation and deliberation.

Premeditation and deliberation are necessary elements of first degree murder. *State v. Propst*, 274 N.C. 62, 71, 161 S.E. 2d 560, 567 (1968). Premeditation means that the defendant thought out the act beforehand for some length of time, however short. *State v. Jackson*, 317 N.C. 1, 23, 343 S.E. 2d 814, 827 (1986), *vacated on other grounds*, 479 U.S. 1077, 94 L.Ed. 2d 133 (1987). "Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation." *Id.* The State may prove the elements of premeditation and deliberation by circumstantial evidence as well as by direct evidence. *Id.* Among the circumstances to be considered in determining whether a defendant acted after premeditation and deliberation are the want of provocation by the victim and the defendant's conduct before and after the killing. *Id.*

The State's evidence tended to show that defendant needed money to pay rent and other bills and decided that Ms. Fore might have some money. Defendant called her and persuaded her to go out with him and Ms. McNeil. They went to her house and picked her up. Defendant had a pistol under the seat. Before he got out of the car, he took the pistol and put it in his belt. When Ms. Fore got out of the car, he shot her in the head. He then took her keys and money and left her body by the side of the road. This evidence is sufficient to support a finding of premeditation and deliberation. Therefore, we hold that the trial court did not err in denying defendant's motion to dismiss.

[3] Defendant next contends that the trial court erred in denying his request to question potential jurors as to their understanding of the length of time a person would serve if sentenced to life imprisonment for first degree murder. The following exchange took place when defense counsel attempted to elicit this information from a potential juror on voir dire:

> Q. Do you think that life imprisonment means an individual would stay in jail for the rest of his natural life?
>
> MR. STEPHENS [prosecutor]: Objection.
>
> COURT: Sustained.
>
> Q. Do you understand that a person who is sentenced to life imprisonment after being convicted of first degree murder is not entitled to be released?
>
> MR. STEPHENS: Objection.
>
> COURT: Sustained.

Defendant argues that he needed this information to exercise effectively his challenges for cause and his peremptory challenges. He argues that misconceptions of jurors about the possibility of early parole for a defendant sentenced to life imprisonment create an unacceptable risk that the jury will sentence that defendant to death.

Defendant cites *King v. Lynaugh*, 828 F. 2d 257 (5th Cir. 1987), in support of his argument. In *King*, the appeals panel held that a defendant's Sixth and Fourteenth Amendment rights were infringed when the trial court refused to allow defense counsel to

ask questions directed toward determining whether venire members had misconceptions about parole law that might bias them in favor of capital punishment. The panel therefore ordered a new sentencing hearing. *King*, 828 F. 2d at 261-62.

Since the filing of briefs and the presentation of the initial oral arguments in this case, the Fifth Circuit Court of Appeals, after a rehearing *en banc*, has reversed the panel decision in pertinent part. *King v. Lynaugh*, 850 F. 2d 1055 (5th Cir. 1988). The court stated:

> We . . . are unable to distinguish possible prejudice based on jurors' misconceptions about parole law from "a host of other possible similar prejudices." The views of a lay venireman about parole are no more likely to be both erroneous and prejudicial than are his views on the defendant's right not to take the stand, the law of parties, the reasonable doubt standard, or any other matter of criminal procedure. It is difficult to conceive how we could constitutionalize the inquiry concerning Texas parole while leaving these similar but also potentially influential matters to the broad discretion of the state trial court. . . . Deference to the state courts in those matters counsels deference here as well. Interrogating veniremen about Texas parole law . . . does not approach a level of constitutional sensitivity.

Id. at 1060 (citations omitted).

This Court has held that the possibility of parole cannot be considered by a jury during sentencing. *State v. Robbins*, 319 N.C. 465, 356 S.E. 2d 279, *cert. denied*, --- U.S. ---, 98 L.Ed. 2d 226 (1987); *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569, *cert. denied*, 459 U.S. 1080, 74 L.Ed. 2d 642 (1982). In *Robbins*, the jury returned to the courtroom to question whether it had the right to recommend a life sentence without the possibility of parole. The trial court responded by giving the following instruction, which has evolved from this Court's decision in *State v. Conner*, 241 N.C. 468, 85 S.E. 2d 584 (1955):

> The question of eligibility for parole is not a proper matter for you to consider in recommending punishment, and it should be eliminated entirely from your consideration and dismissed from your minds.

> In considering whether to recommend death or life imprisonment, you should determine the question as though life imprisonment means exactly what the statute says, imprisonment in the State's prison for life. You should decide the question of punishment according to the issues submitted to you by the Court, wholly uninfluenced by consideration of what another arm of the government might or might not do in the future.

Robbins, 319 N.C. at 518, 356 S.E. 2d at 310. We rejected the defendant's argument that the trial court was constitutionally required to inform the jury about parole procedures in order to dispel the misconceptions most jurors have about parole. We held that because parole procedures are irrelevant to a sentencing determination, they cannot be considered by the jury during sentencing. *Id.* at 521-22, 356 S.E. 2d at 312.

Here, defendant argues that the court erred by refusing to allow defense counsel to question potential jurors concerning their misconceptions about parole. Because parole eligibility is irrelevant to the issues at trial and is not a proper matter for the jury to consider in recommending punishment, we hold that the court properly refused to allow defense counsel to question potential jurors as to their knowledge about parole eligibility. The Fifth Circuit noted on rehearing in *King* that "Texas policy follows that of the large majority of states and avowedly seeks to assist defendants by forbidding a jury to increase their punishment in anticipation of possible parole or clemency," and that to accept the defendant's contention would be contrary to that policy. *King*, 850 F. 2d at 1060-61. We agree with that court that to "re-inject notions of parole eligibility at the forefront of the judicial proceedings," *id.* at 1061, would be an improvident practice. Therefore, we hold that the trial court did not err in denying defendant's request.

[4] Defendant next contends that the trial court erred by excusing three prospective jurors for cause due to their feelings about the death penalty without proper inquiry as to their ability to follow the law and by denying defendant the opportunity to question these prospective jurors. We find no error.

The first prospective juror challenged for cause indicated that she might not be able to vote for the death penalty under any circumstances. The court questioned her:

Now, the question that we're asking at this point is in that context, in that sentencing proceeding, could you consider both of the alternative punishments, both death and life imprisonment or would you automatically in every case vote for one particular punishment, specifically life imprisonment?

A. I—I could consider both but I don't think I'd want to be a part of a jury that had anything to do with putting anyone to death.

COURT: Well—

A. I wouldn't want to be part of a jury that decided to put someone to death.

COURT: Whether you would want to be part of a jury which did that or not, could you consider both alternative punishments and if you determined that the death penalty was appropriate vote for the death penalty.

A. No.

COURT: You could not?

A. I don't think I could.

COURT: Not under any circumstances?

A. No, I don't think so.

Defendant argues that the excusal for cause of this prospective juror violated *Wainwright v. Witt*, 469 U.S. 412, 83 L.Ed. 2d 841 (1985). In *Wainwright*, the United States Supreme Court held that a juror could not be excluded for cause based on that juror's views about the death penalty unless those views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Id.* at 424, 83 L.Ed. 2d at 851-52 (quoting *Adams v. Texas*, 448 U.S. 38, 45, 65 L.Ed. 2d 581, 589 (1980)). The prospective juror here stated that she did not think that she could, under any circumstances, be part of a jury that sentenced someone to death. It is evident that her views on capital punishment impaired her ability to perform her duties as a juror in accordance with the trial court's instructions and with her oath. Therefore, the trial court did not abuse its discretion by removing her for cause.

The second prospective juror responded that he was opposed to the death penalty. When asked whether his beliefs were so strong that he could not under any circumstances vote for the death penalty, he answered, "That's right." The third prospective juror answered "yes" to the question whether she would vote against the death penalty no matter what the evidence showed. It is evident that these prospective jurors' views on capital punishment impaired their ability to perform their duties as jurors. Therefore, the trial court did not abuse its discretion by removing them for cause.

Defendant also argues that the trial court erred by not allowing him to question each of these prospective jurors before they were excused. However, there is nothing in the record to indicate that any of these prospective jurors would have been rehabilitated by defendant. Their answers to questions propounded by the prosecutor were unambiguous and indicated that they could not put aside their personal views and fulfill their duty according to North Carolina law. In *State v. Reese*, 319 N.C. 110, 353 S.E. 2d 352 (1987), we held:

> When challenges for cause are supported by prospective jurors' answers to questions propounded by the prosecutor and by the court, the court does not abuse its discretion, at least in the absence of a showing that further questioning by defendant would likely have produced different answers, by refusing to allow the defendant to question the juror challenged.

Id. at 120-21, 353 S.E. 2d at 358 (quoting *State v. Oliver*, 302 N.C. 28, 40, 274 S.E. 2d 183, 191 (1981)). Defendant has not made a showing that further questioning would have revealed different answers. Therefore, we find no abuse of discretion in the trial court's decision to deny further inquiry.

[5] Defendant next contends that the trial court abused its discretion by denying his challenges for cause of three prospective jurors. When the court denied defendant's challenges for cause of Ms. Moell and Mr. McLean, defendant used peremptory challenges to remove them. Defendant contends that he had exhausted his fourteen peremptory challenges when the trial court refused to excuse Ms. Jones, and that he improperly was precluded from challenging her.

The record reveals, however, that defendant only used thirteen of his fourteen peremptory challenges during jury voir dire, leaving one remaining peremptory challenge which he could have used to strike Ms. Jones. N.C.G.S. § 15A-1214(h) and (i) state:

> (h) In order for a defendant to seek reversal of the case on appeal on the ground that the judge refused to allow a challenge made for cause, he must have:
>
> (1) Exhausted the peremptory challenges available to him;
>
> (2) Renewed his challenge as provided in subsection (i) of this section; and
>
> (3) Had his renewal motion denied as to the juror in question.
>
> (i) A party who has exhausted his peremptory challenges may move orally or in writing to renew a challenge for cause previously denied if the party either:
>
> (1) Had peremptorily challenged the juror; or
>
> (2) States in the motion that he would have challenged that juror peremptorily had his challenges not been exhausted.

N.C.G.S. § 15A-1214(h), (i) (1988). In *State v. Saunders*, 317 N.C. 602, 346 S.E. 2d 451 (1986), we held that "[t]he statutory method for preserving a defendant's right to seek appellate relief when a trial court refuses to allow a challenge for cause is mandatory and is the only method by which such rulings may be preserved for appellate review." *Id.* at 608, 346 S.E. 2d at 456; *see also State v. Quesinberry*, 319 N.C. 228, 235, 354 S.E. 2d 446, 450 (1987) ("[b]ecause [defendant] did not exhaust his peremptory challenges as provided by N.C.G.S. § 15A-1214(h), no prejudice has been shown as to the juror who remained on the panel"). Because defendant did not exhaust his peremptory challenges, he did not comply with the statute. Therefore, he has not preserved his right to appeal on this issue.

[6] Defendant next contends that the trial court erred by failing to intervene *ex mero motu* in portions of the prosecutor's closing argument. The arguments of counsel are left largely to the control and discretion of the trial judge. *State v. Gladden*, 315 N.C.

398, 422, 340 S.E. 2d 673, 688, *cert. denied*, 479 U.S. 871, 93 L.Ed. 2d 166 (1986). Counsel will be granted wide latitude in the argument of fiercely contested cases. *Id.* Counsel may argue the law, the facts in evidence, and all reasonable inferences to be drawn from them. *Id.* Counsel may not refer to facts not in evidence or argue his or her own knowledge, beliefs and personal opinions not supported by the evidence. *Id.* Because defendant did not object to the portions of the argument to which he now assigns error, "review is limited to an examination of whether the argument was so grossly improper that the trial [court] abused [its] discretion in failing to intervene *ex mero motu.*" *Id.* at 417, 340 S.E. 2d at 685.

First, defendant argues that the prosecutor improperly told the jury that he "represented" the victim by saying, "Being a prosecutor is not always a pleasant task, for I speak, Mr. Hobgood speaks for two dead ladies who can not speak." Defendant claims that this statement violates the holding in *Booth v. Maryland*, 482 U.S. 496, 96 L.Ed. 2d 440 (1987). There, the United States Supreme Court held that a sentencing jury must make its recommendation based on the character of the defendant and the circumstances of the crime and not on the personal characteristics of the victim. *Id.* at 502-505, 96 L.Ed. 2d at 448-49. The Supreme Court held that the use of a victim impact statement at the sentencing phase of a capital trial violated the Eighth Amendment. *Id.* at 509, 96 L.Ed. 2d at 452. Here, unlike in *Booth*, the district attorney did not mention any of the personal characteristics of the victims, nor did he discuss the impact of their deaths on their families. Rather, he reminded the jury that he was an advocate for the two victims. We do not find this argument so grossly improper that the court abused its discretion in failing to intervene *ex mero motu.*

Second, defendant claims that the prosecutor argued facts not in evidence when he said about Ms. Stallings, "She's been stabbed. She's been stripped. . . . Obviously from this evidence she has been abused. She stands naked begging for her life and he needs a rifle to frighten her." We conclude that there is evidence to support the prosecutor's statements. There was evidence indicating that defendant had removed part of Ms. Stallings' clothes before he shot her. Ms. McNeil testified that defendant took off Ms. Stallings' clothes after he had strangled her and that

the strangling took place before Ms. McNeil went to get the rifle. The clothes, found in a pile on the floor, had very little blood on them, although there was much blood on the floor and the walls around the body. The autopsy revealed that the victim had been stabbed and otherwise abused. Dr. LeGrand testified that several of the wounds, including the stab wound, the abdominal wound, and the wounds around the left eye, were inflicted before the victim died. Moreover, Ms. McNeil testified that when defendant started choking Ms. Stallings, she said, "Please, y'all, don't hurt me." It is a reasonable inference from the evidence that, before defendant killed Ms. Stallings, he removed her clothes and she begged for her life. This argument was not so grossly improper as to require *ex mero motu* intervention by the trial court.

Third, defendant claims that the prosecutor improperly argued what the victim must have thought as she died. The prosecutor said:

> I'm sure she could speak to you quite vividly if she was here to tell you what is fair and what is unfair. I'm sure she said to Leroy McNeil in her own mind, I'm eighteen years old and I don't want to die. I'm going to die and that's just not fair. No doubt she must have thought she'd never see her mother and her sister and her friends again, and [that] just wasn't fair. No doubt she thought to herself that the last person that she would see on this earth is the man who would murder her, and that's certainly not fair.

In *State v. King*, 299 N.C. 707, 264 S.E. 2d 40 (1980), we held that the prosecutor's comments concerning the thoughts of the victim before he died that he never would see his family again were not so improper as to require the trial court to intervene *ex mero motu*. *Id.* at 711-13, 264 S.E. 2d at 43-44. Likewise, the prosecutor's argument here was not so grossly improper as to require the court to intervene. It was based on facts in evidence and on reasonable inferences from those facts.

We conclude that the guilt phase of defendant's trial was fair and free of prejudicial error.

SENTENCING PHASE

[7] Defendant first contends that the trial court erred in failing to submit as a nonstatutory mitigating circumstance that he was

remorseful. When defense counsel requested this circumstance, the court asked what evidence showed remorse. Defense counsel responded that "the evidence of the confession shortly after the murders took place is evidence of the remorsefulness of the defendant." The court then refused to submit defendant's remorse as a mitigating circumstance.

A trial court has no duty to instruct on a mitigating circumstance unless the record discloses evidence from which the jury reasonably could infer that the circumstance exists. *State v. Wilson*, 322 N.C. 117, 143, 367 S.E. 2d 589, 604 (1988). We have examined defendant's confession and find no expression of remorse. Therefore, we hold that the trial court did not err in failing to submit remorse as a mitigating circumstance.

Defendant argues, however, that his statement to the jury in the form of an allocution supports an instruction on this mitigating circumstance. After the court refused to submit defendant's remorse as a mitigating circumstance, and prior to the special prosecutor's closing argument to the jury, the court allowed defendant to address the jury. Defendant stated:

> I won't take up too much of your time because I realize there's nothing that I can say or anyone here in this courtroom can say that would bring back the lives of those two girls, even my saying that I'm sorry is not going to bring them back. This thirteen or fourteen months that I have been locked up or incarcerated has really brought a lot back to me. It made me realize that there's a lot that I have done, minor things and major things, that if I had to do them again now today I know that I would not do and I deeply say inside that I am sorry for what I have done and I wish there was some way that you all could take it under consideration and spare my life and give me a chance.

Before the court charged the jury, defendant did not renew his request that the court submit remorse as a mitigating circumstance. After the court charged the jury, the court asked whether defendant had requests for additional instructions. Defense counsel responded that he did not.

The trial court did not err in refusing to submit remorse as a mitigating circumstance based on defendant's statement that he

was sorry for committing the crimes. Defendant's statement to the jury was made in allocution. He was not under oath, nor was he subject to cross-examination. Absent such, his statement was not evidence. Therefore, the court had no duty to instruct on remorse. *See id.*

[8] Defendant next contends that the trial court erred by failing to intervene *ex mero motu* in portions of the prosecutor's closing argument. Because defendant did not object to the portions of the argument to which he now assigns error, "review is limited to an examination of whether the argument was so grossly improper that the trial [court] abused [its] discretion in failing to intervene *ex mero motu.*" *State v. Gladden*, 315 N.C. 398, 417, 340 S.E. 2d 673, 685, *cert. denied*, 479 U.S. 871, 93 L.Ed. 2d 166 (1986).

Defendant first argues that the prosecutor made assertions which were not supported by the evidence. The prosecutor commented on defendant's allocution as follows:

> He has the right of eloquention [sic] and he just expressed that right. He spoke with you about that request. He also had that right in 1977, and I wonder what he told the Judge when he pled guilty to killing his wife before he was sentenced.
>
> Do you believe him? Do you really think he's sorry?

The prosecutor then said that the only appropriate sentence for defendant was death, and asked, "If you tell me we have not yet reached that point, then please tell me how many bodies it takes. Is there some magic number? Is three not enough?" Finally, the prosecutor called the women on the jury by name, then asked them collectively how they would have felt

> if he had said to you as you stood naked before him and you begged for your life with all the fiber in your being, if he had said to you: Today you will die I have decided, not God, not nature, I have decided. I have decided the place where you will die. I have decided the time of your death. I have decided the manner of your death. Can you conceivably close your eyes and think how you would have felt? You can't, you can't, you really can't. There's no way that you can appreciate the horror of that or the terror of that, nor can I, and I certainly hope that you never will have to, nor will I.

We conclude that the prosecutor's argument was not so grossly improper that the court abused its discretion in failing to intervene *ex mero motu*. It was not improper for the prosecutor to comment on defendant's prior conviction of involuntary manslaughter, because that conviction was in evidence. Further, the prosecutor's question, "Is three not enough?" did not require *ex mero motu* intervention by the court. *See State v. Holden*, 321 N.C. 125, 156, 362 S.E. 2d 513, 532 (1987), *cert. denied*, --- U.S. ---, 100 L.Ed. 2d 935 (1988) (prosecutor's question "How many more women are we going to have to see this man rape before we say enough is enough?" not so grossly improper as to require *ex mero motu* intervention). Finally, the prosecutor's address to the women on the jury was not so grossly improper as to require *ex mero motu* intervention. We held in *Holden* that the trial court properly sustained the State's objection to a part of the defense counsel's jury argument asking each juror individually to save the defendant's life. *Id.* at 163, 362 S.E. 2d at 537. However, here the prosecutor did not make a personal plea to each female juror; rather, he called them by name, then spoke to them collectively.

Second, defendant argues that the prosecutor improperly appealed to community sentiment in suggesting that only a death sentence would prevent this type of crime. The prosecutor said:

> You are the moral conscience of this community. . . .
>
> . . . Today I'm asking you to be a part of enforcement of our law. Police officers can't do it by themselves. . . .
>
> . . . .
>
> . . . Your verdict as the jury in this case is a message to your community, to your state and to your world. The question is: What will your message be? The eyes of your community are upon you. There's no getting around it. I suggest to you that you do all have the ability to stand confidently before this Court and be satisfied to a moral certainty beyond a reasonable doubt with respect to the law and the evidence that the just and proper verdict in this case, in these two cases is that the defendant be sentenced to death. I suggest to you that under the law and under the facts there's no other reasonable alternative.
>
> . . . .

> I tell you again the eyes of your community are upon you. What message will you speak from your verdict? Only you can tell me that.

We have upheld arguments by prosecutors suggesting to juries that they are the "voice and conscience of the community" and that they have an obligation to do something about serious crime. *State v. Brown*, 320 N.C. 179, 203-04, 358 S.E. 2d 1, 18, *cert. denied*, --- U.S. ---, 98 L.Ed. 2d 406 (1987); *State v. Miller*, 315 N.C. 773, 780-81, 340 S.E. 2d 290, 294-95 (1986). Defendant argues, however, that *State v. Scott*, 314 N.C. 309, 333 S.E. 2d 296 (1985), controls this issue. In *Scott*, the defendant was charged with driving under the influence and two other counts, all arising out of a fatal traffic accident. The prosecutor argued that "there's a lot of public sentiment at this point against driving and drinking, causing accidents on the highway." We held that this argument was improper because it went outside the record and appealed to the jury to convict the defendant because impaired drivers had caused other accidents. *Id.* at 312, 333 S.E. 2d at 298. The State was improperly "asking the jury to lend an ear to the community rather than a voice." *Id.* (quoting *Prado v. State*, 626 S.W. 2d 775, 776 (Tex. Crim. 1982)).

In the case now before us, the prosecutor asked the jury what message it would send to the community, not to "lend an ear to the community." Moreover, the prosecutor did not go outside the record and appeal to the jury to convict defendant because other murderers had killed other victims, nor did he encourage the jury to base its determination on public sentiment. *See State v. Robbins*, 319 N.C. 465, 524, 356 S.E. 2d 279, 313, *cert. denied*, --- U.S. ---, 98 L.Ed. 2d 226 (1987). Rather, he reminded the jurors that they must decide the case on the evidence and the law. Therefore, his argument did not require *ex mero motu* intervention by the court.

Third, defendant claims that the following argument by the prosecutor was grossly improper because it asked the jurors to set a standard for their community regarding the imposition of the death penalty:

> I think you can say from this evidence that we have reached a point with Leroy McNeil which the only sentence appropriate under the law is death. If you tell me we have

> not yet reached that point, then please tell me how many bodies it takes. Is there some magic number? Is three not enough? If you tell me you don't agree, then you tell me what greater violation of the human being and acts of degradation on a victim you would require beyond that which Faye Stallings suffered. I suggest to you that your mind may not allow you to find much greater degradation, much greater violation of the spirit, much greater destruction of human dignity prior to death.

The prosecutor stated further:

> Dr. Rose testified that he has appeared before, testified in cases, names like Barfield, Hutchins, Kirkley, McDougall, names [that will] forever remain in infamy in North Carolina, names that are synonymous with death. Leroy McNeil has joined that group of people.

Defendant argues that asking the jury to consider other cases in which death sentences have been imposed violates defendant's right to individualized sentencing in a capital case. Finally, defendant argues that the prosecutor tried to absolve the jurors of their responsibility for putting someone to death by telling them that if they returned a recommendation of the death sentence, defendant, not the jury, would be responsible for his execution. These arguments were not so grossly improper as to require the trial court to intervene *ex mero motu.*

[9] Defendant next contends that the trial court erred in instructing the jury as follows:

> [T]he first aggravating circumstance, if it applies at all, would under the evidence in this case apply in both cases. It reads as follows:
>
> [H]as [defendant] been previously convicted of a felony involving the use of violence to the person? Now voluntary manslaughter is by definition a felony involving the use of violence to the person. . . .

The court also instructed the jurors that if they did not find the existence of this aggravating circumstance, then they should answer the circumstance "no" for both murders.

Defendant argues that the court's instruction was an improper expression of opinion and that the jury would have understood the instruction to mean that the State had established this aggravating circumstance. He argues that the instruction set up an irrebuttable presumption, lessening the State's burden of proving this circumstance beyond a reasonable doubt.

Because defendant did not object to this instruction at trial, he must show that the court committed plain error in giving the instruction. *State v. Zuniga*, 320 N.C. 233, 263, 357 S.E. 2d 898, 917, *cert. denied*, --- U.S. ---, 98 L.Ed. 2d 384 (1987). The test is whether the alleged error had a probable impact on the verdict. *Id.*

In *State v. McDougall*, 308 N.C. 1, 301 S.E. 2d 308, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 173 (1983), we held that where a prior crime committed by the defendant has the use or threat of violence as an element, introduction of the record of the prior conviction can support a peremptory instruction on this aggravating circumstance. *Id.* at 22, 301 S.E. 2d at 321. Here, the State introduced the record of defendant's prior conviction of the voluntary manslaughter of his former wife, Cynthia Latham McNeil. Defendant did not offer evidence that the killing of his former wife did not involve the use of violence to the person. Voluntary manslaughter is the unlawful killing of another without malice and without premeditation and deliberation. *State v. Barts*, 316 N.C. 666, 692, 343 S.E. 2d 828, 845 (1986). "Generally, voluntary manslaughter occurs when one kills intentionally but does so in the heat of passion suddenly aroused by adequate provocation or in the exercise of self-defense where excessive force is utilized or the defendant is the aggressor." *Id.* Voluntary manslaughter usually—probably always—involves violence to the person within the meaning and intent of N.C.G.S. § 15A-2000(e)(3). In light of this, and of defendant's failure to offer evidence that the killing of his former wife did not involve violence to the person, we cannot conclude that the court's instruction that voluntary manslaughter is a crime involving the use of violence to the person amounted to plain error.

Defendant also argues that the trial court erred by instructing the jury on this aggravating circumstance that "the first aggravating circumstance, if it applies at all, would under the

evidence in this case apply in both cases." Defendant claims that this language prohibited the jury from considering this aggravating circumstance separately as to each murder, citing *State v. Parrish*, 275 N.C. 69, 165 S.E. 2d 230 (1969). In *Parrish* we held that the trial court must instruct the jury to give separate consideration to cases of two codefendants being tried jointly for the same crime. This case, however, involves one defendant on trial for two murders. The evidence supporting the aggravating circumstance that defendant had been convicted previously of a felony involving the use of violence to the person was identical in both cases. We find no plain error.

[10] Defendant next contends that the trial court erred by submitting the aggravating circumstance that the murder of Ms. Stallings was especially heinous, atrocious, or cruel. N.C.G.S. § 15A-2000(e)(9) (1988). This aggravating circumstance exists where "the level of brutality involved exceeds that normally present in first-degree murder, or when the first-degree murder in question was conscienceless, pitiless, or unnecessarily torturous to the victim." *State v. Brown*, 315 N.C. 40, 65, 337 S.E. 2d 808, 826-27 (1985), *cert. denied*, 476 U.S. 1165, 90 L.Ed. 2d 733 (1986), *overruled on other grounds, State v. Vandiver*, 321 N.C. 570, 364 S.E. 2d 373 (1988) (citations omitted). "[T]his factor is [also] appropriate when the killing demonstrates an unusual depravity of mind on the part of the defendant beyond that normally present in first-degree murder." *Id.* at 65, 337 S.E. 2d at 827.

Ms. McNeil testified that defendant grabbed Ms. Stallings around the neck, pulled out a knife, and forced her into the bedroom. He demanded her food stamps, then choked her until she lost consciousness. Finally, he told Ms. McNeil to get his rifle from next door, and when she did, he shot Ms. Stallings. The evidence tends to show that defendant not only choked and shot the victim, but that he beat her, stabbed her, and hit her in the face with a wooden frame which had nails sticking out of it. There was also evidence tending to show that defendant pushed feces into her vagina. This evidence is sufficient to show that the murder was excessively brutal and unnecessarily torturous to the victim. The trial court, therefore, did not err in submitting as an aggravating circumstance that the murder was especially heinous, atrocious, or cruel.

[11] Defendant next contends that the trial court erred by submitting as an aggravating circumstance that each murder was committed while defendant was engaged in the commission of a robbery. N.C.G.S. § 15A-2000(e)(5) (1988). Where the jury convicts a defendant of first degree murder based solely on the felony murder rule, it is improper for the court to submit the underlying felony as one of the aggravating circumstances defined by N.C.G.S. § 15A-2000(e)(5). *State v. Silhan*, 302 N.C. 223, 262, 275 S.E. 2d 450, 478 (1981). However, when a defendant is convicted of first degree murder based on both premeditation and deliberation and the felony murder rule, and both theories are supported by the evidence, the underlying felony may be submitted as an aggravating circumstance. *Id.*

Defendant argues that there was insufficient evidence of premeditation and deliberation to warrant submission of first degree murder on that theory to the jury. We have held that the evidence was sufficient to support the elements of premeditation and deliberation in the murder of Deborah Fore. We also hold that the evidence is sufficient to support the elements of premeditation and deliberation in the murder of Elizabeth Stallings. Because defendant was convicted of both first degree murders on a premeditation and deliberation theory, as well as on a felony murder theory, the court did not err in submitting, for each murder, the aggravating circumstance that the murder was committed while defendant was engaged in the commission of a robbery.

Defendant raises the following "preservation" issues:

[12-14] (1) He contends that the trial court erroneously excluded prospective jurors for cause because of their feelings about capital punishment. Both the United States Supreme Court and this Court have held that "death qualification" of a jury is not unconstitutional. *Lockhart v. McCree*, 476 U.S. 162, 90 L.Ed. 2d 137 (1986); *State v. Evangelista*, 319 N.C. 152, 166, 353 S.E. 2d 375, 385 (1987).

(2) He contends that the trial court erred in instructing the jury that a rifle and a pistol are deadly weapons as a matter of law. This was not error. *State v. Torain*, 316 N.C. 111, 120, 340 S.E. 2d 465, 470, *cert. denied*, 479 U.S. 836, 93 L.Ed. 2d 77 (1986).

(3) He contends that N.C.G.S. § 15A-2000(e)(9), which allows the jury to find as an aggravating circumstance that the murder

was "especially heinous, atrocious, or cruel," has been applied unconstitutionally. This argument is without merit. *State v. Fullwood*, 323 N.C. 371, 399-400, 373 S.E. 2d 518, 535 (1988).

(4) He contends that N.C.G.S. § 15A-2000 is unconstitutionally vague and overbroad, both facially and as applied. This argument is without merit. *State v. Brown*, 315 N.C. 40, 60-61, 337 S.E. 2d 808, 823-24 (1985), *cert. denied*, 476 U.S. 1165, 90 L.Ed. 2d 733 (1986), *overruled on other grounds*, *State v. Vandiver*, 321 N.C. 570, 364 S.E. 2d 373 (1988).

(5) He contends that the trial court erred in instructing the jury that it had a duty to return a recommendation of death if it found that the mitigating circumstances were insufficient to outweigh the aggravating circumstances and that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty. This argument is without merit. *State v. Robbins*, 319 N.C. 465, 515, 356 S.E. 2d 279, 308-09, *cert. denied*, --- U.S. ---, 98 L.Ed. 2d 226 (1987).

(6) He contends that the trial court erred in failing to instruct the jury that the State had the burden of proving the nonexistence of each mitigating circumstance beyond a reasonable doubt and in placing the burden on defendant to prove each mitigating circumstance by a preponderance of the evidence. This argument is without merit. *State v. Gladden*, 315 N.C. 398, 439, 340 S.E. 2d 673, 698, *cert. denied*, 479 U.S. 481, 93 L.Ed. 2d 166 (1986).

(7) Finally, he contends that the trial court erred in instructing the jurors that they must be unanimous before they could find the existence of a mitigating circumstance. Defendant bases this argument on *Mills v. Maryland*, 486 U.S. ---, 100 L.Ed. 2d 384 (1988). For the reasons expressed in *State v. McKoy*, 323 N.C. 1, 372 S.E. 2d 12 (1988), we reject this argument.

We conclude that the sentencing phase of defendant's trial was fair and free of prejudicial error.

PROPORTIONALITY REVIEW

[15] Because we have found no error in the guilt and sentencing phases, we are required to review the record and determine: (1) whether the record supports the jury's findings of the aggravating circumstances upon which the sentencing court based its

sentences of death; (2) whether the sentences were imposed under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the sentences of death are excessive or disproportionate to the penalty imposed in similar cases, considering both the crimes and the defendant. N.C.G.S. § 15A-2000(d)(2) (1988); *State v. Robbins*, 319 N.C. 465, 526, 356 S.E. 2d 279, 315 (1987), *cert. denied*, --- U.S. ---, 98 L.Ed. 2d 226 (1988).

The jury found three aggravating circumstances in the murder of Elizabeth Stallings: (1) defendant had been convicted previously of a felony involving the use of violence to the person, (2) the murder took place during the commission of robbery with a firearm, and (3) the murder was especially heinous, atrocious, or cruel. N.C.G.S. § 15A-2000(e)(3), (5), (9) (1988). The jury found two aggravating circumstances in the murder of Deborah Fore: (1) defendant had been convicted previously of a felony involving the use of violence to the person, and (2) the murder took place during the commission of robbery with a firearm. N.C.G.S. § 15A-2000(e)(3), (5) (1988). The record fully supports the jury's findings of these aggravating circumstances.

We find nothing in the record which suggests that the sentences of death were imposed under the influence of passion, prejudice, or any other arbitrary factor. We thus turn to our final statutory duty of proportionality review.

In conducting proportionality review, we "determine whether the death sentence in this case is excessive or disproportionate to the penalty imposed in similar cases, considering the crime and the defendant." *State v. Brown*, 315 N.C. 40, 70, 337 S.E. 2d 808, 829 (1985), *cert. denied*, 476 U.S. 1165, 90 L.Ed. 2d 733 (1986), *overruled on other grounds, State v. Vandiver*, 321 N.C. 570, 364 S.E. 2d 373 (1988). We use the "pool" of similar cases announced in *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L.Ed. 2d 704 (1983). *Id.* However, "[w]e do not find it necessary to extrapolate or analyze *in our opinions* all, or any particular number, of the cases in our proportionality pool." *State v. Robbins*, 319 N.C. at 529, 356 S.E. 2d at 316 (emphasis in original).

This Court has found the death sentence disproportionate in seven cases. *State v. Benson*, 323 N.C. 318, 372 S.E. 2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E. 2d 653 (1987); *State v.*

Rogers, 316 N.C. 203, 341 S.E. 2d 713 (1986), *overruled on other grounds, State v. Vandiver*, 321 N.C. 570, 364 S.E. 2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E. 2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E. 2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E. 2d 170 (1983); and *State v. Jackson*, 309 N.C. 26, 305 S.E. 2d 703 (1983). In none of these cases was the defendant convicted of more than one murder.

In the case now before us, defendant was convicted of two first degree murders. We stated in *Robbins*, that "[a] heavy factor against Robbins is that he is a multiple killer." *Robbins*, 319 N.C. at 529, 356 S.E. 2d at 316. We have affirmed the death penalty in numerous cases in which the defendant killed or seriously injured more than one person. *See, e.g., State v. Noland*, 312 N.C. 1, 25, 320 S.E. 2d 642, 656 (1984), *cert. denied*, 469 U.S. 1230, 84 L.Ed. 2d 369, *reh'g denied*, 471 U.S. 1050, 85 L.Ed. 2d 342 (1985) (citing other cases).

Defendant argues that *State v. King*, 316 N.C. 78, 340 S.E. 2d 71 (1986); *State v. Whisenant*, 308 N.C. 791, 303 S.E. 2d 784 (1983); and *State v. Crews & Turpin*, 296 N.C. 607, 252 S.E. 2d 745 (1979), where juries returned life sentences, are the cases in the pool most comparable to this case. We disagree.

The murders in *King*, *Whisenant*, and *Crews & Turpin*, although cruel and senseless, did not rise to the same level of brutality as the murders here. In *King*, the defendant shot into a house where his former girlfriend was hiding from him, killing her mother and sister. *King*, 316 N.C. at 79, 340 S.E. 2d at 72. The jury convicted the defendant on a felony murder theory rather than on a premeditation and deliberation theory. *See id.* at 80, 340 S.E. 2d at 72-73. In *Whisenant*, the defendant was convicted of killing an elderly man and his housekeeper. *Whisenant*, 308 N.C. at 792, 303 S.E. 2d at 785. However, that jury convicted the defendant of only one count of first degree murder; the other conviction was for second degree murder. *See id.* at 792, 303 S.E. 2d at 784. In *Crews & Turpin*, the defendants lured two men to their campsite on the pretense that someone had car trouble. Defendant Crews shot one of the men and took his wallet. When the other man tried to run away, defendant Turpin shot him. *Crews & Turpin*, 296 N.C. at 610, 252 S.E. 2d at 748. Although *Crews & Turpin* is somewhat similar to the present case, there are two im-

portant distinctions: first, although each defendant was convicted of two counts of first degree murder, each defendant actually shot only one man; second, there was no physical torture involved in either murder, as there was in the murder of Elizabeth Stallings here. *See id.*

The facts of this case are more similar to the facts in *Robbins*. There, the jury convicted the defendant of two counts of first degree murder and returned a recommendation of the death sentence for each murder. Although we remanded one of the murder counts to the trial court for a new sentencing hearing, we examined the other murder and determined the death penalty not to be disproportionate. *Robbins*, 319 N.C. at 530, 356 S.E. 2d at 316. Robbins killed his two victims in three days. *Id.* at 528, 356 S.E. 2d at 317. He took them both to isolated areas, then shot them. *Id.* at 528, 356 S.E. 2d at 316. The same aggravating circumstances found by the jury in *Robbins*—that the defendant previously had been convicted of a felony involving the use or threat of violence to the person, and that the murder was committed while the defendant was engaged in the commission of robbery with a firearm, *id.* at 526, 356 S.E. 2d at 315—were found by the jury as to both murders here, and here the jury also found as an aggravating circumstance in the murder of Elizabeth Stallings that the murder was especially heinous, atrocious, or cruel. We concluded in *Robbins* that under the circumstances the death sentence was not disproportionate or excessive, considering both the crime and the defendant. *Id.* at 529, 356 S.E. 2d at 317.

This case, like *Robbins*, involves two premeditated and deliberated first degree murders. The evidence shows that defendant killed Elizabeth Stallings to get money after spending his money on alcohol. He persuaded her to get in his car, planned to rob her, and drove her to an isolated area. He then robbed and brutally murdered her. After the murder, defendant continued to reside next door to the building where her body lay. Two days later, after another drinking spree, he planned to rob Deborah Fore. He called her and invited her to go out with him. After she got into his car, he drove to an isolated area and shot her. He then stole several things from her apartment.

Further, the jury found that defendant had been convicted previously of a felony involving the use of violence to the person

—the voluntary manslaughter of his wife. The evidence at trial showed, therefore, that defendant had killed three people.

Under these circumstances, considering both the crimes and the defendant, we cannot say that the death penalty recommendations here were excessive or disproportionate to the penalty imposed in similar cases.

We hold that the defendant received a fair trial and sentencing hearing, free of prejudicial error. In comparing this case to similar cases in which the death penalty was imposed, and in considering both the crimes and the defendant, we cannot hold as a matter of law that the death sentences were disproportionate or excessive. *State v. Robbins*, 319 N.C. at 529, 356 S.E. 2d at 317.

No error.

Chief Justice EXUM concurring.

I concur with the majority's treatment of all issues in the guilt and sentencing phases of this trial.

If in the sentencing phase the Court were addressing for the first time the mitigating circumstance unanimity instruction issue, I would agree with defendant's position that these instructions violate the Eighth Amendment to the federal constitution as that amendment was interpreted in *Mills v. Maryland*, 486 U.S. ---, 100 L.Ed. 2d 384 (1988), for the reasons stated in my dissenting opinions in *State v. McKoy*, 323 N.C. 1, 372 S.E. 2d 12 (1988), and *State v. Allen*, 323 N.C. 208, 372 S.E. 2d 855 (1988). The majority's position on this issue is, as a result of the Court's decisions in *McKoy* and *Allen*, the law of this state to which I am now bound. For this reason I concur with the majority's treatment of this issue.

Justice FRYE dissenting as to sentence.

For the reasons expressed in the Chief Justice's dissenting opinions in *State v. McKoy*, 323 N.C. 1, 372 S.E. 2d 12 (1988), and in *State v. Allen*, 323 N.C. 208, 372 S.E. 2d 855 (1988), I believe the United States Supreme Court's decision in *Mills v. Maryland*, 486 U.S. ---, 100 L.Ed. 2d 384 (1988), requires that defendant be given a new sentencing hearing. Accordingly, I dissent from that

portion of the Court's opinion which rejects defendant's argument based upon the holding of *Mills*. I concur in the result reached by the majority on the guilt phase issues.

SHIRLEY O. COLLINGWOOD v. GENERAL ELECTRIC REAL ESTATE EQUITIES, INC., WALSH PROPERTIES, INC., AND SHARON KAY NELMS

No. 240PA88

(Filed 9 February 1989)

1. **Landlord and Tenant § 8.2— apartment design and construction—no legal duty by manager**

The pleadings, affidavits, and other materials of record failed to establish that the manager of an apartment complex owed plaintiff tenant a legal duty with respect to the design and construction of the complex.

2. **Landlord and Tenant § 8.2— apartment design and construction—compliance with building codes—landlord not insulated from liability**

Compliance with applicable building and housing codes as required by N.C.G.S. § 42-42(a)(1) does not insulate landlords from liability for defects in building design or construction.

3. **Landlord and Tenant § 8.2; Customs and Usages § 1— fire safety standards—observing customs of other apartment owners—liability of landlord for negligence**

Uncontradicted evidence that the owner of an apartment complex observed standards for fire safety customarily followed by the building industry and other apartment complex owners in the area did not absolve the owner from liability for negligence in failing to install additional fire safety features in the common areas of the apartment complex.

4. **Landlord and Tenant § 8.3; Negligence § 47— apartment owner—negligence in failure to install fire safety features—genuine issue of material fact**

In an action to recover for injuries received by plaintiff when she jumped from the window of her third floor apartment to escape a fire, plaintiff raised a genuine issue of material fact as to whether defendant owner was negligent in failing to take appropriate fire safety precautions in the design and construction of the apartment complex where plaintiff presented materials tending to show that the fire had spread from a second floor apartment to the passageway outside plaintiff's door; the apartment complex was built according to a "Type 6" construction plan, the quickest and cheapest type allowed by the North Carolina Building Codes Council; the building code contains only minimal fire safety regulations which provide inadequate protection to apartment dwellers; Type 6 construction does not contain fires and presents problems of fire spread and escape for occupants; the wooden siding and stairways

used in Type 6 construction can become engulfed in flames in a matter of minutes; the city fire chief was aware of other instances in which Type 6 escape routes were rendered impassable by flames and apartment dwellers were forced to jump from their windows or balconies; the fire chief recommended the installation of sprinkler systems, noncombustible stairs and two exit paths to make Type 6 apartment complexes safer; and a statistical study by the city fire department showed the benefits of residential sprinkler systems as an effective, cost-efficient means of protecting lives and property in apartment complexes.

5. **Landlord and Tenant § 8.3— spreading fire—tenant jumping from apartment—foreseeability**

Where affidavits and a statistical summary introduced by plaintiff indicated that the rapid spread of fire to engulf escape routes is a predictable danger in apartments of Type 6 construction, rational jurors could find that it was foreseeable that a resident trapped in a third floor apartment of Type 6 construction by the spreading of a fire would jump from the apartment.

6. **Landlord and Tenant § 8.4; Negligence § 54— fire in apartment complex—tenant jumping from third floor window—no contributory negligence as matter of law**

Plaintiff was not contributorily negligent as a matter of law in jumping from the window of her third floor apartment when she was confronted with a raging fire outside her apartment door although no smoke or flame had entered her apartment and ultimately the only damage to the apartment consisted of some burned molding inside the door.

ON plaintiff's petition for discretionary review of a decision of the Court of Appeals, 89 N.C. App. 656, 366 S.E. 2d 901 (1988), affirming in part and reversing in part summary judgment in favor of the defendants entered by *Burroughs, J.*, at the 27 April 1987 session of Superior Court, MECKLENBURG County. Heard in the Supreme Court 15 November 1988.

Shelley Blum for plaintiff-appellant.

Smith Helms Mulliss & Moore, by Peter J. Covington and Scott P. Vaughn, for General Electric Real Estate Equities, Inc., defendant-appellee.

Golding, Crews & Meekins, by James P. Crews, for Walsh Properties, Inc., defendant-appellee.

MARTIN, Justice.

During the early morning hours of 19 February 1984, a fire broke out in building 7709 at the Cedar Creek apartment complex

in southeastern Mecklenburg County. Plaintiff, a third-floor resident of building 7709, sustained serious personal injuries when she jumped from her apartment window in an attempt to escape the fire. Plaintiff filed this negligence action against General Electric Real Estate Equities, Inc. (G.E.), owner of the apartment complex, Walsh Properties, Inc. (Walsh), manager of the complex, and Sharon Kay Nelms, resident of the apartment in which the fire originated. The sole question for review on appeal is whether the trial court properly granted summary judgment in favor of defendants G.E. and Walsh. We hold that summary judgment for Walsh was proper and that summary judgment for G.E. was not. Accordingly, for the reasons set forth below, the decision of the Court of Appeals is affirmed in part and reversed in part.

The record reveals that the fire started in an electric blanket used by defendant Nelms in her apartment, which was located one floor below plaintiff's apartment on the opposite side of the common passageway. Despite the efforts of Nelms and some neighbors to contain the fire, the flames spread from the Nelms apartment into the common passageway, up the stairs, and into the upper-level passageway outside plaintiff's door. Plaintiff, wakened by shouts and the sound of a whistle, looked out her bedroom window and saw a crowd of people and the "reflection from a fire." She ran down the hallway to the other end of her apartment and opened the door leading into the passageway, whereupon she was confronted by "sheets of flame." She then closed the apartment door, retreated to the bedroom, and jumped out the window. Plaintiff broke her back in several places and shattered her wrist in the fall.

In her complaint plaintiff alleged that defendant Nelms was negligent in her care and maintenance of the electric blanket and in failing to wake plaintiff or to extinguish the fire when it was small. The complaint also alleged that defendants G.E. and Walsh were negligent in the design and construction of Cedar Creek in the following respects: (a) constructing the apartment complex using materials conducive to the rapid spread of fire, such as untreated wooden siding and cedar shakes; (b) constructing the apartment buildings with a lengthy escape path made entirely of untreated wood but without a sprinkler system; (c) constructing the individual apartments with only one door and one escape path; and (d) failing to install an alarm system to warn residents

before the escape path was engulfed in flames. The trial court granted summary judgment in favor of all three defendants. The Court of Appeals affirmed the order of summary judgment as to defendants G.E. and Walsh but reversed as to defendant Nelms. We granted plaintiff's petition for discretionary review. Because defendant Nelms did not file a brief with this Court, we address the summary judgment issue only with respect to defendants Walsh and G.E.

The North Carolina Rules of Civil Procedure 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). 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 cannot surmount an affirmative defense which would bar the claim. *Bernick v. Jurden*, 306 N.C. 435, 293 S.E. 2d 405 (1982); *Dickens v. Puryear*, 302 N.C. 437, 276 S.E. 2d 325 (1981). 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*, 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).

To establish actionable negligence at common law, a plaintiff must show the following: (1) that there has been a failure to exercise proper care in the performance of some legal duty which defendant owed to plaintiff under the circumstances in which they were placed; and (2) that such negligent breach of duty was a proximate cause of the injury. *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 311 S.E. 2d 559 (1984).

[1] At the outset we dispose summarily of the inquiry regarding defendant Walsh. The Court of Appeals held that summary judg-

ment for defendant Walsh was proper because Walsh, as manager of Cedar Creek, was not responsible for the alleged defects in the design and construction of the apartments. We agree that the pleadings, affidavits, and other materials of record fail to establish that Walsh owed plaintiff a legal duty with respect to the design and construction of the complex. We therefore affirm the Court of Appeals decision as it applies to Walsh and turn our attention to the remaining defendant, G.E.

[2] In this case, G.E. and the Court of Appeals relied on N.C.G.S. § 42-42, part of the Residential Rental Agreements Act, to determine the applicable standard of care. Section 42-42(a) provides that a landlord shall:

> (1) Comply with the current applicable building and housing codes . . . to the extent required by the operation of such codes; . . .
>
> (2) Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition;
>
> (3) Keep all common areas of the premises in safe condition; and
>
> (4) Maintain in good and safe working order and promptly repair all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances supplied or required to be supplied by him . . . .

In its brief G.E. argues that subsection (a)(1) is the only subsection pertinent to plaintiff's allegations of unsafe design and construction; therefore, it necessarily establishes the applicable standard of care. That standard, according to G.E., is compliance with state and local building and housing codes. G.E. points out that Cedar Creek's plans, specifications, materials, and construction conformed in all respects to the North Carolina State Building Code as well as to the codes and regulations of Mecklenburg County and the city of Charlotte. G.E. insists that plaintiff must demonstrate some violation of these codes, and thus of section 42-42(a)(1), in order to support her allegation that defendant breached the standard of care, an essential element of her claim.

In some instances, the standard of conduct required of a defendant in a particular situation is prescribed by legislative enact-

ment rather than by the principles of the common law. "The duty may arise specifically by mandate of statute, or it may arise generally by operation of law under application of the basic rule of the common law which imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to endanger the person or property of others." *Pinnix v. Toomey*, 242 N.C. 358, 362, 87 S.E. 2d 893, 897 (1955). Where there is an allegation of the violation of a statute constituting negligence per se, the statute itself establishes the standard of care as to that allegation. However, this is not such a case. By providing that "[a] violation of this Article shall not constitute negligence per se," N.C.G.S. § 42-44(d), the legislature left intact established common-law standards. *Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 365 S.E. 2d 898 (1988); *Cowan v. Transfer Co.*, 262 N.C. 550, 138 S.E. 2d 228 (1964); *Bradley v. Wachovia Bank & Trust Co.*, 90 N.C. App. 581, 369 S.E. 2d 86 (1988); *Brooks v. Francis*, 57 N.C. App. 556, 291 S.E. 2d 889 (1982); *Lenz v. Ridgewood Associates*, 55 N.C. App. 115, 284 S.E. 2d 702 (1981), *cert. denied*, 305 N.C. 300, 290 S.E. 2d 702 (1982). The common-law standard of care is a generalized one of "due care" on the part of the defendant. The standard of due care is always the conduct of a reasonably prudent person under the circumstances. *Bolkhir*, 321 N.C. 706, 365 S.E. 2d 898.

Thus, the question is not simply whether defendant G.E. complied with applicable housing codes and regulations, or with the other requirements of N.C.G.S. § 42-42, but whether in a larger sense defendant, as owner of the apartments, exercised due care for the safety of Cedar Creek residents in the design and construction of the complex. "While compliance with a statutory standard is *evidence* of due care, it is not conclusive on the issue." W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts* § 30 (5th ed. 1984) [hereinafter Prosser & Keeton]. *See also* Restatement (Second) of Torts § 288C (1965). The purpose of the North Carolina Building Code, authorized by article 9, chapter 143 of the General Statutes, is to establish certain *minimum* standards as to materials, design, and construction of buildings "for the protection of the occupants of the building or structure, its neighbors, and members of the public at large." N.C.G.S. § 143-138(b) (1987); North Carolina State Building Code § 101.2 (1978). Because "[s]uch a standard is no

more than a minimum, [compliance] does not necessarily preclude a finding that the actor was negligent in failing to take additional precautions." *Prosser & Keeton* § 36. *See Mitchell v. Hotel Berry Co.*, 34 Ohio App. 259, 171 N.E. 39 (1929) (where plaintiff injured jumping from burning building, defendant hotel not acquitted of a charge of common-law negligence by proof of its compliance with statutes governing the number of exits required). We conclude that compliance with N.C.G.S. § 42-42 does not insulate landlords from liability for defects in building design or construction.

[3] Nor does uncontradicted evidence that defendant G.E. observed the standards customarily followed by the building industry and other complex owners in the area necessitate a finding absolving defendant of negligence liability as a matter of law. At oral argument defendant emphasized that the affidavits of the design architect, construction inspector, and construction manager of the Cedar Creek project established that the design and construction of the complex conformed with all industry-recognized standards for fire safety. Conformity with industry custom, contends defendant, meets a standard of conduct above and beyond mere statutory compliance. Defendant argues that it was entitled to summary judgment because plaintiff failed to rebut evidence that defendant discharged its duty of due care under the industry standard. This argument too must fail:

> [T]he better view . . . is that of the great majority of the cases, that every custom is not conclusive merely because it is a custom, that it must meet the challenge of "learned reason," and be given only the evidentiary weight which the situation deserves. It follows that where common knowledge and ordinary judgment will recognize unreasonable danger, what everyone does may be found to be negligent . . . .

Prosser & Keeton § 33.

[4] We find that plaintiff has raised a genuine issue of material fact as to whether G.E. breached its duty to exercise due care in failing to install additional fire safety features in the common areas of Cedar Creek apartment complex. In addition to her pleadings, plaintiff presented the affidavits of Chief Blackwelder and Inspector Anderson of the Charlotte Fire Department. Both affidavits noted that the Cedar Creek complex was built according to a "Type 6" construction plan, the quickest and cheapest

type allowed by the North Carolina Building Codes Council. Both acknowledged that the building code contains only minimal fire safety regulations which provide inadequate protection to apartment dwellers, and stated that "Type 6 construction does not contain fires, and presents a problem of fire spread and a serious problem of escape for occupants." Both observed that the wooden siding and stairways used in Type 6 construction can become engulfed in flames in "a matter of minutes." Chief Blackwelder further stated that the Charlotte Fire Department was aware of other instances in which Type 6 escape routes were rendered impassable by flames and apartment dwellers were forced to jump from their windows or balconies. He recommended the installation of sprinkler systems, noncombustible stairs, and two exit paths to make Type 6 apartment complexes safer. Inspector Anderson noted that the windows in Type 6 construction often drop out from the heat of a blaze, allowing a rapid spreading of the fire. He was familiar with an instance in which a local Type 6 building ignited so quickly and burned so rapidly that the roof collapsed a scant three minutes after the fire alarm sounded. These affidavits incorporated by reference a statistical study prepared by the Charlotte Fire Department extolling the benefits of residential sprinkler systems as an effective, relatively cost-efficient means of protecting lives and property in apartment complexes.

"Even where there is no dispute as to the essential facts, where reasonable people could differ with respect to whether a party acted with reasonable care, it ordinarily remains the province of the jury to apply the reasonable person standard." *Moore v. Crompton*, 306 N.C. 618, 624, 295 S.E. 2d 436, 441 (1982). The foregoing evidence, taken in the light most favorable to the plaintiff, would permit rational jurors applying the standard of a reasonable and prudent owner under the same or similar circumstances to reach differing conclusions as to whether defendant took appropriate fire safety precautions in the design and construction of Cedar Creek.

[5] G.E. next contends that assuming plaintiff survives summary judgment on the issue of negligence, she has failed to bring forward evidence that her injuries were proximately caused by that negligence. The test of proximate cause is whether a person of ordinary prudence could have reasonably foreseen the actual results, or similar injurious results, from his negligent conduct. *Sut-*

ton v. Duke, 277 N.C. 94, 176 S.E. 2d 161 (1970). Proximate cause is ordinarily a question for the jury. *Conley v. Pearce-Young-Angel Co.*, 224 N.C. 211, 29 S.E. 2d 740 (1944). Here the affidavits and statistical summary introduced by plaintiff, when viewed in their most favorable light, indicated that the rapid spread of fire to engulf escape routes is a predictable danger in apartments of Type 6 construction. Rational jurors could find that the jumping of residents trapped in their apartments by the spreading of the fire was readily foreseeable.

[6] Finally, G.E. argues that it was entitled to summary judgment based on plaintiff's contributory negligence. Specifically, defendant points to plaintiff's admission in her deposition that only five minutes elapsed between the time she woke up and the time she jumped. Plaintiff further conceded that no smoke or flame had entered her apartment and that ultimately the only damage to the apartment consisted of some burned molding inside the door. It is defendant's contention that plaintiff behaved unreasonably by jumping when she could have summoned help and safely remained in her apartment until rescued, or indeed until the fire had been extinguished.

We have held that

> the existence of contributory negligence does not depend on plaintiff's *subjective* appreciation of danger; rather, contributory negligence consists of conduct which fails to conform to an *objective* standard of behavior—"the care an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury."

Smith v. Fiber Controls Corp., 300 N.C. 669, 673, 268 S.E. 2d 504, 507 (1980) (quoting *Clark v. Roberts*, 263 N.C. 336, 343, 139 S.E. 2d 593, 597 (1965)).

Although some of the evidence tends to support defendant's claim of contributory negligence, this is by no means the only reasonable inference that may be drawn from the facts of the case. Plaintiff was confronted with a raging fire outside her apartment door, blocking her only route of escape. She testified in her deposition that after assessing this situation

> I looked out the window and there was nobody around. And I felt like, you know, there would be nobody who would hear

me. Or there was nobody outside my window, or anything, you know, to—and I just felt that I needed to get out of that building.

. . . .

I did not scream for the fact that I just felt like nobody was going to hear me. I felt like, you know, those people I'd seen were so far away, and there was nobody around that part or anywhere near the part of the building where I lived.

We note that another third-floor resident also chose to jump from her apartment. We cannot say as a matter of law that plaintiff was contributorily negligent in failing to remain in her apartment until help arrived. We hold that it was for the jury to decide under the circumstances of this case whether plaintiff's actions were those of an ordinarily prudent person exercising reasonable care for her own safety. Because plaintiff has raised genuine issues of material fact as to each element of her negligence claim against defendant G.E., summary judgment in G.E.'s favor was improperly granted.

The decision of the Court of Appeals is affirmed as to defendant Walsh and reversed as to defendant G.E.

Affirmed in part, reversed in part.

JOSEPH M. PHELPS v. DUKE POWER COMPANY

No. 464PA87

(Filed 9 February 1989)

Interest § 2; Judgments § 55— negligence action—prejudgment interest

In a negligence action arising from plaintiff's combine coming into contact with defendant's power lines in which the trial court first allowed defendant's motion for a directed verdict, the Court of Appeals reversed, the jury answered the liability issues favorably for plaintiff, and the trial court awarded interest from the date of the verdict, the Court of Appeals erred by holding that the trial court should have awarded interest from the date of the directed verdict in defendant's favor. Former N.C.G.S. § 24-5, under which this case was decided, was obviously meant to change the common law rule so that tort damages reduced to judgment would bear interest from the time the action

was commenced, provided the damages ordered to be paid were covered by liability insurance. In cases such as this, where liability insurance is not statutorily required, it is the court's duty on its own motion to inquire of the defendant regarding the existence of any liability insurance which could cover the damages awarded and the duty of defendant to respond fully and adequately to the trial court's inquiry. This case was remanded for determination by this procedure of the existence, if any, of defendant's liability insurance.

ON defendant's petition for discretionary review of a decision of the Court of Appeals, 86 N.C. App. 455, 358 S.E. 2d 89 (1987), vacating in part a judgment entered by *Battle, J.*, presiding at the 27 May 1986 Civil Session of Superior Court, ORANGE County, and remanding for the entry of judgment as directed by the Court of Appeals' opinion. Heard in the Supreme Court 14 March 1988.

Coleman, Bernholz, Dickerson, Bernholz, Gledhill & Hargrave by G. Nicholas Herman and Douglas Hargrave for plaintiff appellee.

Newsom, Graham, Hedrick, Bryson & Kennon by E. Bryson, Jr. and Joel M. Craig; Cheshire & Parker by Lucius M. Cheshire for defendant appellant.

EXUM, Chief Justice.

The questions raised here relate to the awarding of prejudgment interest under former N.C.G.S. § 24-5 (1983 Cum. Supp.) before it was rewritten by Chapter 214 of the 1985 Session Laws.[1] Former N.C.G.S. § 24-5 provided:

1. Former N.C.G.S. § 24-5, under which this appeal is decided, appears *infra* in the text. This statute was substantially rewritten, as the text states, in 1985 and is codified as N.C.G.S. § 24-5(b) (1986) as follows:

(b) Other Actions.—In an action other than contract, the portion of money judgment designated by the fact finder as compensatory damages bears interest from the date the action is instituted until the judgment is satisfied. Interest on an award in an action other than contract shall be at the legal rate.

Chapter 214, section 2 of the 1985 Session Laws provides that the new statutes shall become effective 1 October 1985 and shall not affect pending litigation.

The version of N.C.G.S. § 24-5 (1983 Cum. Supp.) with which we here deal will be referred to hereinafter in the opinion as simply "former N.C.G.S. § 24-5." There were versions of this statute which predate the version now before us. These earlier versions are generally referred to as such later in the opinion.

> The portion of all money judgments designated by the fact-finder as compensatory damages in actions other than contract shall bear interest from the time the action is instituted until the judgment is paid and satisfied, and the judgment and decree of the court shall be rendered accordingly. The preceding sentence shall apply only to claims covered by liability insurance. The portion of all money judgments designated by the factfinder as compensatory damages in actions other than contract which are not covered by liability insurance shall bear interest from the time of the verdict until the judgment is paid and satisfied, and the judgment and decree of the court shall be rendered accordingly.

Plaintiff filed complaint on 19 November 1982, alleging that he was injured on 23 November 1979 when a combine being operated by him contacted defendant's power line, causing plaintiff to suffer severe electrical shock and serious electrical burns which, in turn, caused him substantial injury and damages. Defendant answered, denying negligence.

The case first came on for trial in May 1984 when at the close of plaintiff's evidence the trial court allowed defendant's motion for a directed verdict. The Court of Appeals reversed. *Phelps v. Duke Power Co.*, 76 N.C. App. 222, 332 S.E. 2d 715 (1985), *disc. rev. denied*, 314 N.C. 668, 336 S.E. 2d 401 (1985).

At retrial before Judge Battle, from which this appeal is taken, the jury returned its verdict on 9 June 1986, answering the liability issues favorably to plaintiff and assessing plaintiff's damages at $600,000. Judge Battle denied defendant's motion for judgment notwithstanding the verdict and entered judgment on the verdict on 10 June 1986. The judgment ordered that the amount awarded, $600,000, would accrue interest from 9 June 1986, the date of the verdict. Defendant appealed.

In the Court of Appeals defendant presented in its brief the single question whether the trial court erred in admitting the testimony of an economist proffered by plaintiff on the issue of plaintiff's damages. The Court of Appeals found no error in the admission of this testimony.

Plaintiff cross-assigned as error the trial court's "limiting the award of interest on the judgment from the date of the judg-

ment." Plaintiff argued in the Court of Appeals that, pursuant to former N.C.G.S. § 24-5, the trial court should have awarded interest on the judgment from the date the action was instituted to the extent defendant had liability insurance covering plaintiff's claims. For that portion of the judgment not covered by liability insurance, plaintiff argued, the trial court should have awarded interest from 31 May 1984, the date the directed verdict was entered against plaintiff at the first trial. The Court of Appeals first concluded that because plaintiff's cross-assignment of error constituted an attack on the judgment itself "and not an alternative basis in law for supporting the judgment," it was not, under Appellate Procedure Rule 10(d), a proper vehicle for bringing forward plaintiff's challenge to the interest awarded. 86 N.C. App. at 458, 358 S.E. 2d at 91. The Court of Appeals elected, pursuant to Appellate Procedure Rule 2, to treat plaintiff's cross-assignment of error as a petition for writ of certiorari under Appellate Procedure Rule 21 and to issue its writ in order to address the prejudgment interest question.

The Court of Appeals decided: (1) Since plaintiff had not raised at trial the question of his entitlement to interest on the basis of defendant's having liability insurance, he was precluded from raising it for the first time on appeal. (2) The trial court should have awarded interest from 31 May 1984, the date of the directed verdict in defendant's favor (ultimately reversed) at the first trial.

The Court of Appeals vacated that portion of the trial court's judgment awarding interest from 9 June 1986, the date of the jury verdict in the second trial, and remanded the matter for entry of judgment awarding interest from 31 May 1984, the date of the ultimately reversed directed verdict in defendant's favor.

We allowed defendant's petition for further review of the Court of Appeals' decision that plaintiff was entitled to interest from the date of the directed verdict. We now reverse that decision and remand for further proceedings consistent with this opinion.

We are confident, contrary to the holding of the Court of Appeals, that the legislature intended the words "from the time of the verdict" to mean the verdict upon which judgment in favor of plaintiff was rendered.

In determining the legislature's intent the court should consider the act as a whole, "the language of the statute, the spirit of the act and what the act seeks to accomplish." *Town of Emerald Isle v. State of N. C.*, 320 N.C. 640, 654, 360 S.E. 2d 756, 764 (1987); *accord, In re Arthur*, 291 N.C. 640, 231 S.E. 2d 614 (1977); *Stevenson v. City of Durham*, 281 N.C. 300, 188 S.E. 2d 281 (1972). A court may consider the "circumstances surrounding [the statute's] adoption which throw light upon the evil sought to be remedied." *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 399, 269 S.E. 2d 542, 561 (1980); *accord, Milk Commission v. Food Stores*, 270 N.C. 323, 154 S.E. 2d 548 (1967).

It is clear that the purpose of former N.C.G.S. § 24-5 was to change the common law rule with reference to the accrual of interest on tort claims reduced to judgment. At common law prejudgment interest was not awarded on damages recovered for personal injuries. *Penny v. R.R.*, 161 N.C. 523, 77 S.E. 774 (1913). The statutes which preceded former N.C.G.S. § 24-5 did not address the question of prejudgment interest on claims other than contract. They provided simply that these claims when reduced to judgment would bear interest from the time of the judgment. *See* N.C.G.S. § 24-5 (Replacement 1965) and its predecessors. Former N.C.G.S. § 24-5 was obviously meant to change the common law rule so that tort damages reduced to judgment would bear interest from the time the action was commenced provided the damages ordered to be paid were covered by liability insurance. The legislature, it seems clear to us, did not intend to change the rule regarding the accrual of interest on tort claims not covered by liability insurance.

For its holding that plaintiff was entitled to interest from the time of the directed verdict, ultimately reversed, in favor of defendant, the Court of Appeals relied on *Jackson v. Gastonia*, 247 N.C. 88, 100 S.E. 2d 241 (1957).

Jackson involved an action for tortious conversion of a water and sewer system in a suburban real estate development. Most of the material facts, including the amount of damages, were stipulated; the parties waived jury trial; and the matter was submitted to the trial court for determination of the facts and law. The trial court entered judgment of nonsuit against plaintiffs. On appeal this judgment was reversed and judgment ordered to be entered

for plaintiffs. *Jackson v. Gastonia*, 246 N.C. 404, 98 S.E. 2d 444 (1957). When, on remand, the trial court entered judgment for plaintiffs, it ordered interest on the stipulated damages from the filing of the complaint. Defendant appealed the award of interest. On this second appeal, the Court held that interest under the facts before it would ordinarily be figured from the first day of the term at which judgment in plaintiffs' favor was rendered. The Court held further that since judgment should have been rendered in plaintiffs' favor at the first trial, "in so far as plaintiffs' right to recover interest is concerned, the judgment as entered below after remand will be treated as having been entered at the 10 December, 1956 Term of Court [the term at which the first trial was conducted], and the plaintiffs' recovery will bear interest from the first day of that term." *Jackson*, 247 N.C. at 90, 100 S.E. 2d at 242.

Jackson does not control here. *Jackson* did not construe former N.C.G.S. § 24-5. *Jackson* applied common law rules governing interest assessable in actions for conversion in addition to a predecessor of former N.C.G.S. § 24-5—a statute which did not use the term "verdict" but provided simply that judgments entered in actions other than contract bore interest from the time of the judgment. *See* N.C.G.S. § 24-5 (Replacement 1965). As the *Jackson* Court expressly recognized, juries at common law in conversion cases were permitted to assess interest from the time of the conversion. *Jackson v. Gastonia*, 247 N.C. at 90, 100 S.E. 2d at 242. *See also Lance v. Butler*, 135 N.C. 419, 47 S.E. 488 (1904); *Stephens v. Koonce*, 103 N.C. 266, 9 S.E. 315 (1889). Finally, *Jackson* involved essentially resolutions of questions of law on stipulated facts and liquidated, stipulated damages.

The case before us involves essentially factual questions regarding both defendant's negligence and the amount of damages, all of which a jury was required ultimately to determine. Until a jury made these determinations there was no basis for the award of interest. Even if the trial court at the first trial had not entered a directed verdict for defendant and had permitted the case to go to the jury, we cannot be certain that that jury would have returned a verdict for plaintiff. As this Court noted in *Penny*:

> . . . [Prejudgment] interest is not recoverable on the damages awarded in actions for torts to the person, because the damages in such cases are in large measure discretionary with the jury and are not ascertainable with reference to a pecuniary standard. [Citation omitted.]
>
> The universal principle deduced from all the precedents is that a personal injury does not create a debt and does not become one until it is judicially ascertained . . . . We do not find a single dissenting case to that proposition.

Penny, 161 N.C. at 526, 77 S.E. at 776-77.

Plaintiff continues to contend before us, as he did in the Court of Appeals, that he is entitled to interest under former N.C.G.S. § 24-5 from the time the action was begun. Plaintiff argues that in the absence of any showing in the trial court regarding defendant's liability insurance, there should be a presumption that defendant has such insurance which will cover the damages awarded, and prejudgment interest should, under the statute, be awarded accordingly. At least, plaintiff contends, the matter should be remanded to the trial court for a determination of the existence of defendant's liability insurance, if any, and, depending on the outcome of this determination, interest awarded accordingly. We disagree with the first, but agree with the second, of plaintiff's arguments.

Plaintiff relies on *Harris v. Scotland Neck Rescue Squad, Inc.*, 75 N.C. App. 444, 331 S.E. 2d 695, *disc. rev. and stay denied*, 314 N.C. 329, 333 S.E. 2d 486-87 (1985), to support his argument that in the absence of any showing in the trial court regarding a defendant's liability insurance, interest should be awarded under former N.C.G.S. § 24-5 as if defendant had insurance covering the damages awarded, *i.e.* from the time the suit was begun. *Harris* was an action for damages arising out of an automobile collision. In this context the Court of Appeals held that under the prejudgment interest statute when the record is silent on the question of the existence of liability insurance, interest should be figured from the date of the filing of the complaint, this being the time when the action was "instituted." The Court of Appeals said:

> In light of the statutory requirement of financial responsibility, G.S. 20-309 *et seq.*, which is generally met through liability insurance, we hold that defendant had the burden of showing the absence of such insurance.

Harris, 75 N.C. App. at 452, 331 S.E. 2d at 701.

Whatever the merits of the *Harris* rule in the context of statutorily mandated automobile liability insurance, we conclude it should not be applied in cases, such as the one before us, where liability coverage is not statutorily required. We hold in these kinds of cases when plaintiff recovers judgment, it is the trial court's duty, on its own motion, to inquire of the defendant regarding the existence of any liability insurance which could cover the damages awarded. It is the defendant's duty to respond fully and accurately to the trial court's inquiry. In almost all cases there should be no controversy about the existence and extent of defendant's liability insurance, and this procedure should satisfactorily resolve the matter. If there is controversy about defendant's liability insurance, plaintiff, of course, should be given an opportunity to be heard. Evidence, if needed, may be taken and the matter resolved by the trial court, if necessary, by the usual findings of fact and conclusions of law with plaintiff having the burden to establish the existence and the extent of the insurance. We remand this case for determination by this procedure of the existence, if any, of defendant's liability insurance.

To the extent that defendant here has liability insurance which covers the damages awarded plaintiff, as determined by the trial court, plaintiff, pursuant to the prejudgment interest statute, shall be awarded interest from the date the complaint was filed. To the extent that defendant has no liability insurance which covers the damages awarded, plaintiff shall be awarded interest from the day the verdict was entered against defendant. *See Wagner v. Barbee and Seiler v. Barbee*, 82 N.C. App. 640, 347 S.E. 2d 844 (1986), *disc. rev. denied*, 318 N.C. 702, 351 S.E. 2d 761 (1987).

For the foregoing reasons, the decisions of the Court of Appeals that (1) plaintiff is not entitled to interest on the basis that defendant had liability insurance because the matter was not raised at trial and (2) plaintiff is entitled to interest from the date of the directed verdict in favor of defendant are reversed. The case is remanded to the Court of Appeals for remand to the Superior Court, Orange County, for further proceedings consistent with this opinion.

Reversed and remanded.

DANIEL R. SMITH AND ALICE SMITH v. BUTLER MOUNTAIN ESTATES PROPERTY OWNERS ASSOCIATION, INC.

No. 260A88

(Filed 9 February 1989)

1. **Deeds § 20.2— restrictive covenant—minimum square footage—finding of violation by trial court**

Although a homeowners association did not reject plaintiffs' proposed house plans on the basis of a minimum square footage restrictive covenant, there was sufficient competent evidence before the trial court to support the trial court's independent finding that plaintiffs' plans called for construction of a house which would violate the restrictive covenant establishing the minimum square footage requirement, and this finding supported the trial court's dismissal of plaintiffs' action seeking declaratory and injunctive relief prohibiting enforcement of the restrictive covenant.

2. **Deeds § 20.7— subdivision restrictive covenants—modification or repeal**

All property owners in a subdivision subject to restrictive covenants may join together and modify or repeal them, but ordinarily the same mutuality is required to vary the restrictions as to create them, and one owner in a restricted subdivision cannot modify the restrictions without the agreement of all the others.

3. **Deeds § 20.6— subdivision restrictive covenants—who may enforce**

The owner of any one lot in a subdivision subject to restrictive covenants running with the land may enforce them against any other lot owner.

4. **Deeds § 20.2— minimum square footage restrictive covenant**

A restrictive covenant establishing the minimum square footage requirement for homes built in a subdivision was valid and enforceable against the plaintiffs.

ON appeal by the plaintiffs pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 90 N.C. App. 40, 367 S.E. 2d 401 (1988), affirming the judgment of *Burroughs, J.*, entered in the Superior Court, BUNCOMBE County, on 18 December 1986, involuntarily dismissing the plaintiffs' action pursuant to N.C.G.S. § 1A-1, Rule 41(b). Heard in the Supreme Court on 14 November 1988.

Brock & Drye, P.A., by Floyd D. Brock and Michael W. Drye, for the plaintiff appellants.

Adams, Hendon, Carson, Crow & Saenger, P.A., by Martin K. Reidinger, for the defendant appellee.

MITCHELL, Justice.

The plaintiffs, who own a lot in Butler Mountain Estates, instituted this declaratory judgment action seeking to have certain restrictive covenants declared void and unenforceable. As alternative relief, the plaintiffs sought to have the defendant, Butler Mountain Estates Property Owners Association, Inc., enjoined from enforcing the restrictions.

Evidence introduced in the trial court tended to show that Butler Mountain Estates is a residential development consisting of forty-eight lots. At the time this action was commenced, houses had been constructed on twelve of the lots and houses were under construction on three of the other lots. All lots in the subdivision are subject to restrictive covenants set out in the provisions of a recorded restrictive agreement. The restrictive agreement provides, *inter alia*, that any house built in the subdivision must have a habitable floor space on its main level, exclusive of basements, porches and garages, of at least 1,100 square feet.[1] Furthermore, the restrictive agreement provides in provision number nine that all building plans "require the approval of the developer and/or Property Owners Association."[2] The restrictive agreement specifically provides in provision number one that the covenants and restrictions set out in the agreement are to be covenants running with the land and shall be binding on all parties and their heirs, assigns and successors in interest.

Initially, plans for houses proposed for construction in the subdivision were taken by the president of the association to the owners of existing homes in the subdivision and approved or disapproved by those individual homeowners. Subsequently, the defendant association formed an architectural review committee which consisted of the board of directors of the association and the owners of lots in the subdivision on which houses had been

1. Although provision number eight in the restrictive agreement which deals with the square footage requirement is not clearly drafted, we agree with the Court of Appeals that this was the proper construction of the restrictive covenant established by that provision.

2. Prior to any of the acts of the defendant association resulting in the bringing of this action by the plaintiffs, the developer executed a "Grant of Architectural Review" granting the defendant association all of the rights reserved to the developer by this provision.

constructed. Thereafter, the committee reviewed plans for proposed houses and accepted or rejected them.

In October 1985, the plaintiffs submitted a set of plans to the architectural review committee for approval. Those plans, which were not for a geodesic dome house, were rejected solely because they failed to call for the required minimum area of 1,100 square feet on the main level of the proposed house.

The plaintiffs submitted another set of plans for a proposed house to the architectural review committee for approval in December 1985. These plans were for a geodesic dome house and were rejected by the architectural review committee. The president of the defendant association then wrote the plaintiffs a letter indicating that the "proposed structure reflects a marked departure from home-building styles prevailing throughout the area" and that the plaintiffs "might consider a design closer to the home-building styles that exist on Butler Mountain Estates." At trial, the president of the association testified that the plans were not rejected on the basis of the minimum square footage covenant, even though they "could have been rejected for that reason" because the house called for by the plans would be 30 to 50 square feet short of the required 1,100.

The architectural review committee did not have any written standards as to what constituted acceptable building plans. However, an informal "format" was established by which to review plans submitted by property owners, based upon the committee's belief that the homes in the subdivision should "conform and blend together."

After the committee rejected the plaintiffs' second set of plans, the plaintiffs instituted this declaratory judgment action, which was tried without a jury. The trial court, having made findings of fact and conclusions of law, entered its judgment granting the defendant's motion to dismiss pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure.

The plaintiffs appealed to the Court of Appeals which, with one judge dissenting, affirmed the trial court. The Court of Appeals first concluded that there was sufficient competent evidence to support the trial court's finding of fact that the plaintiffs' second set of plans did not meet the minimum square footage re-

quirements of the restrictive covenants. The Court of Appeals also concluded that the trial court did not err in its conclusion that the defendant association properly rejected the plans on that basis. Next, the Court of Appeals concluded that there was sufficient competent evidence to support the trial court's findings of fact that: (a) the defendant had developed an architectural style as construction took place; (b) the existing housing was of a common, similar or like design; and (c) the plaintiffs' second set of plans was a marked departure from existing homes in the development and did not meet the roofline designs of homes in the area. Finally, the Court of Appeals concluded that the rejection of the plaintiffs' second set of house plans was not arbitrary or capricious, because the record on appeal shows that those plans did not call for a house that would fit into the present and existing general plan or development scheme of the homes in the area.

In his dissenting opinion, Judge Cozort opined that there was no evidence to support a finding that the second set of plans were rejected *by the defendant association* on the basis of insufficient square footage. Furthermore, he did not believe that the evidence would support a conclusion that it was proper for the defendant association to reject the plans because of the geodesic dome design.

[1] On the record before us in this case, we only find it necessary to decide: (1) whether there was sufficient competent evidence to support the *trial court's* finding of fact that the plaintiffs' second proposed house plans violated the minimum square footage requirement of the restrictive covenants and, if so, (2) whether that finding was sufficient to support the trial court's dismissal of the action. We conclude in this regard that the evidence supported the trial court's finding of fact, which in turn supported the trial court's dismissal of the plaintiffs' action.

The plaintiffs argue that there was no competent evidence to support the *trial court's* finding that "said plans did not meet the square footage requirement" or its holding—erroneously denominated a "finding of fact"—that "[t]he rejection of the Plaintiffs' second plans is upheld [*by the trial court*] based upon their failure to meet the square footage requirement of the restrictive covenants; no finding is made as to the facade or geodesic design." Further, the plaintiffs contend that the trial court erred in con-

cluding as a matter of law that "[t]he rejection of the Plaintiffs' second set of plans [*by the defendant*] due to square footage requirements was a valid exercise of authority under the restrictive covenants that were a matter of public record." They argue in support of this contention that there is simply no evidence to support a finding that the plans were rejected by the *defendant association* on the basis of inadequate square footage.

We agree with Judge Cozort and the plaintiffs that the evidence did not support a finding that *the defendant association*—either itself or through the committee—rejected the plaintiffs' second set of plans due to their failure to call for the minimum square footage. However, our agreement in this regard is not determinative of this appeal. Instead, we must decide whether the trial court properly denied the plaintiffs declaratory and injunctive relief because *the trial court* found that their second set of plans called for construction of a house which would violate the restrictive covenant establishing the minimum square footage requirement.

It is clear that one basis, at least, for the *trial court's* conclusion that the plaintiffs were not entitled to injunctive or declaratory relief was that *the trial court* had made an independent finding of fact that: "The plaintiffs' second set of plans did not meet the restrictive covenant square footage requirement." For this reason, and possibly for others,[3] the trial court allowed the defendant's motion, pursuant to N.C.G.S. § 1A-1, Rule 41(b), to dismiss the plaintiffs' action on the ground that they had shown no right to the relief they sought.

3. Although both the defendant and the plaintiffs appear to agree that one basis for the trial court's judgment dismissing this action was that the plaintiffs' proposed geodesic dome house would not share a similar design with existing homes and that the defendant had, therefore, reasonably rejected the plaintiffs' second plans, this is by no means clear from the face of the judgment itself. Although the trial court's findings of facts include findings to the effect that the houses in the subdivision are of "a common, similar or like design" and that there are no other geodesic houses in the subdivision, the "finding" of the trial court upholding the defendant's rejection of the plans specifically stated that "no finding is made as to the facade or geodesic design." The trial court's conclusions of law include a conclusion that the restrictive covenants are connected to a general plan of development, but do not include a conclusion specifically relating to the geodesic design of the house called for by the plans.

The defendant argues that the record clearly includes evidence to support the trial court's finding that the second set of plans violated the minimum square footage restrictive covenant. It points out that there was specific testimony by John Teeter, president of the defendant association, that the plans were thirty to fifty feet short of the minimum square footage required.

A trial court's findings of facts supported by substantial competent evidence are conclusive on appeal, even where there is conflict in the evidence. *Morse v. Curtis*, 276 N.C. 371, 378, 172 S.E. 2d 495, 501 (1970). We agree with the defendant that substantial competent evidence was introduced at trial to support the *trial court's* finding of fact that the house called for by the plaintiffs' second set of plans would violate the minimum square footage covenant. Further, we conclude that this finding was sufficient to support the trial court's dismissal of the action.

[2] Restrictive covenants running with the land are subject to discharge by a properly executed release or agreement. 20 Am. Jur. 2d *Covenants, Conditions, Etc.* § 270 (1965). All property owners in a subdivision subject to restrictive covenants may join together and modify or repeal them, but ordinarily the same mutuality is required to vary the restrictions as to create them, and one owner in a restricted subdivision cannot modify the restrictions without the agreement of all[4] the others. *Id.* "The willingness of some lot owners in a tract to waive the restriction is not binding on others who insist on its strict observance." *Id.*

[3] The minimum square footage covenant in question here is not a mere factor to be considered by the defendant association in deciding whether to approve or disapprove a proposed dwelling. The owner of any one lot in a subdivision subject to restrictive covenants running with the land may enforce them against any other lot owner. *Stegall v. Housing Authority*, 278 N.C. 95, 178 S.E. 2d 824 (1971). This is particularly clear where, as in this case, the covenants specifically provide that they are to run with the

4. The particular restrictive agreement in question provides, however, that the covenants may be modified or deleted by the owners of two-thirds of the land conveyed in Butler Mountain Estates, if those owners' interests represent two-thirds of the land area of the subdivision.

land and be enforceable by *any lot owner.*[5] *Lamica v. Gerdes*, 270 N.C. 85, 90, 153 S.E. 2d 814, 818 (1967).

In the present case, Teeter's testimony that the plaintiffs' second set of plans were thirty to fifty feet short of the minimum area required by the covenants is substantial competent evidence that the plans did not call for the requisite area. Therefore, substantial competent evidence supports *the trial court's* finding of fact that the home called for in the plaintiffs' second set of plans would violate the restrictive covenant establishing the minimum requirement for square footage. This finding in turn supports the trial court's holding—erroneously denominated a "finding"—that, "[t]he rejection of the Plaintiffs' second plans is upheld [*by the trial court*] based upon their failure to meet the square footage requirement of the restrictive covenants . . . ."

[4] The restrictive covenant in this case establishing the minimum square footage requirement for homes built in the subdivision is valid and enforceable against the plaintiffs. 7 G. Thompson, Commentaries on the Modern Law of Real Property § 3166 (1962 repl.); *see generally Lamica v. Gerdes*, 270 N.C. 85, 153 S.E. 2d 814 (1967) (reasonable covenants imposing building restrictions not regarded as "impolitic" unless contrary to public policy); *Sheets v. Dillon*, 221 N.C. 426, 20 S.E. 2d 344 (1942) (same). Indeed, the plaintiffs do not contend to the contrary. Unless and until this restrictive covenant is properly modified or repealed, each and every lot owner in the subdivision is entitled to the protection provided by its terms. There is no indication of any sort in the record before us that any lot owner has agreed to waive such protection. The trial court having properly determined that the home called for by the plaintiffs' plans would not contain the required minimum square footage, the plaintiffs were not entitled to any relief which would allow them to build a home in violation of this valid and enforceable restrictive covenant. Therefore, the trial court did not err by entering judgment dismissing their action seeking such relief.

5. Provision number two of the restrictive agreement provides that any owner of any real property in the subdivision may "prosecute any proceedings at law or in equity" against any of the parties to the restrictive agreements or their heirs or assigns who violate or attempt to violate the covenants "and either prevent him or them from so doing and/or to recover damages or other dues from such violation including reasonable attorneys fees."

As the defendant was entitled to a dismissal of the plaintiffs' action for the foregoing reasons, neither the trial court nor the Court of Appeals was required to consider or determine whether the remaining restrictive covenants contained in the restrictive agreement are either valid or enforceable.[6] We do not reach or decide any such questions.

For the foregoing reasons, the decision of the Court of Appeals, affirming the trial court's judgment dismissing the plaintiffs' action, is affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. DONALD RAY BEALE, JR.

No. 64PA88

(Filed 9 February 1989)

Homicide § 1— killing of unborn child not murder

The unlawful, willful and felonious killing of a viable but unborn child is not murder within the meaning of N.C.G.S. § 14-17.

ON grant of defendant's petition for certiorari to review an order entered by *Ellis, J.*, at the 16 November 1987 Criminal Session of Superior Court, CUMBERLAND County, denying defendant's motion to dismiss an indictment charging him with murder of an unborn child. Heard in the Supreme Court 14 December 1988.

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

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

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6. We neither consider nor decide whether, on the facts of this case, an "actual controversy" as to the remaining restrictive covenants existed at the time of the filing of the plaintiffs' complaint which commenced this declaratory judgment action. *See Sharpe v. Park Newspapers of Lumberton*, 317 N.C. 579, 347 S.E. 2d 25 (1986); *Gaston Bd. of Realtors v. Harrison*, 311 N.C. 230, 316 S.E. 2d 59 (1984).

FRYE, Justice.

On 2 February 1987, the grand jury of Cumberland County returned a true bill on a two-count indictment charging that defendant, on 17 December 1986, 1) "unlawfully, willfully and feloniously did of malice aforethought kill and murder Donna Faye West Beale, in violation of North Carolina General Statutes Section 14-17"; and 2) "unlawfully, willfully and feloniously did employ an instrument, a 410 shotgun, on Donna Faye West Beale, a pregnant woman, by firing the 410 shotgun with intent to destroy the unborn child, in violation of North Carolina General Statutes Section 14-44." On 31 August 1987, the grand jury returned a superseding indictment, again with two counts. The first count, as before, charged defendant with the murder of Donna Faye West Beale. The second count charged that defendant "unlawfully, willfully and feloniously did of malice aforethought kill and murder Baby Girl Beale, a human being, a viable but unborn child, in violation of North Carolina General Statutes Section 14-17."

Thereafter, defendant moved, pursuant to N.C.G.S. § 15A-954, to dismiss the second count of the indictment on the ground that the indictment failed to state an offense under North Carolina law. Following a hearing, the court entered an order denying defendant's motion. Defendant's petition for certiorari was allowed by this Court on 6 April 1988.

The question before this Court is whether the trial judge properly denied defendant's motion to dismiss the second count of the indictment. To decide this question we must determine whether the unlawful, willful and felonious killing of a viable but unborn child is murder within the meaning of N.C.G.S. § 14-17.[1]

1. Murder in the first and second degree defined; punishment.

A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing . . . shall be deemed to be murder in the first degree, and any person who commits such murder shall be punished with death or imprisonment in the State's prison for life as the court shall determine . . . . All other kinds of murder . . . shall be deemed murder in the second degree, and any person who commits such murder shall be punished as a Class C felon.

N.C.G.S. § 14-17 (1988).

N.C.G.S. § 14-17 classifies murder into two degrees: murder in the first degree, which carries a punishment of death or life imprisonment; and murder in the second degree, a Class C felony.[2] While the statute uses the term "murder," it does not define murder. Prior to the enactment of this statute in 1893, there were no degrees of murder in North Carolina. *State v. Benton*, 276 N.C. 641, 657, 174 S.E. 2d 793, 803 (1970). *See State v. Rhyne*, 124 N.C. 847, 33 S.E. 128 (1899). "Any unlawful killing of a human being with malice aforethought, express or implied, was murder and punishable by death." *State v. Benton*, 276 N.C. at 657, 174 S.E. 2d at 803. The killing of a viable, but unborn child was not considered murder. One who caused the death of an unborn child, either by using or employing on "any woman either pregnant or quick with child . . . any instrument or other means with intent thereby to destroy such child," was guilty of a felony punishable by a fine and up to ten years in prison "unless the same be performed to preserve the life of the mother." 1881 N.C. Sess. Laws ch. 351, § 1; *State v. Jordon*, 227 N.C. 579, 42 S.E. 2d 674 (1947). *See State v. Hoover*, 252 N.C. 133, 113 S.E. 2d 281 (1960); *State v. Green*, 230 N.C. 381, 53 S.E. 2d 285 (1949). This statute, codified as N.C.G.S. § 14-44, was amended in 1967 and again in 1979 when the punishment was changed to that of a Class H felony. 1967 N.C. Sess. Laws ch. 367; 1979 N.C. Sess. Laws ch. 760, § 5.

The second count of the superseding indictment in this case charged defendant with murder of a viable but unborn child in violation of N.C.G.S. § 14-17. Murder under N.C.G.S. § 14-17 is murder as defined at common law. *State v. Streeton*, 231 N.C. 301, 305, 56 S.E. 2d 649, 652 (1949). North Carolina has clearly adopted the common law. N.C.G.S. § 4-1 (1988). It is beyond question that when the predecessor statutes to N.C.G.S. § 4-1 and N.C.G.S. § 14-17 were originally enacted in 1715 and 1893 respectively, and when the Declaration of Independence was promulgated in 1776, the killing of a viable, but unborn child was not murder at common law. *See generally, Keeler v. Superior Court*, 2 Cal. 3d 619, 87 Cal. Rptr. 481, 470 P. 2d 617 (1970) (and authorities cited therein).

2. A Class C felony is "punishable by imprisonment up to 50 years, or by life imprisonment, or a fine, or both imprisonment and a fine." N.C.G.S. § 14-1.1(a)(3) (1986 & Cum. Supp. 1988).

The State contends that this Court should abandon the common law rule that a viable fetus cannot be the subject of murder unless it was born alive and subsequently died of injuries inflicted prior to birth. The State says this Court has the authority to alter judicially created common law, absent a legislative declaration, when it deems it necessary in light of experience and reason. The State argues that due to advances in medical technology which enable the State to show with certainty the viability and cause of death of an unborn child, this Court should abandon the common law "born alive rule" in favor of a rule which would allow prosecution for murder if the fetus, at the time of the killing, was capable of living apart from the mother without artificial support. Relying on *DiDonato v. Wortman*, 320 N.C. 423, 358 S.E. 2d 489 (1987), the State says that this Court has recognized that a viable, but unborn child is a human being in the context of the Wrongful Death Statute.[3] The State notes that the highest courts of South Carolina, Massachusetts and Wisconsin have determined that a viable fetus is a person for the purposes of a homicide statute. *See State v. Horne*, 282 S.C. 444, 319 S.E. 2d 703 (1984); *Commonwealth v. Cass*, 392 Mass. 799, 467 N.E. 2d 1324 (1984); *Foster v. State*, 182 Wis. 298, 196 N.W. 233 (1923).

We disagree with the State's contentions. Assuming that the problems of proving causation have decreased due to technological advancements, these advancements are not a sound basis for extending the common law definition of murder to encompass a class of persons originally excluded under the common law definition of murder in existence when the legislature enacted N.C.G.S. § 14-17.

The strongest case in support of the State's contentions is *State v. Horne*, 282 S.C. 444, 319 S.E. 2d 703. In that case, the South Carolina Supreme Court reversed a conviction of voluntary manslaughter where the evidence disclosed that defendant stabbed his estranged wife, resulting in the death of an unborn,

3. In *DiDonato*, a civil case, this Court held that any uncertainty in the meaning of the word "person" as used in the Wrongful Death Act, N.C.G.S. § 28A-18-2, should be resolved in favor of permitting an action to recover for the destruction of a viable fetus *en ventre sa mere*. The Court reached this conclusion after considering the language of the Wrongful Death Act, its legislative history, and the statute's broadly remedial objectives. *DiDonato v. Wortman*, 320 N.C. 423, 430, 358 S.E. 2d 489, 493.

full-term, viable child the wife was carrying. However, the court, in so doing, held that in the future when the State can prove beyond a reasonable doubt that the fetus was able to live separate and apart from its mother without the aid of artificial support, an action for homicide may be maintained under a South Carolina statute defining murder as "the killing of any person with malice aforethought, either express or implied." *Id.*; S.C. Code Ann. § 16-3-10 (Law. Co-op. 1976). The court refused to apply its decision to the defendant since no previous South Carolina decision "had held that the killing of a viable human being *in utero* could constitute a criminal homicide" and because "[t]he criminal law whether declared by the courts or enacted by the legislature cannot be applied retroactively." *State v. Horne*, 282 S.C. at 447, 319 S.E. 2d at 704.

In *Commonwealth v. Cass*, 392 Mass. 799, 467 N.E. 2d 1324, the Supreme Judicial Court of Massachusetts was called upon to decide whether a viable fetus is a "person" for purposes of that state's vehicular homicide statute. The court, after stating that "[t]he question is one of legislative intent," concluded that "the better rule is that infliction of prenatal injuries resulting in the death of a viable fetus, before or after it is born, is homicide." *Id.* at 800, 807, 467 N.E. 2d 1325, 1329. In reaching its decision, the majority opinion noted that since "at least the fourteenth century, the common law has been that the destruction of a fetus *in utero* is not a homicide" and that "[t]he rule has been accepted as the established common law in every American jurisdiction that has considered the question." *Id.* at 805, 467 N.E. 2d at 1328. In concluding that its decision should not be applicable to the defendant, the court noted that its decision "may have been unforeseeable" and that "the rule that a fetus cannot be the victim of a homicide is the rule in every jurisdiction that has decided the issue, except those in which a different result is dictated by statute." *Id.* at 808-09, 467 N.E. 2d at 1329. The three dissenting justices called the majority decision "an inappropriate 'exercise of raw judicial power.' " *Id.* at 810, 467 N.E. 2d at 1330.

Foster v. State, 182 Wis. 298, 196 N.W. 233, involved the question of whether the defendant was prosecuted under the proper statute for performing a criminal operation upon a six to eight week pregnant woman resulting in a premature expulsion of the fetus. Section 4583 of the Wisconsin statutes made it a crime

to produce a criminal miscarriage. Section 4352 provided that a person who employed an instrument or other means with intent to destroy the child of a pregnant woman shall be deemed guilty of manslaughter in the second degree if the death of the child is caused thereby. The court reversed the defendant's conviction under section 4352, holding that a "two months' embryo is not a human being in the eye of the law . . . ." *Id.* at 302, 196 N.W. at 235. In reaching its decision, the court said that the unlawful killing of a "quick" child is manslaughter.

In each case relied upon by the State, the courts had to determine whether the defendant could be prosecuted under the statute in question. The defendant's conviction was not upheld in either of the three cases. Nevertheless, the cases do support the proposition that a person may be prosecuted under a homicide statute for causing the death of a viable fetus. Arrayed against these cases are those from the overwhelming majority of courts which have considered the issue and concluded that the killing of a viable but unborn child is not murder under the common law. *Keeler v. Superior Court*, 2 Cal. 3d 619, 87 Cal. Rptr. 481, 470 P. 2d 617 (1970); *State v. Anonymous*, 40 Conn. Supp. 498, 516 A. 2d 156 (1986); *White v. State*, 238 Ga. 224, 232 S.E. 2d 57 (1977); *People v. Greer*, 79 Ill. 2d 103, 37 Ill. Dec. 313, 402 N.E. 2d 203 (1980); *State v. Trudell*, 243 Kan. 29, 755 P. 2d 511 (1988); *Hollis v. Commonwealth*, 652 S.W. 2d 61 (Ky. 1983); *State v. Brown*, 378 So. 2d 916 (La. 1979); *State v. Evans*, 745 S.W. 2d 880 (Tenn. Crim. App. 1987); *State v. Larsen*, 578 P. 2d 1280 (Utah 1978); *State ex rel. Atkinson v. Wilson*, 332 S.E. 2d 807 (W. Va. 1984). These courts have adhered to the common law rule that the killing of a fetus is not criminal homicide unless it was born alive and subsequently died of injuries inflicted prior to birth. *Id.*

The creation and expansion of criminal offenses is the prerogative of the legislative branch of the government. The legislature has considered the question of intentionally destroying a fetus and determined the punishment therefor. N.C.G.S. § 14-44 (1986). It has adopted legislation dealing generally with the crimes of abortion and kindred offenses. N.C.G.S. §§ 14-44 through 14-46 (1986). It has also created the new offenses of felony and misdemeanor death by vehicle. N.C.G.S. § 20-141.4 (1983 & Cum. Supp.

1988).[4] It has amended N.C.G.S. § 14-44 and N.C.G.S. § 14-17 on more than one occasion. Nothing in any of the statutes or amendments shows a clear legislative intent to change the common law rule that the killing of a viable but unborn child is not murder.

Criminal statutes must be strictly construed. *State v. Smith*, 323 N.C. 439, 444, 373 S.E. 2d 435, 438 (1988); *State v. Brown*, 264 N.C. 191, 141 S.E. 2d 311 (1965); *State v. Campbell*, 223 N.C. 828, 28 S.E. 2d 499 (1944); *State v. Jordon*, 227 N.C. at 580, 42 S.E. 2d at 675.

In view of the action previously taken by the legislature and considering the weight of authority in other jurisdictions on this question, we believe that any extension of the crime of murder under N.C.G.S. § 14-17 is best left to the discretion and wisdom of the legislature. The General Assembly has determined that the intentional destruction of a fetus may constitute a crime punishable as a Class H felony. We do not discern any legislative intent to include the act of killing a viable fetus within the murder statute. We conclude that defendant may not be prosecuted under N.C.G.S. § 14-17, as it now exists, for the killing of a viable but unborn child. Thus, defendant's motion to dismiss the second count of the indictment should be allowed.

The order of the trial court denying defendant's motion to dismiss the second count of the indictment is

Reversed.

4. A bill creating the crime of feticide and making it "punishable to the same extent as if the defendant's conduct had caused the death of the mother," was introduced in the 1985 Session of the General Assembly but was not enacted into law. H.B. 1276, First Session, May 20, 1985.

STATE OF NORTH CAROLINA v. EDWIN BYRON PARKS

No. 154A88

(Filed 9 February 1989)

1. **Constitutional Law § 34— burglary and first degree murder—no double jeopardy**

Defendant was not subjected to double jeopardy where the State was allowed to try him for both the burglary of the Comer home and the first degree murder of Russell Comer with the murder as the intended felony for the burglary. Although in this case the plan to commit murder fulfilled the intent requirement of burglary and also supplied the premeditation and deliberation elements of first degree murder, each crime requires proof of elements not present in the other.

2. **Criminal Law § 138.25— aggravating factor—pretrial release on other charges—no error**

The trial court did not err when sentencing defendant for burglary by finding in aggravation that defendant committed the burglary while on pretrial release from another felony charge, despite the earlier charge being left dormant by the prosecutor for one and one-half years. The speed or lack thereof with which the first charge is tried is irrelevant to the factor's validity. N.C.G.S. § 15A-1340.4(a)(1).

3. **Criminal Law § 138.15— burglary—aggravating factors outweighing mitigating factors—no abuse of discretion**

The trial court did not abuse its discretion when sentencing defendant for burglary by finding that the aggravating factors outweighed the mitigating factors where the aggravating factors, a prior criminal record and the fact that this crime was committed while defendant was on pretrial release for another felony, were not insignificant.

4. **Jury § 7.12— death penalty—State's use of peremptory challenges to remove ambivalent jurors—no error**

Defendant's rights under the Sixth and Fourteenth Amendments to the U. S. Constitution and Art. I, § 19 of the North Carolina Constitution were not violated by the State's use of peremptory challenges to remove jurors who were not *Witherspoon* excludables, but who were ambivalent concerning their ability to impose the death penalty.

5. **Criminal Law § 138.42— refusal to find nonstatutory mitigating factors—no error**

The trial court did not err when sentencing defendant for burglary by refusing to find the presence of two requested nonstatutory mitigating factors where the evidence failed to support those two factors.

6. **Constitutional Law § 63— death qualified jury—not unconstitutional**

The trial court did not err in a prosecution for burglary and murder by denying defendant's request to limit death qualification of the jury.

State v. Parks

APPEAL by defendant from judgments sentencing him to two life sentences upon his convictions of first degree murder and first degree burglary. Judgments imposed by *John, J.*, at the 30 November 1987 Criminal Session of Superior Court, MOORE County. Heard in the Supreme Court 13 October 1988.

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

Bruce T. Cunningham, Jr., and Sherwood F. Lapping for defendant-appellant.

FRYE, Justice.

On the basis of six assignments of error defendant seeks reversal of his first degree burglary conviction, a new trial on his conviction of murder in the first degree, or, in the alternative, a new sentencing hearing on the burglary conviction. We find no error and thus leave undisturbed defendant's two life sentences.

On 27 July 1987, the grand jury of Moore County returned true bills on separate indictments charging defendant with the 5 April 1987 murder of Russell Comer and first degree burglary of the dwelling house of Russell Comer while the house was occupied by Russell Comer. The cases were consolidated for trial. In the murder case the jury returned a verdict of guilty of first degree murder on the basis of malice, premeditation and deliberation. The jury made no findings as to whether defendant was also guilty of murder under the first degree felony murder rule. The jury also found defendant guilty of first degree burglary.

The trial court concluded that the jury's failure to return a verdict of guilty under the felony murder rule precluded submission to the jury of the aggravating circumstance that the murder was committed while defendant was engaged in the commission of, or an attempt to commit, burglary. The court also found that there were no other aggravating circumstances and therefore allowed defendant's motion to impose a mandatory life sentence in the murder case, thus obviating the necessity of a sentencing hearing before the jury. In the burglary case, the court made findings of aggravating and mitigating factors and after finding that the aggravating factors outweighed the mitigating factors, sentenced defendant to a term of life imprisonment to commence

at the expiration of the life sentence in the murder case. Defendant appeals his murder conviction and sentence to this Court as a matter of right pursuant to N.C.G.S. § 7A-27. Defendant's motion to bypass the North Carolina Court of Appeals upon his appeal of the burglary conviction was allowed by this Court on 29 April 1988.

A brief summary of the evidence presented at trial is as follows. Defendant and Darlene Parks separated on 28 March 1987. They had been married fourteen years, but had separated on several occasions. The couple had two minor sons. The family lived in a trailer in West End, Moore County. Mrs. Parks asked defendant to move out because he had beaten her. Defendant left, but returned to the trailer later that evening. After Mrs. Parks opened the door defendant took the shotgun she was holding away from her, beat her and then shot at her. Defendant threatened to kill Mrs. Parks, and beat her so severely that she suffered broken ribs. Mrs. Parks got the children out of the trailer and into her automobile. She then went to the hospital. Upon her release from the hospital Mrs. Parks and the children went to stay with her mother and stepfather, Christine and Russell Comer. During an argument on 29 March 1987 concerning defendant's right to visit his children, defendant threatened to kill Russell Comer.

On 4 April 1987 Mrs. Parks and the children were still residing with the Comers. Around midnight, defendant went to the home of his cousin, Gerald Laton. Defendant told his cousin, "I'm going to do it," and then proceeded in the direction of the Comers' home, a block away. Moments later Mrs. Laton, the wife of defendant's cousin, telephoned the Comers' home to warn them that defendant was in the area. Mrs. Comer answered the telephone, and told her husband to get his gun because defendant was in the area.

Defendant arrived at the Comers' front door, picked up a piece of wood lying nearby and broke the storm glass door. Mrs. Comer heard defendant say, "I'll kill you, you bastard." She then heard gunshots. Mrs. Parks and the children also heard the glass breaking and the shots. Mr. Comer was dead when the rescue squad arrived. An autopsy revealed that he had been shot three times and his death was due to gunshot wounds.

[1] Defendant first contends that the trial court erred by permitting the State to try him for both the burglary of the Comer home and the first degree murder of Russell Comer because the intended felony for the burglary is the murder of Russell Comer. Defendant argues that the burglary charge and the murder charge under the facts in this case are "circular charges." According to defendant, the burglary charge should have been dismissed because it merged into the murder charge and multiple punishment for what amounts to one offense constitutes double jeopardy.

"Where . . . a single criminal transaction constitutes a violation of more than one criminal statute, the test to determine if the elements of the offenses are the same is whether each statute requires proof of a fact which the others do not." *State v. Etheridge*, 319 N.C. 34, 50, 352 S.E. 2d 673, 683 (1987). "If proof of an additional fact is required for each conviction which is not required for the other, even though some of the same acts must be proved in the trial of each, the offenses are not the same." *State v. Murray*, 310 N.C. 541, 548, 313 S.E. 2d 523, 529 (1984). If at least one essential element of each crime is not an element of the other, the defendant may be prosecuted for both crimes, and such prosecution does not constitute double jeopardy under the fifth and fourteenth amendments to the Constitution of the United States or article I, section 19 of the Constitution of North Carolina. *Id.* at 547-49, 313 S.E. 2d at 528-29.

Clearly, the offenses of first degree burglary and first degree murder both require proof of an additional fact which the other does not. First degree murder is the unlawful killing of a human being with malice, premeditation and deliberation. *State v. Bullard*, 312 N.C. 129, 160, 322 S.E. 2d 370, 388 (1984). To prove murder, there is no requirement that the perpetrator commit the act at night or that he break and enter an occupied dwelling; such elements, among others, are required to prove first degree burglary. First degree burglary is the unlawful breaking and entering into an occupied dwelling at night with the intent to commit a felony therein. *State v. Noland*, 312 N.C. 1, 13, 320 S.E. 2d 642, 650 (1984). The actual completion of the intended felony is not essential to the crime of burglary. *State v. Bell*, 285 N.C. 746, 208 S.E. 2d 506 (1974). Although in the instant case the plan to commit murder fulfilled the intent element of burglary and also sup-

plied the premeditation and deliberation elements of first degree murder, each crime requires proof of elements not present in the other. Since it is clear that here at least one essential element of each crime is not an element of the other, we find no merit in defendant's contentions that he was subjected to double jeopardy.

Defendant's nocturnal intrusion into this home violated the rights of the occupants to be secure in their home. The subsequent murder of Mr. Comer violated his right to live. We find no constitutional or other prohibition to prosecuting and punishing defendant for both offenses.

[2] In his second assignment of error, defendant contends that the trial court erred by finding, in aggravation of the burglary sentence, that defendant committed the burglary while on pretrial release from another felony charge. Defendant disputes the constitutionality of N.C.G.S. § 15A-1340.4 when applied to the instant case since the earlier felony charge was left dormant by the prosecutor for one and one-half years. No authority is cited for this proposition.

This assignment is without merit. N.C.G.S. § 15A-1340.4(a)(1) lists a series of statutory aggravating factors. One factor is "defendant committed the offense while on pretrial release on another felony charge." N.C.G.S. § 15A-1340.4(a)(1)(k) (1988). The speed or lack thereof with which the first case is tried is irrelevant to the factor's validity, although the weight to be given such factor is for the judge's discretion. This factor is constitutionally permissible when there is a "disdain for the law by committing an offense while on release pending trial of an earlier charge, and this may indeed be considered an aggravating [factor]." *State v. Webb*, 309 N.C. 549, 559, 308 S.E. 2d 252, 258 (1983).

[3] In his third assignment of error defendant contends that the trial court erred in finding that the aggravating factors outweighed the mitigating factors found. The balance struck in weighing aggravating and mitigating factors pursuant to the Fair Sentencing Act is a matter within the sound discretion of the trial judge. *State v. Penley*, 318 N.C. 30, 347 S.E. 2d 783 (1986). This balance will not be disturbed on appeal unless the court's ruling is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision. Only when there is no rational basis for the manner in which the aggravating and

mitigating factors are weighed will an appellate court intervene. *State v. Parker*, 315 N.C. 249, 258-60, 337 S.E. 2d 497, 502-03 (1985).

As the State points out, the aggravating factors found in the instant case—a prior criminal record and the fact that this crime was committed while defendant was on pretrial release for another felony—are not, as defendant suggests, insignificant. In view of the substantiality of these factors, we find no abuse of discretion by the trial judge.

[4] Defendant next contends that his rights secured by the sixth and fourteenth amendments to the United States Constitution and article I, section 19 of the North Carolina Constitution were violated by the State's use of peremptory challenges to remove jurors who were not *Witherspoon* excludables, but who were ambivalent concerning their ability to impose the death penalty. This identical issue was decided contrary to defendant's contentions in our recent decision in *State v. Allen*, 323 N.C. 208, 221-22, 372 S.E. 2d 855, 863 (1988).

[5] In his fifth assignment of error defendant contends that the trial court erred by refusing to find the presence of two requested nonstatutory factors in mitigation: (1) no significant history of prior criminal activity, and (2) his attempts to resolve the child custody problem through lawful means. The evidence fails to support these two nonstatutory factors, and the trial judge did not abuse his discretion in failing to find them. *See State v. Spears*, 314 N.C. 319, 333 S.E. 2d 242 (1985). This assignment is without merit.

[6] Defendant's final assignment of error, that the trial court erred in denying defendant's request to limit death qualification of the jury, is brought forward solely as a preservation issue. We find no error. *See Lochart v. McCree*, 476 U.S. 162, 90 L.Ed. 2d 137 (1986); *State v. Holden*, 321 N.C. 125, 363 S.E. 2d 513 (1987); *State v. Wingard*, 317 N.C. 590, 346 S.E. 2d 638 (1986).

No error.

LARRY HIGGINS v. SAMUEL DAVID SIMMONS AND GREENSBORO NATIONAL BANK, GARNISHEE

No. 147PA88

(Filed 9 February 1989)

1. **Garnishment § 2.1— service of attachment upon loan officer trainee—sufficient**

A bank was properly served with attachment papers in a garnishment action in accordance with N.C.G.S. § 1-440.26 where the papers were delivered to a loan officer trainee and where the trial court found that the trainee's duties included the collecting of loan payments on the bank's behalf, that finding was supported by testimony, and N.C.G.S. § 1-440.26(c) plainly states that one who collects money on behalf of a corporation is deemed to be a local agent of the corporation.

2. **Garnishment § 1— garnishment of account containing workers' compensation—permissible**

The Supreme Court rejected a garnishee bank's contention that N.C.G.S. § 97-21 prohibits the court from allowing garnishment of an account into which the proceeds of a workers' compensation claim have been deposited because the bank failed to present this issue to the trial court; the garnishee bank has no standing to enforce the right of its depositor under the Workers' Compensation Act; and plaintiff sought to attach compensation proceeds that had been deposited into a general account with the garnishee bank rather than a claim for compensation.

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

ON plaintiff's petition for discretionary review of a decision of the Court of Appeals, 89 N.C. App. 61, 365 S.E. 2d 187 (1988), reversing judgment entered by *John, J.*, at the 4 May 1987 session of Superior Court, GUILFORD County. Heard in the Supreme Court 14 December 1988.

Smith, Patterson, Follin, Curtis, James & Harkavy, by Marion G. Follin III, for plaintiff-appellant.

Barbee, Johnson & Glenn, by Ronald Barbee, for garnishee-appellee.

MARTIN, Justice.

[1] The issue underlying this appeal is whether the bank's loan officer trainee was an agent for the purpose of serving attachment papers upon the garnishee bank in accordance with N.C.G.S.

§ 1-440.26. Based upon a straightforward reading of this statute as applied to the facts in this case, we find that the loan officer was the bank's agent and therefore the bank was properly served.

Plaintiff filed a complaint 14 January 1983, alleging a debt of $4,200 owed to him by defendant. Attachment proceedings were initiated concurrently, culminating in the service three days later of a summons to garnishee and notice of levy on Greensboro National Bank. Garnishee bank, which failed to respond to the summons, later filed a motion to dismiss the attachment and garnishment proceedings on the grounds that the process had not been properly served because it had been delivered to an employee who lacked the authority to accept service on behalf of the bank. The trial court denied the bank's motion to dismiss, stating among its findings of fact that garnishment papers had been served upon Calvin L. Corbett, a loan officer trainee at garnishee bank, whose duties at the time of service included discussing loan applications with applicants, reviewing loan applications, recommending approval or disapproval of loan applications, and collecting loan payments on the bank's behalf. The trial court cited these facts in support of its conclusion that Corbett was an agent of the bank.

The Court of Appeals examined Corbett's role as a loan officer in the context of N.C.G.S. § 1-440.26, which governs service of process in garnishment proceedings against corporate garnishees. That statute states, in pertinent part, that when the garnishee is a domestic corporation, garnishment process "may be delivered to the president or other head, secretary, cashier, treasurer, director, managing agent or local agent of the corporation." N.C.G.S. § 1-440.26(a) (1983). The statute specifically provides some guidance as to who may be considered a local agent for purposes of service of process: "A person receiving or collecting money within this State on behalf of a corporation is deemed to be a local agent of the corporation for the purpose of this section." N.C.G.S. § 1-440.26(c) (1983). The Court of Appeals concluded that Corbett's "limited authority to accept a loan payment check from a bank client and carry it to a teller for deposit under the supervision of the branch manager [did] not constitute 'receiving or collecting money on behalf of a corporation' within the

meaning of the statute." *Higgins v. Simmons*, 89 N.C. App. 61, 66, 365 S.E. 2d 187, 190 (1988).

The Court of Appeals then analyzed Corbett's employment in the context of *Carolina Paper Co. v. Bouchelle*, 285 N.C. 56, 203 S.E. 2d 1 (1974). In *Bouchelle* this Court did not apply N.C.G.S. § 1-401.26(c) (an employee who receives or collects money for his employer is its agent for purposes of service of process) but examined that issue only within the limited context of N.C.G.S. § 1-401.26(a). The Court of Appeals determined that, unlike the agent in *Bouchelle*, "Corbett had no discretion and control with respect to corporate business, had no official or supervisory powers, conducted his duties of employment wholly under the supervision of [bank] officials, and was not left in charge of the office on the day the papers were served or any other day." 89 N.C. App. at 66, 365 S.E. 2d at 189. The Court of Appeals concluded that the garnishment papers had not been properly served upon the garnishee bank and reversed the judgment of the trial court against the bank.

The Court of Appeals erred in relying upon *Bouchelle* and in holding consequently that the garnishee bank was not properly served. Under the facts of this case, we find *Bouchelle* inapposite. N.C.G.S. § 1-440.26(c) plainly states that one who collects money on behalf of a corporation is deemed to be a local agent of the corporation. This language is "intelligible without any additional words." *State v. Camp*, 286 N.C. 148, 151, 209 S.E. 2d 754, 756 (1974). Even so, the same language in the predecessor statute was restated with unmistakable clarity in *Copland v. Telegraph Co.*, 136 N.C. 11, 12, 48 S.E. 501, 501 (1904): "The authority to receive money, of itself, constitutes the one so authorized a local agent." In the case sub judice this express statute controls. The trial court found that Corbett's duties included the collecting of loan payments on the bank's behalf. This finding was supported in the record by the testimony of the bank's president and chief executive officer, which included the acknowledgment that Corbett "did have authority to collect money on behalf of the bank."

Where supported by competent evidence, the trial court's findings of fact are conclusive on appeal. *Lumbee River Elec. Membership Corp. v. City of Fayetteville*, 309 N.C. 726, 309 S.E. 2d 209 (1983). We conclude that the record not only supports the

trial court's findings, but that it describes Corbett's duties at the bank in the precise terms of the statute.

[2] Garnishee bank raised for the first time before the Court of Appeals the additional issue of whether the prohibition in N.C.G.S. § 97-21 against the assignment of workers' compensation claims likewise prohibits the court from allowing garnishment of an account into which the proceeds of a workers' compensation claim have been deposited. This defense must fail for these reasons:

First, "review [of an appeal] in the Supreme Court is limited to consideration of the questions stated in the . . . petition for discretionary review . . . and *properly* presented in the new briefs required by Rules 14(d)(1) and 15(g)(2)." N.C.R. App. P. 16(a) (effective 1 September 1988) (emphasis added). Because a contention not made in the court below may not be raised for the first time on appeal, *Plemmer v. Matthewson*, 281 N.C. 722, 190 S.E. 2d 204 (1972), the bank's contention was not *properly* presented to the Court of Appeals for review and is therefore not properly before this Court. Although the bank had ample opportunity to present this issue to the trial court, it failed to do so. The record on appeal contains no assignment of error based upon this argument. A party may not exchange his trial horse for what he perceives to be a steadier mount on appeal. *State v. Benson*, 323 N.C. 318, 372 S.E. 2d 517 (1988).

Second, the garnishee bank has no standing to enforce this right of its depositor under the Workers' Compensation Act. "Standing typically refers to the question of whether a particular litigant is a proper party to assert a legal position. Standing carries with it the connotation that someone has a right; but, quaere, is the party before the court the appropriate one to assert the right in question." *State v. Labor and Indus. Review Comm'n*, 136 Wis. 2d 281, 287 n.2, 401 N.W. 2d 585, 588 n.2 (1987). As the personal character of compensation payments has resulted in their being made nonassignable by statute, *see* 2 A. Larson, *The Law of Workmen's Compensation* § 58.46 (1987), it follows that the prohibition against assignment is similarly personal to the employee or to those with a statutory right to assert his compensation claim. *See, e.g.*, N.C.G.S. § 97-10.2 (1985).

> [W]orker's compensation benefits derive solely from legislative enactments. Those enactments create new rights; only if rights and benefits are specifically conferred by the worker's compensation act can it be said that they exist. . . . [T]he quasi-contractual status of the worker in relation to the employer is the result of a legislatively imposed social compact by which an employee acquires rights not recognized by the common law and the employer and its insurer are subject to only limited or scheduled liability. Only rights expressly conferred and liabilities expressly imposed are contemplated by the legislative intent of the compensation act.

State v. Labor and Indus. Review Comm'n, 136 Wis. 2d at 286-87, 401 N.W. 2d at 588. The Workers' Compensation Act of North Carolina does not confer upon a garnishee bank the right to rely upon the exemption statute, N.C.G.S. § 97-21. In the absence of express statutory authority, a garnishee bank has no such right.

Third, plaintiff does not seek to attach a *claim* for compensation, but seeks to attach compensation proceeds that defendant had deposited in a general account with the garnishee bank. Once the proceeds from a compensation claim have been deposited in a bank, they become indistinguishable from other funds on deposit. "When [the claimant] elects to part with the money the exemption ceases. It neither follows the money into the hands of the person to whom it is paid, nor attaches to the newly acquired property." *Merchants Bank v. Weaver*, 213 N.C. 767, 769-70, 197 S.E. 551, 553 (1938). Because defendant had deposited the proceeds of the claim with the garnishee bank, the proceeds were no longer protected by the exemption statute.

We hold that the bank was properly served in accordance with N.C.G.S. § 1-440.26. The decision of the Court of Appeals is

Reversed.

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

IN RE: GEORGE A. GUESS, M.D., RESPONDENT

No. 232PA88

(Filed 9 February 1989)

Physicians, Surgeons and Allied Professions § 7— review of Board of Medical Examiners—appeal of right to Court of Appeals

The Court of Appeals is the proper court to determine appeals taken from decisions of the superior court in proceedings for judicial review of decisions of the Board of Medical Examiners. Although N.C.G.S. § 90-14.11 directs appeals from superior court review of decisions of the Board to the Supreme Court, N.C.G.S. § 7A-27(b) effectively directs such appeals to the Court of Appeals and is the later enacted statute.

ON grant of North Carolina Board of Medical Examiners' petition for discretionary review of a decision of the Court of Appeals, 89 N.C. App. 711, 367 S.E. 2d 11 (1988), dismissing the Board's appeal from an order of the Superior Court, WAKE County, by *Farmer, J.*, Civil Session 20 May 1987, reversing and vacating an order of the North Carolina Board of Medical Examiners which conditionally revoked respondent's medical license. Heard in the Supreme Court 14 November 1988.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Michael E. Weddington, for appellant-Board of Medical Examiners.

Manning, Fulton & Skinner, by Charles E. Nichols, Jr., for appellee.

FRYE, Justice.

This case is before the Court by grant of discretionary review to determine the proper place of appeal from a decision of the superior court reversing a decision of the North Carolina Board of Medical Examiners (Board). The Board appealed the decision to the Court of Appeals, which dismissed the appeal holding that appeal was directly to this Court pursuant to N.C.G.S. § 90-14.11. For the reasons stated hereinafter, we now reverse and hold that appeal lies of right to the Court of Appeals.

This case had its genesis in a professional disciplinary matter before the North Carolina Board of Medical Examiners under N.C.G.S. § 90-14(a)(6). The Board is authorized to suspend or

revoke the medical licenses of physicians who engage, *inter alia*, in unprofessional conduct. Dr. Guess, an Asheville physician Board certified in the practice of family medicine, was charged with "[u]nprofessional conduct, including . . . any departure from, or the failure to conform to, the standards of acceptable and prevailing medical practice . . . irrespective of whether or not a patient is injured thereby . . . ." N.C.G.S. § 90-14(a)(6) (1985 & Cum. Supp. 1988).

The charges and allegations brought by the Board against Dr. Guess are that he held himself out as professing to diagnose and treat human ailments by the practice of homeopathic medicine and that he engaged in the practice of homeopathic medicine for various patients. Following a public hearing, the Board concluded that Dr. Guess had engaged in unprofessional conduct by practicing homeopathic medicine because such a practice is not within the accepted standards and prevailing practice of medicine in this State. The Board therefore conditionally revoked his license to practice medicine in North Carolina.

Dr. Guess sought judicial review of the Board's decision in the Wake County Superior Court which reversed and vacated the Board's decision, finding it both arbitrary and capricious. The Board appealed to the Court of Appeals. Both the Board and Dr. Guess filed briefs in the Court of Appeals, presenting arguments on whether the superior court erred in finding that the Board's decision was not supported by competent, material and substantial evidence and on whether the Board's decision was arbitrary and capricious or prejudiced the substantial rights of Dr. Guess. No question was raised as to the jurisdiction of the Court of Appeals to hear the appeal. Nevertheless, following oral arguments on the merits, the Court of Appeals dismissed the appeal on the ground that it was not authorized to hear it. This Court allowed the Board's petition for discretionary review in order to resolve the jurisdictional question.

N.C.G.S. § 90-14.11 provides: "Any party to the review proceeding, including the Board, may appeal to the Supreme Court from the decision of the superior court under rules of procedure applicable in other civil cases." In reaching its decision, the Court of Appeals relied upon this statute and our case of *In re Wilkins*, 294 N.C. 528, 242 S.E. 2d 829 (1978) (a license revocation case initi-

ated by the Board where this Court accepted an appeal directly from the superior court). The Court of Appeals found N.C.G.S. § 90-14.11 controlling notwithstanding the later enactment of N.C.G.S. § 7A-27(b) (1986) which provides that "[f]rom any final judgment of a superior court . . . including any final judgment entered upon review of a decision of an administrative agency, appeal lies of right to the Court of Appeals."

The two statutes are in obvious conflict. N.C.G.S. § 90-14.11 directs appeals from superior court review of decisions of the Board to the Supreme Court while N.C.G.S. § 7A-27(b) effectively[1] directs such appeals to the Court of Appeals. The conflict between the two statutes was not discussed in *In re Wilkins*. In fact, there is no reference in the opinion to N.C.G.S. § 7A-27(b).

It is a generally accepted rule that where there is an irreconcilable conflict between two statutes, the later statute controls as the last expression of legislative intent. *Bland v. City of Wilmington*, 278 N.C. 657, 661, 180 S.E. 2d 813, 816 (1971); *Victory Cab Co. v. City of Charlotte*, 234 N.C. 572, 577, 68 S.E. 2d 433, 437 (1951); *Guilford County v. Estates Administration, Inc.*, 212 N.C. 653, 655, 194 S.E. 295, 296 (1937). N.C.G.S. § 90-14.11 was enacted in 1953, at a time when the Supreme Court was North Carolina's only appellate court. Then in 1967, the General Assembly enacted legislation creating the Court of Appeals. *See* 1967 N.C. Sess. Laws ch. 108, § 1 (codified as N.C.G.S. § 7A-16 (1986)). N.C.G.S. § 7A-27(b) was a part of that legislation and clearly provided for a right of direct appeal to the Court of Appeals from a final judgment of a superior court entered upon review of a decision of an administrative agency.

Any doubt regarding the appropriate appellate court to which an appeal lies from final decision of a superior court entered upon review of a decision of the Board of Medical Examiners was resolved by this Court in *In re Archibald Carter Magee*, No. 125P87, 356 S.E. 2d 5 (1987). In that case, the Board's appeal to this Court from the Wake County Superior Court "under the provisions of G.S. 90-14.11" was dismissed by this Court. The order provides as follows:

1. The North Carolina Board of Medical Examiners is clearly an administrative agency as that term is used in N.C.G.S. § 7A-27(b). *See* N.C.G.S. § 150B-1(c) (1987).

Purported appeal dismissed on the ground that the later enacted statute which makes the Court of Appeals the proper court to hear the appeal controls. The clerk shall return all documents delivered to this Court to counsel for the appellant forthwith. By order of the Court in conference, this the 5th day of May 1987.

Id.

Thereafter, the Court of Appeals heard the appeal and rendered its decision on the merits. *See In re Magee*, 87 N.C. App. 650, 362 S.E. 2d 564 (1987).

We now hold that the later enacted statute (N.C.G.S. § 7A-27(b)) controls in the instant case. The Court of Appeals is the proper court to determine appeals taken from decisions of the superior court in proceedings for judicial review of decisions of the Board of Medical Examiners. Thus, the Court of Appeals erred in dismissing the appeal. We reverse the decision of the Court of Appeals and remand to that court for consideration on the merits of the issues previously briefed and argued in that court.

Reversed and remanded.

BARBARA KRAMER VAUGHN, WILLIAM GARY VAUGHN, AND AUTUMNE VAUGHN AND ALANA VAUGHN, BY RONALD ERIC VAUGHN, THEIR GUARDIAN AD LITEM, PLAINTIFFS v. GEORGE E. CLARKSON, R.T.C. TRANSPORTATION, INC., AND PAVEMENT TECHNOLOGY SYSTEMS, LTD., DEFENDANTS

No. 248PA88

(Filed 9 February 1989)

Parent and Child § 1— loss of parental consortium—claim not recognized

A child's claim for loss of parental consortium against a third party for negligent injuries to a parent is not recognized in North Carolina.

ON discretionary review under N.C.G.S. § 7A-31 prior to determination by the Court of Appeals of the order entered by *Brannon, J.*, on 11 February 1988 dismissing the plaintiffs' claims

for loss of parental consortium. Heard in the Supreme Court 13 December 1988.

This appeal involves the loss of parental consortium. The allegations of the complaint show that plaintiff Barbara Kramer Vaughn is the mother of plaintiff Alana Vaughn and the stepmother of plaintiff Autumne Vaughn. The plaintiffs alleged that Barbara Kramer Vaughn was injured by the negligence of the defendants and as a result of her injuries Alana Vaughn and Autumne Vaughn have been damaged by the loss of consortium with Barbara Kramer Vaughn. The superior court dismissed the claims of Alana Vaughn and Autumne Vaughn.

Thorp, Fuller & Slifkin, P.A., by Anne R. Slifkin, Margaret E. Karr and James C. Fuller, Jr., for plaintiff appellants.

Young, Moore, Henderson & Alvis, P.A., by David P. Sousa and Knox Proctor, for defendant appellees Clarkson and R.T.C. Transportation, Inc.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Nigle B. Barrow, Jr., Susan M. Parker and Mark A. Ash, for defendant appellee Pavement Technology Systems, Ltd.

Smith, Patterson, Follin, Curtis, James & Harkavy, by Michael K. Curtis, for North Carolina Academy of Trial Lawyers, amicus curiae.

Wallace, Morris, Barwick & Rochelle, by David R. Duke, for North Carolina Association of Defense Attorneys, amicus curiae.

PER CURIAM.

This case brings to this Court the question of whether either a child or a stepchild has a claim for loss of consortium against a third party for negligent injuries to the mother and stepmother. We conclude the child and the stepchild do not have such a claim.

The common law of this jurisdiction has refused to recognize a child's claim for loss of parental consortium when the parent was negligently injured by another, *Ipock v. Gilmore*, 85 N.C. App. 70, 354 S.E. 2d 315, *cert. denied*, 320 N.C. 169, 358 S.E. 2d 52 (1987); or when the mother's affections were intentionally alienated by another, *Henson v. Thomas*, 231 N.C. 173, 56 S.E. 2d 432 (1949). In *Nicholson v. Hospital*, 300 N.C. 295, 266 S.E. 2d 818

(1980), this Court expressed its belief that claims for loss of consortium should be limited to the spousal relationship, saying:

> If a loss of consortium is seen not only as a loss of service but as a loss of legal sexual intercourse and general companionship, society and affection as well, by definition any damage to consortium is limited to the legal marital partner of the injured. Strangers to the marriage partnership cannot maintain such an action. . . .

Id. at 303, 266 S.E. 2d at 822-23 (footnote omitted). In *Azzolino v. Dingfelder*, 315 N.C. 103, 337 S.E. 2d 528 (1985), *cert. denied*, 479 U.S. 835, 93 L.Ed. 2d 75 (1986), this Court affirmed "[f]or the reasons set forth . . . in the opinion of the Court of Appeals," *id.* at 117, 337 S.E. 2d at 537, that court's decision, which relied in part on *Henson*, that children could not maintain an action for loss of parental consortium against one who, it was alleged, negligently caused another sibling with Downs Syndrome to be born to the parents.

Cognizant of these precedents and conceding that a majority of jurisdictions has consistently rejected a child's claim for loss of parental consortium, appellants nonetheless ask us now to recognize such a claim, pointing to a supposed "trend" since 1980 toward recognition. Some jurisdictions have, it is true, recently recognized these claims. *Ferriter v. Daniel O'Connell's Sons, Inc.*, 381 Mass. 507, 413 N.E. 2d 690 (1980); *Berger v. Weber*, 411 Mich. 1, 303 N.W. 2d 424 (1981); *Weitl v. Moes*, 311 N.W. 2d 259 (Iowa 1981); *Audubon-Exira v. Illinois Central*, 335 N.W. 2d 148 (Iowa 1983); *Theama v. City of Kenosha*, 117 Wis. 2d 508, 344 N.W. 2d 513 (1984); *Ueland v. Reynolds Metal Co.*, 103 Wash. 2d 131, 691 P. 2d 190 (1984); *Hay v. Medical Center Hospital of Vermont*, 145 Vt. 533, 496 A. 2d 939 (1985); *Hibpshman v. Prudhoe Bay Supply, Inc.*, 734 P. 2d 991 (Alaska 1987); *Leach v. Newport Yellow Cab, Inc.*, 628 F. Supp. 293 (S.D. Ohio 1985). Other jurisdictions, just as recently, have either refused such claims for the first time or have continued to follow earlier precedents which refused them. *DeLoach v. Companhia de Navegacao Lloyd Brasileiro*, 782 F. 2d 438 (3rd Cir. 1986) (no recovery under maritime law or federal common law); *Madore v. Ingram Tank Ships, Inc.*, 732 F. 2d 475 (5th Cir. 1984); *Green v. A. B. Hagglund and Soner*, 634 F. Supp. 790 (D. Idaho 1986) (applying Idaho law); *Kershner v. Beloit Corp.*,

611 F. Supp. 943 (D. Me. 1985) (applying Maine law); *Clark v. Romeo*, 561 F. Supp. 1209 (D. Conn. 1983); *Hoesing v. Sears, Roebuck & Co.*, 484 F. Supp. 478 (D. Neb. 1980) (applying Nebraska law); *Lewis v. Rowland*, 287 Ark. 474, 701 S.W. 2d 122 (1985); *Nix v. Preformed Line Products Co.*, 170 Cal. App. 3d 975, 216 Cal. Rptr. 581 (1985); *Ledger v. Tippitt*, 164 Cal. App. 3d 625, 210 Cal. Rptr. 814 (1985); *Lee v. Colorado Dept. of Health*, 718 P. 2d 221 (Colo. 1986); *Zorzos v. Rosen*, 467 So. 2d 305 (Fla. 1985); *Fayden v. Guerrero*, 420 So. 2d 656 (Fla. App. 3 Dist. 1982), *review denied*, 430 So. 2d 450 (1983); *Bremer v. Graham*, 169 Ga. App. 115, 312 S.E. 2d 806 (1983); *Hearn v. Beelman Truck Co.*, 154 Ill. App. 3d 1022, 507 N.E. 2d 1295 (1987); *Huter v. Ekman*, 137 Ill. App. 3d 733, 484 N.E. 2d 1224 (1985); *Block v. Pielet Bros. Scrap and Metal Inc.*, 119 Ill. App. 3d 983, 457 N.E. 2d 509 (1983); *Mueller v. Hellrung Constr. Co.*, 107 Ill. App. 3d 337, 437 N.E. 2d 789 (1982); *Koskela v. Martin*, 91 Ill. App. 3d 568, 414 N.E. 2d 1148 (1980); *Durepo v. Fishman*, 533 A. 2d 264 (Me. 1987); *Salin v. Kloempken*, 322 N.W. 2d 736 (Minn. 1982); *DeAngelis v. Lutheran Medical Center*, 84 A.D. 2d 17, 445 N.Y.S. 2d 188 (1981), *aff'd*, 58 N.Y. 2d 1053, 462 N.Y.S. 2d 626, 449 N.E. 2d 406 (1983); *Morgel v. Winger*, 290 N.W. 2d 266 (N.D. 1980); *Sanders v. Mt. Sinai Hospital*, 21 Ohio App. 3d 249, 487 N.E. 2d 588 (1985); *Masitto v. Robie*, 21 Ohio App. 3d 170, 486 N.E. 2d 1258 (1985); *Norwest v. Presbyterian Intercommunity Hosp.*, 293 Or. 543, 652 P. 2d 318 (1982); *Steiner v. Bell Tele. Co.*, 358 Pa. Super. 505, 517 A. 2d 1348 (1986), *aff'd*, 518 Pa. 57, 54 A. 2d 266 (1988); *Graham v. Ford Motor Co.*, 721 S.W. 2d 554 (Tex. Civ. App. 1986); *Bennight v. Western Auto Supply Co.*, 670 S.W. 2d 373 (Tex. Civ. App. 1984).

It would serve little purpose here to array all the cases on both sides of the issue. Neither can we add profitably to what has already been said in these cases both for and against the recognition of such claims. For references to many of the cases and a general summary of the arguments, *see Child's Action—Loss of Parental Attention*, 11 A.L.R. 4th 549 (1982). It suffices to say that we believe the majority view on the issue is the better one and it is consistent with our precedents. We conclude, therefore, that a child's claim for loss of parental consortium against one who is alleged to have negligently injured the parent ought not to be recognized.

Affirmed.

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

ALLSTATE INS. CO. v. McCRAE

No. 552PA88.

Case below: 91 N.C. App. 505.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 9 February 1989.

BROOKS v. BROOKS

No. 51P89.

Case below: 92 N.C. App. 598.

Petition by defendant for writ of supersedeas and temporary stay denied 16 February 1989.

CORWIN v. DICKEY

No. 563P88.

Case below: 91 N.C. App. 725.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 February 1989.

HARRISON v. HARRISON

No. 554P88.

Case below: 91 N.C. App. 586.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 February 1989.

JONES v. JEFFERSON AND IRELAND v. JEFFERSON AND TOTTEN v. JEFFERSON

No. 488P88.

Case below: 91 N.C. App. 289.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 9 February 1989.

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

LEE v. NGO

No. 542P88.

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

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 9 February 1989.

LOWDER v. ALL STAR MILLS

No. 549P88.

Case below: 91 N.C. App. 621.

Petition by several defendants for discretionary review pursuant to G.S. 7A-31 denied 9 February 1989.

MATTHEWS v. WATKINS

No. 559A88.

Case below: 91 N.C. App. 640.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues denied 9 February 1989.

SMITH v. BUCKHRAM

No. 496P88.

Case below: 91 N.C. App. 355.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 9 February 1989.

STATE v. BARNES

No. 574PA88.

Case below: 91 N.C. App. 484.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals allowed 9 February 1989.

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

STATE v. BEAM

No. 524PA88.

Case below: 91 N.C. App. 629.

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 9 February 1989.

STATE v. BIRDSONG

No. 43PA89.

Case below: 92 N.C. App. 382.

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 9 February 1989.

STATE v. BRADLEY

No. 538P88.

Case below: 91 N.C. App. 559.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 February 1989.

STATE v. BULLOCK

No. 498P88.

Case below: 91 N.C. App. 585.

Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 9 February 1989. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 February 1989.

STATE v. BYRD

No. 595P88.

Case below: 92 N.C. App. 244.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 February 1989.

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

STATE v. CONWAY

No. 555P88.

Case below: 91 N.C. App. 587.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 February 1989.

STATE v. DEAVER

No. 567P88.

Case below: 92 N.C. App. 114.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 February 1989.

STATE v. HUNT

No. 551PA88.

Case below: 91 N.C. App. 574.

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 9 February 1989.

STATE v. JOSEPH

No. 23P89.

Case below: 92 N.C. App. 203.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 9 February 1989.

STATE v. LUNSFORD

No. 397P88.

Case below: 90 N.C. App. 772.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 February 1989.

STATE v. MARTIN

No. 553P88.

Case below: 91 N.C. App. 587.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 February 1989.

STATE v. PEACOCK

No. 564P88.

Case below: 91 N.C. App. 738.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 February 1989.

STATE v. PEGRAM

No. 527P88.

Case below: 91 N.C. App. 586.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 February 1989.

STATE v. POWELL

No. 501P88.

Case below: 91 N.C. App. 441.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 February 1989.

STATE v. ROUNDTREE

No. 36P89.

Case below: 92 N.C. App. 384.

Petition by defendant for writ of supersedeas and temporary stay denied 24 January 1989. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 9 February 1989. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 February 1989.

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

STATE v. SPELLMAN

No. 572P88.

Case below: 92 N.C. App. 115.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 February 1989.

STOKES COUNTY v. PACK

No. 550P88.

Case below: 91 N.C. App. 616.

Petition by Stokes County for discretionary review pursuant to G.S. 7A-31 denied 9 February 1989.

WOODSON v. ROWLAND

No. 584A88.

Case below: 92 N.C. App. 38.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues allowed 9 February 1989.

PETITION TO REHEAR

MYERS & CHAPMAN, INC. v. EVANS

No. 140PA88.

Case below: 323 N.C. 559.

Petition by plaintiff to rehear denied 9 February 1989.

STATE OF NORTH CAROLINA v. BILLY D. McQUEEN, JR.

No. 32A86

(Filed 2 March 1989)

1. **Homicide § 25.2— murder—instructions on premeditation and deliberation—absence of any excuse or justification**

There was no plain error in a prosecution for first degree murder from the court's use of "the absence of any excuse or justification" as a factor in determining premeditation and deliberation because there was no evidence introduced at trial to show that any just cause, excuse or justification for the murder existed.

2. **Criminal Law § 75.2— incriminating statements made after arrest—admissibility**

The trial court in a prosecution for first degree murder correctly ruled on the admissibility of a group of statements made during and after defendant's arrest where questions from a trooper about the whereabouts of guns were clearly designed to elicit an incriminating response and were properly ruled inadmissible; questions from a trooper asking defendant whether he was tired and hungry and whether he had come all the way down the river were in the nature of general conversation which took place during rest periods in the climb out of the river gorge and it cannot be said that the trooper should have known that such generalized questions were reasonably likely to elicit an incriminating response from defendant; and those questions were not designed to elicit questions defendant himself subsequently put to officers.

3. **Criminal Law § 75.4— murder—statements made after Miranda warnings and request for attorney—admissible**

The trial court did not err in a first degree murder prosecution by admitting statements defendant made to S.B.I. agents after defendant had received *Miranda* warnings twice and had requested an attorney where defendant received *Miranda* warnings when he was arrested by state troopers, defendant again received *Miranda* warnings when interrogated by S.B.I. agents because they had no knowledge that defendant had already been read his rights, defendant underscored the line on the warnings form which stated "I do not want a lawyer at this time" and signed the form, defendant gave several equivocal answers and the agents attempted to obtain a statement from defendant until he stated for the first time unequivocally "I want my lawyer," the agents terminated the interview and one agent left the room to get the arrest warrant, the remaining agent was silent, defendant began to cry and made certain statements and asked certain questions, and neither agent asked defendant any questions from the time he stated "I want my lawyer." The totality of the circumstances demonstrates a valid waiver of defendant's *Miranda* rights, and the silence of the agent who remained in the interrogation room, his willingness to respond to defendant's questions, and his actual answers cannot be equated with words or actions that he should have known were reasonably likely to elicit an incriminating response.

4. Criminal Law § 75.4— invocation of right to counsel—statement admissible

The trial court did not err in a first degree murder prosecution by permitting the State to cross-examine defendant about a statement made to an S.B.I. agent regarding the location of guns used in the murder where the State had introduced evidence that defendant left a car with a rifle, a pistol and a box of ammunition and had only two pocketknives in his possession when he was arrested; defendant's counsel repeatedly pointed out on cross-examination of the arresting officers that the guns had not been found; defendant testified that he had only a knife when he left the car; on cross-examination by the State, defendant testified that in response to a question from agents about the location of the guns he stated that he would talk to them if his attorneys said it was all right; and an S.B.I. agent testified in rebuttal that defendant had said that he would tell them where the guns were if his lawyer told him to. Defendant took the stand at trial and opened the door to the cross-examination; prior statements mentioning a lawyer do not give a defendant a license to commit perjury on the stand. Furthermore, defendant's knowledge of the location of the guns was not a collateral matter because his version of the events was that he was suffering an alcoholic blackout or that his companion had committed the crime and the State's theory was that defendant had control of the weapons at all times and that he left the car with them.

5. Criminal Law § 73— murder—statement of companion—hearsay

There was no prejudicial error in a first degree murder prosecution for the killing of a state trooper where the trial court sustained the State's objection to testimony that, when defendant and a companion woke up in the companion's car, the companion asked defendant "You don't remember killing a state trooper?" Defendant's testimony was hearsay and falls within none of the exceptions to the hearsay rule; defendant had previously cross-examined the companion as to whether he had asked defendant this question and the companion had denied doing so; and similar evidence was before the jury.

6. Criminal Law § 83.1— murder—testimony against defendant by wife—no error

The trial court did not err in a first degree murder prosecution for the murder of a state trooper by admitting testimony from defendant's wife that defendant was on his way to North Carolina to kill his wife. The testimony of defendant's wife on voir dire demonstrates that she was aware of her right to refuse to testify but that she voluntarily chose to do so; moreover, defendant's threat to come to North Carolina and cut her into "little, bitty pieces" was not a confidential marital communication because threats are not confidential communications.

7. Criminal Law § 86.2— murder—prior incident—admissible

The testimony of defendant's wife in a first degree murder prosecution of a state trooper concerning a prior incident in which defendant had used a gun and made threats against her was relevant because it tended to illustrate defendant's intent to get to his wife at anyone's expense. It was therefore properly admitted where the trial court denied the State's motion for permission to question the wife about the prior incident, defendant took the stand and admitted on cross-examination to the prior altercation and convictions without objection, defendant then recalled his wife during his case in chief, and the wife

testified to the prior incident during cross-examination by the State. N.C.G.S. § 8C-1, Rule 404(b).

8. **Criminal Law § 33.3— murder—corroboration testimony—not a collateral matter**

Testimony in a prosecution for the murder of a highway patrolman did not address a collateral matter and was properly admitted where defendant's wife's friend and employer were both called to corroborate the wife's testimony that defendant had threatened to kill her on the day before he left Kentucky. This testimony went to the core of the State's theory that defendant intended to travel from Kentucky to North Carolina to do harm to his wife or at least to get her back, and that he intended to remove anyone who stood in his way. N.C.G.S. § 8C-1, Rule 402.

9. **Homicide § 8.1— murder—intoxication—no prejudicial error in instruction**

There was no prejudicial error in the trial court's instruction on voluntary intoxication in a prosecution for the murder of a state trooper where the court erroneously charged the jury that defendant would not be guilty of murder in the first degree if, as a result of intoxication, he was utterly incapable of forming the specific intent to kill. The evidence might support an inference that defendant was intoxicated, but it would not support a conclusion that defendant was intoxicated to the extent that he was utterly incapable of forming the specific intent to kill after premeditation and deliberation, and defendant was not entitled to any jury instruction on the issue of voluntary intoxication.

Chief Justice EXUM dissenting.

APPEAL as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from the imposition of a life sentence entered by *Friday, J.*, at the 23 September 1985 Session of Superior Court, HAYWOOD County, upon defendant's conviction by a jury of one count of first-degree murder. Heard in the Supreme Court 14 November 1988.

Lacy H. Thornburg, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, and Linda Anne Morris, 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 indicted on one count of first-degree murder for the shooting death of Trooper Giles Harmon of the North Car-

olina Highway Patrol. The case was tried capitally, on a theory of premeditated and deliberated murder.

The State's evidence tended to show the following events. In November 1984 defendant and his wife, Marsha McQueen, separated for the second time. Marsha McQueen moved from their home in Lexington, Kentucky, to Statesville, North Carolina. Defendant remained in Kentucky and began living with Charles "Ickey" Barker, a man he had known for several years, who owned a farm near Lexington.

On 7 April 1985, Marsha McQueen was with her friend Ann Sims. Defendant telephoned, asking to speak to his wife. He then informed his wife that he was going to come to North Carolina and cut her into "little, bitty pieces." On 8 April 1985, defendant telephoned Ann Sims several times and told her to put Marsha McQueen on a bus and send her home to Kentucky. He stated that he was going to kill Ann Sims and her husband and blow up their home. Defendant told Ann Sims that he had a stick of dynamite and a .22 rifle with a scope and that no one would see him. When Ann Sims expostulated, "no woman is worth this," defendant replied, "Well, I'm going to kill you all. You're not going to see me," and said that no one was going to stand in his way. Also on 8 April defendant telephoned Carl Fox, the manager at the store where Marsha McQueen worked, and told him to fire her because he would make so much trouble that it would not be worthwhile retaining her as an employee.

State's witness Charles "Ickey" Barker testified that during the course of 8 April 1985, he and defendant drank a fifth of liquor and one-half of a case of beer and watched a movie on television in the evening. Barker went to bed at approximately 2:00 a.m. At approximately 4:30 a.m. on 9 April 1985, defendant, who had Barker's .22 rifle, woke Barker and demanded that Barker drive him to North Carolina. Since he needed money for the trip, defendant also demanded that Barker use his bank card to withdraw $500.00 from his account. Barker refused and after an argument during which defendant several times threatened to shoot Barker, the latter ran into the kitchen and returned with a knife. Barker testified that his intent was to get the rifle away from defendant, but he saw that defendant was going to shoot him. He turned to reenter the kitchen, and as he did so, defendant shot

him in the right thigh. Defendant bandaged Barker's leg with a shirt sleeve to stop the bleeding. He then took Barker's .22 pistol, as well as the rifle, made him dress and forced him to write a note to his farmhand that he was taking defendant to Knoxville, Tennessee.

Barker testified that as the two left his house by the kitchen door, defendant shot Barker's dog in the paw. Defendant and Barker took the latter's car. Defendant had the rifle, the pistol and several boxes of ammunition under his control inside the car. Defendant drove to a local store where there was a bank teller machine and forced Barker at gunpoint to withdraw $60.00 from his account and give it to him. Defendant attempted to get more money from the machine but was unsuccessful.

With defendant driving, the men proceeded south on Interstate 75. In the afternoon of 9 April, they stopped in Newport, Tennessee. Defendant bought some food and a six-pack or two and two quarts of beer. They went to a motel, where defendant made Barker hide in the car while he registered using Barker's driver's license. Once in the motel room, defendant pushed one of the beds against the door to prevent Barker from escaping. Both men slept for some time. Barker testified that defendant wanted him to write a check for $5,000. Barker told defendant that he was going to use the bathroom. He tore the checkbook in half and hid the pieces there. Defendant had gone back to sleep, but when Barker attempted to leave the motel room, defendant woke up and threatened to shoot him.

Soon after dark, defendant and Barker left the motel, and with defendant behind the wheel, they drove east on Interstate 40. Defendant was driving Barker's car at a high rate of speed. Barker tried to persuade defendant to slow down, but defendant stated that if an officer stopped him, he would have to kill the officer. As the Interstate entered North Carolina from Tennessee, it narrowed from two lanes to one. A large cave-in had closed one of the road tunnels in the area, so that traffic was detoured. Because of the detour, two Troopers of the North Carolina Highway Patrol were assigned to the area twenty-four hours a day. One of the Troopers assigned on 9 April 1985 was the victim, Giles Harmon.

Defendant was still driving very fast. Shortly after 9:00 p.m., having traveled approximately three miles into North Carolina on Interstate 40, the men saw the blue light of a State Highway Patrol vehicle begin to flash behind Barker's car. Defendant commented that "they" were not going to take him to jail. He pulled over to the side of the road and stopped. Trooper Harmon left his vehicle and approached Barker's car. As he came to the driver's door, defendant stuck the pistol out of the window, held the barrel against Trooper Harmon's chest and pulled the trigger. Trooper Harmon turned around and began to stagger away. Defendant cocked the pistol and fired again. This bullet entered Trooper Harmon's back, severing his spine.

Defendant started Barker's car and drove off as fast as the car would go, passing several trucks on the right. Barker heard him say, "I killed a man." Defendant took the first exit off Interstate 40, turned onto a logging road and drove for approximately six miles. The men then saw a bridle trail which was barred to vehicles by three posts. Defendant used the car's front bumper to loosen the middle post. He pulled it up, drove the car onto the trail and then replaced the post. Having continued up the trail for some way, defendant tied Barker up with some sheets stolen from the Newport motel. The two spent the night in the car.

Barker testified that he and defendant awoke at approximately 6:30 a.m. the next morning, 10 April 1985. Defendant untied Barker's bonds. He told Barker that he believed he had killed a man. They listened to the car radio and heard that Trooper Harmon was dead. The men heard helicopters passing overhead, so defendant camouflaged the car. At approximately 12:30 p.m., defendant took the two guns and a box of ammunition and left on foot. Barker waited for about an hour and then drove his car out.

Barker was interviewed at the law enforcement command post and then taken to the hospital. As a result of his information, officers located the bridle trail and the site where the car had been hidden overnight. The ongoing manhunt for defendant intensified. On 11 April 1985, a motorist reported sighting defendant. Law enforcement officers apprehended defendant in a dry riverbed, approximately 250 to 300 yards below and away from the In-

terstate. Defendant was handcuffed and brought up the steep cliff to the road.

At trial, defendant took the stand on his own behalf. He testified that he had been in several alcohol and drug detoxification centers in the past. Defendant testified that he and Barker were both drinking heavily during the afternoon and evening of 8 April 1985, and at some point, defendant passed out. He was later awakened by Barker, an admitted homosexual, who had pulled down defendant's pants. A struggle ensued, during which defendant shot Barker in the leg. According to defendant, Barker shot the dog because it stole a sandwich off a plate. Defendant testified that Barker agreed to take him to North Carolina. He testified that he did not remember who was driving, but that he had vague memories of traveling through Tennessee and into North Carolina. He did not want Barker's money, so he tore up Barker's checkbook himself. He had a clear memory of waking in the car on the morning of 10 April. Defendant further testified that after he heard on the radio that a Trooper had been killed, after Barker suggested to him that defendant had shot the Trooper and after he saw police helicopters flying overhead, he became scared and decided to run. Before he could decide whether to turn himself in, he was found by law enforcement officers and arrested.

Defendant presented expert testimony that he was an alcoholic, that he had "very possibl[y]" been experiencing an "alcoholic blackout" during the time of the shooting and that, in any event, he did not have the ability to form the specific intent to kill at the time.

The jury found defendant guilty of first-degree murder. At the sentencing hearing, several aggravating and mitigating circumstances were submitted to the jury. The jury found in aggravation that the murder was committed for the purpose of preventing a lawful arrest and that the murder was against a State Highway Patrolman while engaged in the performance of his official duties, but did not find that the murder was committed while defendant was engaged in the commission of or attempt to commit the felony of kidnapping. In mitigation, the jury found that the murder was committed while defendant was under the influence of mental or emotional disturbance and that defendant was a battered and abused child, but did not answer whether de-

fendant had no significant history of prior criminal activity or whether there were any other circumstances arising from the evidence which it deemed to have mitigating value. The jury recommended a sentence of life imprisonment, which the trial court imposed.

Defendant presents six issues for our consideration, all of which pertain to the guilt-innocence phase of his trial. We find no prejudicial error.

[1] Defendant first assigns error to the trial court's instructions to the jury on premeditation and deliberation. The court instructed in part as follows:

> Now, members of the jury, neither premeditation or deliberation are ususally [sic] susceptible of direct proof. They may be proven from circumstances from which they may be inferred, such as the lack of provocation on the part of the victim, the conduct of the defendant before, during and after the killing, any threats or declarations of the defendant at the time, *the absence of any excuse or justification for the shooting*, the number of shots fired and where fired, the declarations of the defendant prior to the shooting and the manner in which the killing was done.

(Emphasis added.) Defendant argues that this instruction allowed the jury to find the premeditation and deliberation required for a verdict of first-degree murder on an improper basis, because a killing without "just cause, excuse or justification" is the basis for a verdict of second-degree murder, not first-degree murder. *State v. Benson*, 183 N.C. 795, 799, 111 S.E. 869, 871 (1922).

Defendant concedes that he failed to object to this instruction at trial. Any alleged error must therefore be scrutinized under the "plain error" standard promulgated in *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983). The plain error standard is intended for those rare cases where an instructional error causes a miscarriage of justice. *State v. Dixon*, 321 N.C. 111, 361 S.E. 2d 562 (1987). Before deciding that an error by the trial court amounts to "plain error," an appellate court must be convinced that absent the error, the jury would probably have reached a different result. *State v. Walker*, 316 N.C. 33, 340 S.E. 2d 80 (1986). Defendant carries a heavier burden of persuasion under this

standard than he would under N.C.G.S. § 15A-1443. *See State v. Gardner*, 315 N.C. 444, 340 S.E. 2d 701 (1986).

First-degree murder based upon a theory of premeditation and deliberation requires a showing of the intentional killing of a human being with malice and after premeditation and deliberation. N.C.G.S. § 14-17 (1986); *State v. Melton*, 307 N.C. 370, 298 S.E. 2d 675 (1983). We have consistently defined premeditation and deliberation as follows:

> Premeditation means "thought of beforehand" for some length of time, however short. *S. v. McClure*, 166 N.C. 328[, 81 S.E. 458 (1914)].
>
> Deliberation means the act is done in a cool state of the blood. It does not mean brooding over it or reflecting upon it for a week, a day, or an hour, or any other appreciable length of time, but it means an intention to kill, executed by the defendant in a cool state of the blood, in furtherance of a fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose, and *not under the influence of a violent passion, suddenly aroused by some lawful or just cause or legal provocation. S. v. Coffey*, 174 N.C. 814[, 94 S.E. 416 (1917)].

State v. Benson, 183 N.C. 795, 798, 111 S.E. 869, 871 (1922) (emphasis added). *See also State v. Rose*, 323 N.C. 455, 460, 373 S.E. 2d 426, 429 (1988); *State v. Biggs*, 292 N.C. 328, 337, 233 S.E. 2d 512, 517 (1977).

The State contends that the trial judge was following the applicable law in his instructions regarding premeditation and deliberation, because listing an "absence of any excuse or justification" for the shooting as a factor for the jury's consideration in determining whether defendant was guilty of first-degree murder was the equivalent of listing the factor as a lack of a "lawful or just cause or legal provocation." *State v. Benson*, 183 N.C. 795, 111 S.E. 869. However, even assuming, arguendo, that the "absence of any excuse or justification" language used by the trial court was error, it does not rise to the level of "plain error" under *State v. Walker*, 316 N.C. 33, 340 S.E. 2d 80. The transcript reveals that no evidence was introduced at trial to show that any just cause, excuse or justification for the murder existed. Therefore, we are

convinced that, absent the challenged language in the instruction, the jury would not have reached a different result. *Id.* This assignment of error is overruled.

Defendant next assigns error to the trial court's denial of his motion to suppress certain statements that defendant made during and after his arrest. Since the statements are separated in time and circumstances, we address them separately.

[2] The transcript reveals that the first group of statements occurred after law enforcement officers had found defendant in the dry riverbed below Interstate 40. Defendant was lying face down among the rocks. Trooper Campbell placed his revolver on the back of defendant's head and told him not to move. While Officer Warren handcuffed defendant, Sergeant Buchanan of the Highway Patrol asked defendant several times where his guns were located. Each time, defendant replied, "No comment." Trooper Thompson arrived as defendant was placed on his feet. As the officers were discussing the easiest route of egress from the river gorge, Trooper Thompson discovered that defendant had not been advised of his constitutional rights (in accordance with *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694 (1966)) and proceeded to administer them to defendant. Trooper Thompson then asked defendant if he wished to say anything, to which defendant replied, "Not without a lawyer."

As the officers were taking defendant out of the gorge, Trooper Thompson said to him, "I guess you're tired and hungry." Defendant replied, "Yes, sir, I'm wore out." Trooper Thompson asked defendant if he had come all the way down the river, to which defendant responded, "That's the only way I could get around you guys." Approximately five minutes later, defendant addressed Trooper Thompson with, "You've asked me several questions. Now can I ask you one?" Trooper Thompson replied, "Sure." Defendant then asked, "[W]hat is all this about?" One of the officers said, "No comment." Defendant asked, "Does this involve murder?" and "Did the man have any children?" Trooper Thompson responded, "What difference does that make?" One of the officers said, "He had a wife." No further conversation occurred until defendant was brought up to the highway and placed in a patrol car with an agent from the State Bureau of Investigation.

Defendant now argues that although he invoked his right to counsel as soon as he was advised of his *Miranda* rights, he was nevertheless interrogated on the way out of the gorge. According to defendant, the officers' questions to him were successfully calculated to elicit responses from him. Defendant maintains that he did not waive the right to counsel merely by "agreeing to respond to the . . . continued interrogation." As a result, he made several statements that he asserts the jury might have understood as indicating guilty knowledge on his part. He contends that all the statements he made subsequent to invoking his right to counsel in the river gorge should have been found inadmissible by the trial court. In addition, he complains that the trial court made inadequate findings of fact when it ruled that all defendant's questions to law enforcement officers and all his responses to their questions immediately after his arrest, except those concerning the whereabouts of the guns, were admissible.

We note that when defendant filed his motion to suppress these statements, he failed to file a supporting affidavit as required by N.C.G.S. § 15A-977(a). This omission would ordinarily amount to a waiver on appeal of the right to contest the admission of evidence on either statutory or constitutional grounds. *State v. Holloway*, 311 N.C. 573, 578, 319 S.E. 2d 261, 264 (1984). Notwithstanding defendant's omission, however, we elect to address the issue under our supervisory powers. N.C.R. App. P. 2.

The facts here are not in dispute. We are satisfied that the trial court's findings of fact as to the statements defendant made in the river gorge are adequate, though they do not directly address the voluntariness of these particular exchanges. It is not error per se for the trial court to omit findings of fact. *State v. Phillips*, 300 N.C. 678, 268 S.E. 2d 452 (1980).

The ultimate test of the admissibility of a statement is whether it was voluntarily and understandingly made. *State v. Davis*, 305 N.C. 400, 290 S.E. 2d 574 (1982). A volunteered statement of any kind is not barred by the fifth amendment. *Miranda v. Arizona*, 384 U.S. 436, 478, 16 L.Ed. 2d 694, 726. *Accord, State v. Tann*, 302 N.C. 89, 273 S.E. 2d 720 (1981). Voluntariness is judged by the totality of the circumstances. *State v. Pruitt*, 286 N.C. 442, 212 S.E. 2d 92 (1975). If the *Miranda* safeguards are to

be implicated, questioning of the defendant or its functional equivalent must occur. Such interrogation is defined as follows:

> A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect . . . amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.

Rhode Island v. Innis, 446 U.S. 291, 301-02, 64 L.Ed. 2d 297, 308 (1980). The interrogation must reflect a measure of compulsion above and beyond that inherent in custody itself. *State v. Ladd*, 308 N.C. 272, 302 S.E. 2d 164 (1983).

Applying these principles to the questions and statements in the river gorge, we conclude that the trial court ruled correctly on their admissibility. Sergeant Buchanan's questions to defendant as to the whereabouts of the guns were clearly designed to elicit an incriminating response and were properly ruled inadmissible. In contrast, however, Trooper Thompson's questions to defendant asking whether he was tired and hungry and whether he had come all the way down the river were in the nature of general conversation which took place during rest periods in the climb out of the gorge. We cannot say that Trooper Thompson should have known that such generalized questions were reasonably likely to elicit an incriminating response from defendant. *See State v. Young*, 317 N.C. 396, 346 S.E. 2d 626 (1986) (officer's statement to defendant during booking that he thought defendant was lying was not interrogation); *State v. Forney*, 310 N.C. 126, 310 S.E. 2d 20 (1984) (sheriff's question to defendant as to whether he knew other persons involved was not interrogation). Moreover, these questions were not designed to elicit the questions defendant himself subsequently put to the officers. Defendant said, "You've asked me several questions. Now can I ask you one?" He then asked why he had been arrested, whether his arrest involved murder, and several questions about the victim. For the most part, he received noncommittal answers. Under the totality of the circumstances, we conclude that defendant's responses to Trooper Thompson's generalized questions and his own questions to the of-

ficers taking him out of the river gorge were voluntary, *Edwards v. Arizona*, 451 U.S. 477, 68 L.Ed. 2d 378 (1981); *see State v. Banks*, 322 N.C. 753, 370 S.E. 2d 398 (1988); *State v. Herring*, 322 N.C. 733, 370 S.E. 2d 363 (1988), and were not the result of an interrogation, *Rhode Island v. Innis*, 446 U.S. 291, 64 L.Ed. 2d 297.

[3] After climbing out of the gorge onto the highway, SBI Agent Jones took defendant to the Highway Patrol station, so that he and Agent Rasmussen could interview him. Agent Rasmussen testified that because the agents had no knowledge that defendant had already been read his *Miranda* rights, Agent Jones proceeded to read them to defendant again. He read the rights aloud from a written waiver of rights form while defendant took a pen and followed the words across the paper as if he were reading them. Defendant underscored the line which stated, "I do not want a lawyer at this time," and signed the form. The interview began with standard questions about defendant's height and weight. When Agent Rasmussen asked defendant for his address, defendant replied, "I don't know whether I should answer any more questions." The interview continued. The agents told defendant that they knew what had happened and wanted his side of the story. In response, defendant asked whether the agents could obtain food and clean clothes for him when he was taken to the jail. Agent Rasmussen replied that he would attempt to get defendant a jail uniform when they went to the jail. The agents provided defendant with water and cigarettes upon his request and attempted to continue the interview by challenging defendant with the information they had about the murder, with a view "to encourage him to . . . to confess to the crime." Defendant gave several equivocal responses, such as, "I might should wait to tomorrow morning to answer that," "I might tell you tomorrow morning after I talk to my lawyer," and "Maybe I should talk to my lawyer before I answer that." The agents attempted to obtain a statement from defendant until he stated for the first time unequivocally, "I want my lawyer," whereupon they terminated the interview and Agent Jones left the room to get the arrest warrant.

After Agent Jones had left, Agent Rasmussen was silent. Defendant began to cry. He sobbed, "What a waste. . . . What a waste." After a pause, during which he was crying softly, he said, "I'm no better off than he is." Then he said, "Oh yes I am. At

least I'm alive. I can see my mother and sister." Defendant then asked whether the agents had spoken to his wife. He inquired of Agent Rasmussen about the several degrees of murder, the sentences they carry and whether any executions had occurred in North Carolina. He asked whether Barker was going to bring kidnapping charges against him and how Barker's car had been found. Agent Rasmussen attempted to answer all of defendant's questions. Agent Jones then returned with the arrest warrant. From the time defendant stated, "I want my lawyer," to his incarceration, neither Agent Jones nor Agent Rasmussen asked defendant any questions. The trial court ruled that the statements defendant made and the questions he asked of Agent Rasmussen after Agent Jones left the room were all volunteered and therefore admissible at trial. Defendant argues, however, that the trial court erred in doing so because the statements he made at the Highway Patrol station were the result of police interrogation after he had again invoked his right to counsel.

The trial judge found as a fact that although defendant was in custody, his questions and statements were voluntarily made. Defendant received cigarettes and water upon request. His handcuffs had been removed. The agents were not armed. Agent Rasmussen testified that, in his observation, although defendant was disheveled, he was coherent and appeared to be sober. Defendant followed the wording of the waiver form and underlined the statement waiving the presence of a lawyer. He then signed the form. We conclude that the totality of the circumstances demonstrate a valid waiver of defendant's *Miranda* rights. Defendant further contends, however, that this second *Miranda* warning was a violation of *Edwards v. Arizona*, 451 U.S. 477, 68 L.Ed. 2d 378. He relied on the United States Supreme Court's recent opinion in *Arizona v. Roberson*, --- U.S. ---, 100 L.Ed. 2d 704 (1988), wherein the Court held (1) that the *Edwards* rule that a suspect who has invoked his right to counsel is not subject to further interrogation until counsel has been made available to him applies when a police-initiated interrogation following a suspect's request for counsel occurs in the context of a separate investigation, and (2) that the fact that the officer who conducted the defendant's second interrogation did not know he had requested counsel when he was arrested could not justify his failure to honor that request. Defendant's reliance upon *Roberson* is misplaced because (1) here

there was only one investigation and (2) the SBI agents honored defendant's request for a lawyer once he had claimed the privilege in plain terms.

The agents terminated the interview with defendant when he unequivocally stated, "I want my lawyer." With regard to defendant's statements and questions made after this juncture, the same principles discussed above apply here. The transcript fails to show that defendant was thereafter "interrogated" as the term is defined in *Rhode Island v. Innis*, 446 U.S. 291, 301-02, 64 L.Ed. 2d 297, 308. After Agent Jones left to get the arrest warrant, defendant began to cry and initiated the break in the silence by directing a series of questions to Agent Rasmussen. Agent Rasmussen remained silent from the time of Agent Jones' departure from the interview room until he answered defendant's direct questions. The transcript demonstrates that Agent Rasmussen's answers were factual but terse. We cannot equate Agent Rasmussen's silence, his willingness to respond to defendant's questions or his actual answers to them with "words or actions . . . that [he] *should have known* were reasonably likely to elicit an incriminating response." *Id.* Defendant's statements and questions were voluntary. *Edwards v. Arizona*, 451 U.S. 477, 68 L.Ed. 2d 378; *State v. Herring*, 322 N.C. 733, 370 S.E. 2d 363. The trial court did not err in admitting them. This assignment of error is overruled.

[4] Defendant next contends that the trial court erred in permitting the State to cross-examine defendant about a statement that he made to Agent Jones at the Highway Patrol station regarding the location of the guns. He argues that the statement was an invocation of his right to counsel and was therefore inadmissible. The State introduced evidence through Charles Barker that defendant left Barker's car with a rifle, a pistol and a box of ammunition. When defendant was arrested, he had only two pocketknives in his possession. On cross-examination of the arresting officers, defendant's counsel repeatedly pointed out that the guns had not been found. When defendant took the stand, he testified that he had only a knife when he left Barker's car. On cross-examination of defendant by the State, the following colloquy occurred:

Q. Do you remember [Agent Jones] asking you after you were arrested, "Billy, at least tell us where the guns are."? Do you remember him asking you that question?

A. Yes, sir, he asked me where the guns were, to tell them where the rifle and pistol were, and I told them I would tell them anything they asked, that they wanted to know, the next day after I talked to my attorney and found out what was going on, what was being said.

Q. I'll ask you if your words weren't, "After I talk to my lawyer and if he tells me, I'll tell you."? Isn't that what you said?

A. Probably. If . . . not to that . . . not exactly like that, no, sir.

Q. Well, how exactly was it?

A. We was up in the jail. It was after I had been arrested and brought . . . after they had questioned me, and I kept asking them to help me . . . I kept asking them if I could get some food and some clothes, and the last thing they asked me before I went—before they started taking me up, was, "Billy, at least tell us where the guns are." I believe that was the question, something like that. And I said to him, "I'll tell you . . . ." I can't think for sure exactly what the words was, but I told them I would tell them anything they wanted to know.

Q. After you talked to your lawyers and if they told you to.

MR. JORDAN: Objection.

THE COURT: Overruled.

A. Yes, sir, that's right.

Q. After they told you to.

A. No, sir, not if they told me to. If I did say that what I was saying, what I meant is I would talk to them if my attorneys[] said it was all right to talk to them[.]

Q. Do you know where those guns are today?

A. No, sir, I haven't the vaguest idea.

The State called Agent Jones as a rebuttal witness. He testified as follows:

> A. I walked over to Mr. McQueen, put my hand on his shoulder and said, "Billy, at least tell us where the guns are at."
>
> MR. BROWN: Objection.
>
> THE COURT: Overruled.
>
> THE WITNESS: He said, "After I talk to my lawyer and if he tells me to, I'll tell you where they are at."

Defendant argues that by giving him the *Miranda* warnings at the Highway Patrol station, the SBI agents indicated that they were prepared to recognize his right to the presence of an attorney should he choose to exercise it. Relying inter alia on *State v. Ladd*, 308 N.C. 272, 302 S.E. 2d 164, defendant contends that the statement, "After I talk to my lawyer and if he tells me to, I'll tell you where they are at," was an invocation of his constitutional privilege to counsel and should not have been admitted into evidence against him. We disagree.

Defendant correctly asserts that in several cases where the defendants did not take the stand at trial, we held that the introduction of testimony relating to their constitutional rights under *Miranda* was impermissible. *See, e.g., State v. Ladd*, 308 N.C. 272 (State may not introduce evidence relating to defendant's expression of his right to counsel during custodial interrogation); *State v. McCall*, 286 N.C. 472, 212 S.E. 2d 132 (1975), *judgment vacated in part*, 429 U.S. 912, 50 L.Ed. 2d 278 (1976) (State may not introduce evidence that defendant exercised his fifth amendment right to remain silent); *State v. Castor*, 285 N.C. 286, 204 S.E. 2d 848 (1974) (same). These decisions have no application to this case, however, because here defendant took the stand at trial and opened the door to the State's cross-examination. *See Harris v. New York*, 401 U.S. 222, 28 L.Ed. 2d 1 (1971). In *Harris*, the issue was whether otherwise inadmissible statements under *Miranda* could be used to impeach a defendant's credibility. The United States Supreme Court stated:

> Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot

> be construed to include the right to commit perjury. Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process. Had inconsistent statements been made by the accused to some third person, it could hardly be contended that the conflict could not be laid before the jury by way of cross-examination and impeachment.

Id. at 225-26, 28 L.Ed. 2d at 4-5 (citations omitted). The same interests apply here. Defendant had testified on direct examination that he had two knives but no "weapons" when he left Barker's car. On cross-examination, the State attempted to bring out the fact that, while at the Highway Patrol station, defendant had told the SBI agents that he knew where the guns were. Prior statements mentioning a lawyer do not give a defendant license to commit perjury on the stand. The State was properly using "traditional truth-testing devices" to impeach defendant's credibility by questioning him about a prior inconsistent statement.

Defendant argues further that the issue of his knowledge of the location of the guns was a collateral matter with regard to the question of whether he intentionally shot Trooper Harmon, so that he was not subject to impeachment by extrinsic evidence. We disagree. Defendant's version of the events was that he was suffering an alcoholic blackout or that Charles Barker had committed the crime. The State's theory was that defendant had control of the weapons at all times and that he left Barker's car with them. Even after an extensive search, the guns were never found. Defendant's statement to Agent Jones at the Highway Patrol station that he would reveal the location of the guns was in direct conflict with defendant's own testimony that he had left Barker's car without them and had no idea where they were. We conclude that defendant's knowledge of the location of the murder weapon was not a collateral matter. *See State v. Williams*, 322 N.C. 452, 368 S.E. 2d 624 (1988). This assignment of error is overruled.

[5] Defendant next assigns error to the trial court's exclusion of a statement that Charles Barker allegedly made to defendant on the morning after the killing. Defendant wished to testify that, when the two men woke up in Barker's car, Barker asked defend-

ant, "You don't remember killing a State Trooper?" The trial court sustained the State's objection to this testimony. Defendant contends that Barker's question was admissible as relevant testimony under N.C.G.S. § 8C-1, Rule 401, because it tended to prove that defendant did not remember the shooting. He argues that the testimony was also admissible to impeach Barker's testimony that he had not asked defendant this question. These contentions are without merit. Defendant's testimony is hearsay. *See* N.C.G.S. § 8C-1, Rules 801(c), 802 (1988). It falls within none of the exceptions to the rule prohibiting hearsay. *See* N.C.G.S. § 8C-1, Rules 803, 804 (1988). In addition, defense counsel had previously cross-examined Barker as to whether he had asked defendant this question, and Barker had denied doing so. In any event, similar evidence was before the jury. Defendant testified that, before he left Barker's car, he had heard on the radio that Trooper Harmon had been killed. He also testified:

> I got to the Interstate and there was ten, fifteen State Patrol cars there. By that time, I knew that there was some truth, that it was true to [sic] *what Barker had said*, that there had been a patrolman killed.

(Emphasis added.) This assignment of error is overruled.

[6] Defendant next assigns error to the admission of certain evidence introduced by the State to show that defendant was on his way to North Carolina to kill his wife. The State called defendant's wife, Marsha McQueen, her friend Ann Sims, and her employer, Carl Fox, who testified that defendant had threatened all three of them before he left Kentucky.

Defendant contends that his wife was compelled to testify and that her testimony was privileged as part of a confidential marital communication. These contentions are meritless. When Marsha McQueen was called to the stand, defendant objected and requested a voir dire to ascertain her competence as a witness. The following exchange took place between Marsha McQueen and defense counsel:

> Q. Mrs. McQueen, are you testifying today voluntarily?
>
> A. Yeah. I talked with you [defense counsel] and you told me if I didn't want to testify, and I don't . . . . If I did not want to come down here I did not want to [sic]. They

could make me come down. He told me he could make me testify.

Q. Told you what?

A. Told me they could make me come to North Carolina but could not make me testify. I felt like if I'm called as a witness I feel like I should.

Q. The result of your testimony today, after being subpoenaed as a witness, you're doing it voluntarily, out of no threats.

A. They told me that I did not have to testify, that I could come down here and refuse.

MR. BROWN: We have no other questions.

Under N.C.G.S. § 8-57(b) Marsha McQueen was competent to testify but not compellable. The privilege of choosing not to testify belonged to the wife, not to defendant. *State v. Britt*, 320 N.C. 705, 709 n.1, 360 S.E. 2d 660, 662 n.1 (1987). *See State v. Freeman*, 302 N.C. 591, 596, 276 S.E. 2d 450, 454 (1981). This colloquy demonstrates that Marsha McQueen was aware of her right to refuse to testify but that she voluntarily chose to do so.

Marsha McQueen testified that defendant had telephoned her and threatened to come to North Carolina and cut her into "little, bitty pieces." Defendant did not object to this testimony at trial, but now argues that, notwithstanding his estrangement from his wife, the testimony was an inadmissible confidential marital communication. In making such a determination

> the question is whether the communication, whatever it contains, was induced by the marital relationship and prompted by the affection, confidence, and loyalty engendered by such relationship.

State v. Freeman, 302 N.C. 591, 598, 276 S.E. 2d 450, 454. We fail to see how defendant's threat to Marsha McQueen was prompted by the affection, loyalty or confidence engendered by marriage. Threats are not confidential communications. *State v. Britt*, 320 N.C. 705, 360 S.E. 2d 660.

[7] The State moved for permission to question Marsha McQueen about a prior incident in which defendant had used a gun

and made threats against her. The trial court denied the motion, with the proviso that if defendant testified to the incident, then the door to the State's questions would "swing open." Defendant took the stand and on cross-examination admitted, without objection, to the altercation and to the conviction he received stemming from it. Defendant then recalled Marsha McQueen during his case in chief. On cross-examination by the State, she testified as follows:

Q. Mrs. McQueen, calling your attention to the incident at you[r] brother-in-law's—Billy's brother's house—in March of 1984, what did he do on that occasion?

MR. BROWN: Objection.

THE COURT: Overruled.

A. Who are you talking about?

Q. What did Billy McQueen do?

MR. BROWN: Objection.

THE COURT: Overruled.

A. He came into his brother's house with a gun and shot, I thought two times. He shot twice and then he took me out with him.

Defendant argues that this cross-examination was improper because it was an impermissible inquiry into the facts and circumstances surrounding his prior conviction and because it was extrinsic evidence used to impeach him on a collateral matter. We disagree.

Defendant opened the door to the State's questions of Marsha McQueen as a result of his own testimony about the altercation. This evidence was therefore properly admitted. Further, the State's theory of the case was that defendant's presence in North Carolina was founded on his motive and intent to kill his wife, Marsha McQueen. The nature of the prior altercation between defendant and his wife was therefore proper impeachment under N.C.G.S. § 8C-1, Rule 404(b) because it related to his motive for carrying weapons and traveling to this state. Under Rule 404(b), evidence with regard to extrinsic acts is not limited to cross-examination and may be provided by extrinsic evidence. *State v.*

Morgan, 315 N.C. 626, 340 S.E. 2d 84 (1986). As defendant correctly notes, evidence of other offenses is inadmissible if its only relevance is to show the character of the accused. However, if that evidence tends to show any other relevant fact, it will not be excluded merely because it also shows him guilty of an independent crime. *State v. Young*, 317 N.C. 396, 346 S.E. 2d 626 (1986). Marsha McQueen's testimony was relevant because it tended to illustrate defendant's intent to get to his wife at anyone's expense and was therefore properly admitted in rebuttal.

[8] Ann Sims, Marsha McQueen's friend, and Carl Fox, Marsha McQueen's employer, were both called to corroborate Marsha McQueen's testimony that defendant had threatened to kill her on the day before he left Kentucky. Defendant now argues that their corroboration was a collateral matter. This argument is without merit. Carl Fox testified that Marsha McQueen told him she had been receiving harassing and threatening telephone calls from defendant and that he agreed to intercept them. This testimony went to the core of the State's theory that defendant intended to travel from Kentucky to North Carolina to do harm to his wife, or at least to get her back, and that he intended to remove anyone who stood in his way. With regard to Ann Sims, we note that the testimony which is the basis for the assignment of error does not relate to corroboration of Marsha McQueen's testimony. Ann Sims testified that defendant told her on the telephone that he was on his way to Statesville and that "nobody was going to stand in his way of getting—of him doing what he had to do." Again, this was precisely the State's theory of the case. Under N.C.G.S. § 8C-1, Rule 402, the testimony of both Carl Fox and Ann Sims was relevant. It did not address a collateral matter. These witnesses were properly allowed to testify as they did.

[9] Defendant's final assignment of error relates to the trial court's jury instruction on voluntary intoxication. The trial court charged the jury as follows:

> Now, gentlemen—members of the jury, voluntary intoxication is not a legal excuse for crime. However, if you find that the defendant was intoxicated you should consider whether this condition affected his ability to formulate the specific intent which is required for conviction of first degree murder. In order for you to find the defendant guilty of first

> degree murder you must find beyond a reasonable doubt that he killed the deceased, Giles Harmon, with malice and in the execution of an actual, specific intent to kill formed after premeditation and deliberation. If, as a result of intoxication, the defendant did not have the specific intent to kill the deceased formed after premeditation and deliberation, *that is, if he was utterly incapable of forming the specific intent to kill,* he is not guilty of murder in the first degree. In such a situation the grade of the offense would be reduced to murder in the second degree.

(Emphasis added.) Defendant objected to the emphasized language. Defendant now contends that under *State v. Mash*, 323 N.C. 339, 372 S.E. 2d 532 (1988), decided three years after defendant's conviction, the emphasized portion of this instruction was sufficiently prejudicial to require a new trial. Although we agree that the emphasized language was erroneous, we do not find prejudicial error.

In *Mash*, we explained that two distinct standards apply when a defendant desires to raise the issue of voluntary intoxication in a criminal case.

> A defendant who wishes to raise an issue for the jury as to whether he was so intoxicated by the voluntary consumption of alcohol that he did not form a deliberate and premeditated intent to kill has the burden of producing evidence, or relying on evidence produced by the state, of his intoxication. . . .
>
> > The evidence must show that at the time of the killing the defendant's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill. *State v. Shelton*, 164 N.C. 513, 79 S.E. 883 (1913). In absence of some evidence of intoxication to such degree, the court is not required to charge the jury thereon. *State v. McLaughlin*, 286 N.C. 597, 213 S.E. 2d 238 (1975).
>
> *State v. Strickland*, 321 N.C. 31, 41, 361 S.E. 2d 882, 888 (1987) (quoting *State v. Medley*, 295 N.C. 75, 79, 243 S.E. 2d 374, 377 (1978)).

> . . . For the jury, evidence of defendant's intoxication need only raise a reasonable doubt as to whether defendant formed the requisite intent to kill required for conviction of first degree murder in order for defendant to prevail on this issue. *State v. Wilson*, 280 N.C. 674, 187 S.E. 2d 22; N.C.P.I. Crim. 305.11.

State v. Mash, 323 N.C. at 346, 372 S.E. 2d at 536-37. In short, to entitle a defendant to a charge on intoxication, the trial judge must conclude that defendant was "utterly incapable" of forming the necessary intent, but the jury need only conclude that "because of his intoxication either defendant did not form the requisite intent or there is at least a reasonable doubt about it." *Id.* at 347, 372 S.E. 2d at 537. A defendant must meet the higher standard of showing that he was "utterly incapable" of forming a deliberated and premeditated intent to kill only for the purpose of entitling himself to the jury instruction. *See State v. Clark*, 324 N.C. 146, 377 S.E. 2d 54 (1989). It follows, therefore, that a jury instruction on voluntary intoxication which itself includes language to the effect that a defendant may be found not guilty of first-degree murder only where his intoxication renders him "utterly incapable" of forming the specific intent to kill is erroneous. The jury instruction given here was in error.

The error in the instruction on voluntary intoxication was not prejudicial in this case, however, because the evidence was insufficient to require such an instruction. We have stated that "[i]n determining whether to give the substance of an instruction concerning a defense, . . . the trial court must . . . assess the evidence first for the legal principles it implicates, and second for the sufficiency of the evidence itself." *Id.* at 161, 377 S.E. 2d at 63. "The measure of what is 'legally sufficient,' however, depends upon the defense asserted." *Id.* at 161, 377 S.E. 2d at 63. "Evidence of mere intoxication . . . is not enough to meet defendant's burden of production [before the trial judge]. He must produce *substantial* evidence which would support a conclusion by the judge that he was so intoxicated that he could not form a deliberate and premeditated intent to kill." *State v. Mash*, 323 N.C. at 346, 372 S.E. 2d at 536 (emphasis added). Our scrutiny of the transcript convinces us that, even taken in the light most favorable to him, *State v. McCray*, 312 N.C. 519, 324 S.E. 2d 606 (1985), defendant nevertheless failed to produce *substantial* evidence to

show that he was so intoxicated that he could not form a deliberate and premeditated intent to kill. The combined testimony of defendant and Charles Barker shows that during the afternoon and evening before the two left Kentucky for North Carolina, they consumed half a case of beer and a fifth of whiskey. Defendant testified that he and Barker also took some Valium pills. Defendant stated that during the journey to North Carolina, the men stopped twice to buy beer, once at a gas station and again at a convenience store. Defendant could not recall the exact amount purchased, but Barker testified that they bought either one or two six-packs plus two quarts at the convenience store. Defendant testified that he drank an unspecified quantity of beer while in the Newport, Tennessee, motel on the afternoon of the shooting and that both men slept for some time. Defendant testified that he and Barker were "hung over" on the morning after the shooting. Defendant's expert medical witness testified that defendant was an alcoholic and was "very possibl[y]" suffering an alcoholic blackout during the evening of the shooting.

In the light most favorable to defendant, this testimony shows that on the day before the shooting, defendant and Barker drank half a case of beer and one fifth of whiskey between them. On the day of the shooting, defendant and Barker *bought* at least one six-pack, two quarts and a further unspecified amount of beer. There is no definitive evidence as to who *drank* what amount. Both men slept before driving from Tennessee into North Carolina. In short, the evidence might support an inference that defendant was intoxicated, but it would not support a conclusion that defendant was intoxicated to the extent that he was "utterly incapable" of forming the specific intent to kill after premeditation and deliberation. " '[A] person may be excited, intoxicated and emotionally upset, and still have the capability to formulate the necessary plan, design, or intention to commit murder in the first degree.' " *State v. Hamby*, 276 N.C. 674, 678, 174 S.E. 2d 385, 387 (1970) (quoting *State v. Thompson*, 110 Utah 113, 123, 170 P. 2d 153, 158 (1946)). A trial judge should not give instructions that are not supported by a reasonable view of the evidence. *State v. Lampkins*, 283 N.C. 520, 196 S.E. 2d 697 (1973). We conclude that defendant was not entitled to *any* jury instruction on the issue of voluntary intoxication. Although the evidence was insufficient to warrant the trial court charging the jury on this issue, defendant

received the benefit of an instruction. The error in the instruction was favorable to defendant. This assignment of error is overruled.

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

No error.

Chief Justice EXUM dissenting.

I differ from the majority with respect only to its conclusion that there was no reversible error in the trial court's instruction on voluntary intoxication. The majority rightly concludes there was error in the instruction but, I think, wrongly concludes that the error was harmless because there was no evidentiary support for such an instruction.

As the majority recognizes, the test for determining whether a voluntary intoxication instruction should be given in a first degree murder prosecution is this: The instruction should not be given unless there is substantial evidence to support a conclusion that defendant was so intoxicated that he could not form, or was utterly incapable of forming, a deliberate and premeditated specific intent to kill. *State v. Mash*, 323 N.C. 339, 372 S.E. 2d 532 (1988). "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). It is for the trial judge, in the first instance, to determine whether this test has been met and for the appellate court, finally, to decide whether the trial court made the correct determination.

The test is properly a stringent one in order to ensure that voluntary intoxication will be available to reduce a defendant's culpability only in the most compelling cases. Nevertheless, I believe the evidence here meets the test. Indeed, in some ways, the evidence here epitomizes that kind of evidence which entitles a defendant to this instruction.

The majority itself correctly capsules defendant's position at trial by saying, "Defendant's version of the events was that he was suffering an alcoholic blackout or that Charles Barker had committed the crime." One who is suffering from an "alcoholic blackout" at the time a crime is committed epitomizes a defend-

ant who is so intoxicated that he cannot form a deliberate and premeditated specific intent to kill.

There is considerable evidence which supports this, the defendant's, version of the events. Much of it is recited in the majority opinion. It is the principal basis for the defense proffered in this case.

As the majority correctly states, the testimony of both Barker, the state's principal witness, and defendant, an alcoholic, tends to show that the two consumed half a case of beer and a fifth of whiskey during the afternoon and evening of April 8, before they left Kentucky for North Carolina. (Defendant also testified that on the morning of April 8 he was "hung over," having consumed an unspecified quantity of alcohol the night before.) During their trip to North Carolina, the two stopped twice to buy beer—one or two six-packs plus two quarts, according to Barker. (Defendant testified they purchased "a sackful of beer.")

Defendant testified as follows: He and Barker checked into a motel in Newport, Tennessee, in the early morning hours of April 9. At the motel, the name and location of which defendant could not recall, the two "were drinking beer." Defendant went to sleep. When he "came to" Barker had his arm over him. Defendant pushed Barker off the bed, and they fought with each other. Defendant "was somewhat sober then." Defendant threatened to leave and hitchhike to Statesville, but instead he decided to "go down to the supermarket and get some more beer and to cool off." He took the beer back to the motel room, "and I went in and we started to drink." Defendant remembered "taking some pills." Defendant and Barker continued to argue. "We would argue some. We would get drunk some. Then things would kind of cool down . . . ." Defendant said, "I started to just go on and hitchhike. I was drunk. We were drinking . . . . I barely remember leaving the motel room. I remember I was falling and I remember [Barker] had to help me some." The next thing defendant recalled was the morning after the shooting "being in the front seat of the car and it was just getting daylight. I woke up. I was sick from . . . felt bad from drinking. . . . I didn't know where we was at."

Defendant called as a witness Dr. Anthony Sciara, a forensic psychologist and Director of Psychological Services at Appalachian Hall. Dr. Sciara testified to his extensive experience treating

alcoholics at Appalachian Hall and elsewhere. He testified at length regarding the various examinations and tests he administered to defendant, reports from other institutions about defendant which he considered, and interviews he conducted with defendant. He told the jury that in his opinion, based on all he had considered, defendant was an alcoholic and on the night of the crime "it is unlikely that [defendant] possessed the ability to form a particular intent to shoot the trooper." It seems clear from all the testimony of Dr. Sciara that this inability was due to defendant's consumption of alcohol during the period of time preceding the shooting and certain "psychological problems relating to alcoholism." There is simply nothing else referred to in the record, or in Dr. Sciara's testimony, that could have produced this inability to form a deliberate and premeditated intent to kill. This view of the basis for Dr. Sciara's opinion is supported by Dr. Sciara's further testimony on redirect examination that, "It is my opinion that it is very possible that [defendant] was suffering from a blackout [at the time of the killing] because of the amount of alcohol ingested during the previous twenty-four hours and the restriction of his memory and his behavior."

I must conclude, therefore, that the evidence was sufficient to require the voluntary intoxication instruction. Such an instruction would not, of itself, entitle defendant to an acquittal; it goes merely to the degree of defendant's culpability. Should the jury, because of this evidence and with proper instructions, have a reasonable doubt about whether defendant had a deliberate and premeditated specific intent to kill, it would not acquit him; it would find him guilty of second degree, rather than first degree, murder. As we said recently in *Mash*, 323 N.C. at 349-50, 372 S.E. 2d at 538-39:

> Although there is little question that defendant committed a homicide, the case is relatively close on the degree of his culpability. The closeness is due to . . . the substantial evidence of defendant's intoxication at the time he committed the crime . . . . The central issue for the jury . . . was whether defendant should be found guilty of first or second degree murder; and this issue hinged largely on how the jury would consider the evidence of defendant's intoxication. For these reasons . . . had the error in the instructions on intox-

ication not been made, there is a reasonable possibility that a different result would have obtained at trial.

I must also conclude, therefore, that the error here in the voluntary intoxication instruction entitles this defendant, as it did the defendant in *Mash*, to a new trial.

STATE OF NORTH CAROLINA v. BONNIE SUE CLARK

No. 27A88

(Filed 2 March 1989)

1. Criminal Law § 75.7— statements not result of custodial interrogation

Oral and written exculpatory statements made by defendant at the police station were not the products of custodial interrogation, and *Miranda* warnings were not required for their admission, where defendant was found slumped over the steering wheel of a car and the body of her husband, who had been stabbed to death, was lying between the front and back seats of the car; defendant stated that both car doors had been opened and she had been rendered unconscious; defendant was taken by rescue squad vehicle to a hospital in the company of a police officer; the officer remained with defendant throughout the half-hour of tests and treatment; defendant agreed to accompany another officer to the police station so he could obtain a statement as to what happened; defendant reiterated her exculpatory statement and began writing it a half hour after her arrival at police headquarters; all officers who were at some time with defendant from the moment she was found to the time she reiterated the statement at police headquarters viewed defendant as a victim; and the investigation of the murder of defendant's husband did not actually focus upon defendant until after she signed her written exculpatory statement. Defendant's constant accompaniment by police personnel and the fact that the officer who took her from the hospital to police headquarters admitted to being "suspicious" of defendant was not tantamount to custodial interrogation.

2. Criminal Law § 75.4— continuation of interrogation—request for counsel not shown

Defendant's inculpatory statement was not inadmissible on the ground that interrogation continued despite her request to have an attorney present where the evidence supported the trial court's findings that, although defendant expressed reservations about whether to talk with officers without first contacting a lawyer, she was repeatedly told that she could use the telephone and that she could call a lawyer immediately, but she never invoked her right to counsel and eventually signed a waiver of rights form.

3. Criminal Law § 75.7— encouragement to tell truth not interrogation

Encouraging a defendant to tell the truth, even after he or she has asked for a lawyer, does not constitute interrogation or its functional equivalent and does not render a subsequent confession involuntary.

4. Criminal Law § 81— life insurance policy—knowledge by defendant—best evidence rule inapplicable

Testimony that a witness saw at defendant's residence a life insurance policy which insured deceased and named defendant as beneficiary did not violate the best evidence rule where the testimony was offered not to prove the contents or terms of the policy but to show defendant's knowledge that the policy existed. Assuming error arguendo, the fact that the actual contents of the policy were before the jury through the testimony of insurance personnel nullified any prejudicial effect the testimony might have had upon the outcome of defendant's trial. N.C.G.S. § 15A-1443(a) (1988).

5. Criminal Law § 74.2— prosecutor's question—Bruton rule not violated

The prosecutor's question to defendant as to whether a non-testifying co-defendant "tried to put the blame on you, and you are trying to put the blame on him, is that right?" did not violate the rule in *Bruton v. United States*, 391 U.S. 123 (1968). Any arguable error was cured by the admission of defendant's statements clearly setting forth her role and motives and those of the co-defendant in the murder in question.

6. Criminal Law § 50.1; Homicide § 15.2— intent to kill—ultimate jury issue—expert testimony not precluded

A clinical psychologist was not precluded from stating an opinion as to whether defendant was able to form the specific intent to kill the victim merely because such testimony embraced an ultimate issue to be decided by the jury. N.C.G.S. § 8C-1, Rule 704 (1988).

7. Criminal Law § 50.1; Homicide § 15.2— intent to kill—expert testimony properly excluded

The trial court properly excluded expert testimony by a clinical psychologist as to whether defendant had the ability to form the specific intent to kill the victim where the witness admitted that his conclusions regarding defendant's mental condition on the day of the murder were "purely speculative" and "conjecture," and the witness indicated no comprehension of the legal significance of "specific intent." N.C.G.S. § 8C-1, Rule 702 (1988).

8. Homicide § 25.2— specific intent to kill—consideration of mental condition of defendant—when instruction required

When a defendant requests the trial court to instruct the jury that it may consider the mental condition of defendant in deciding whether he or she formed a premeditated and deliberate specific intent to kill the victim, the proper test of the legal sufficiency of the evidence for such an instruction is whether the evidence of defendant's mental condition is sufficient to cause a reasonable doubt in the mind of a rational trier of fact as to whether the defendant was capable of forming the specific intent to kill the victim at the time of the killing.

9. Homicide § 25.2— specific intent to kill—mental condition of defendant—instruction not required

The trial court in a first degree murder case did not err in refusing to instruct the jury that it could consider evidence of defendant's mental disorder as rendering her incapable of forming the specific intent to kill where a clinical psychologist testified to an endemic mental condition, but he never suggested that defendant's disorder might have rendered her incapable of forming a premeditated and deliberate specific intent to kill; the evidence presented by defendant tended to show that her personality disorder had affected her since childhood and that, although the disorder appeared to have been exacerbated by the experience of living with abusive, domineering males, she had actually twice extricated herself from such situations by moving out; and the evidence showed that defendant not only physically accompanied a codefendant when he stabbed her husband, but she arranged the rendezvous with her husband and drove the car.

10. Homicide § 30— first degree murder—intent to kill—instruction on second degree murder not required

In a prosecution of defendant for the first degree murder of her husband as an aider and abettor, defendant's evidence that she tried numerous times to talk her codefendant out of his intention to kill her husband, and that she behaved more or less robotically, allowing the codefendant to make the decisions and "just doing what he told" her, did not present a jury question on intent to kill so as to require the trial court to instruct on second degree murder where evidence presented by the State and by defendant, including testimony that defendant knew for some time of her codefendant's intent to kill her husband, that she arranged for the codefendant to be in the same place at the same time as her husband, and that she was also present at the time of the killing, belied anything other than a premeditated and deliberate killing.

11. Criminal Law § 123; Homicide § 31— verdict form—theory of aiding and abetting

The trial court's addition of the basis for first degree murder in its listing on the verdict form of the possible verdict of "guilty of murder in the first degree by aiding and abetting" did not constitute an expression of opinion in violation of N.C.G.S. § 15A-1232, could not have confused the jury, and was supported by N.C.G.S. § 15A-1237.

12. Constitutional Law § 32— restriction of public egress during jury arguments—no denial of public trial

The trial judge's warning to spectators of a first degree murder trial that they would not be allowed to leave the courtroom after closing arguments began did not constitute the denial of a public trial and was authorized by N.C.G.S. § 15A-1034(a) (1988). Sixth Amendment to the U.S. Constitution; Art. I, §§ 18 and 24 of the N.C. Constitution.

13. Criminal Law § 85.3— cross-examination of defendant—specific instance of reprehensible conduct—inadmissibility—harmless error

The prosecutor's cross-examination of defendant about whether she enjoyed smoking marijuana was improper under N.C.G.S. § 8C-1, Rule 608(b),

since defendant's admission to having smoked marijuana had no tendency to prove or disprove her credibility; furthermore, the question and its elicited response were also barred by N.C.G.S. § 8C-1, Rule 404(b), which prohibits evidence of other crimes, wrongs, or acts to prove defendant acted in conformity with a character trait those acts exhibit. However, the admission of such evidence was not prejudicial error in light of the overwhelming evidence of defendant's guilt and other circumstances of this case.

14. Criminal Law § 138.42— honorable discharge mitigating circumstance—erroneous failure to find

In sentencing defendant for conspiracy to commit murder, the trial court erred in failing to find the statutory mitigating circumstance that defendant had been honorably discharged from the armed services where defendant gave uncontradicted testimony that she had been honorably discharged from the Marine Corps on two separate occasions. N.C.G.S. § 15A-1340.4(a)(2)(o) (1988).

Justice WEBB dissenting.

APPEAL by defendant from judgments sentencing her to consecutive terms of life imprisonment for conviction of murder in the first degree and ten years for conviction of conspiracy to commit murder, said judgments imposed by *Stevens (Henry L.), J.*, at the 10 August 1987 session of Superior Court, DUPLIN County. Heard in the Supreme Court 11 October 1988.

Lacy H. Thornburg, Attorney General, by David Roy Blackwell, Special Deputy Attorney General, for the state.

Charles H. Henry, Jr. and Walter W. Vatcher for defendant.

MARTIN, Justice.

Defendant was convicted in a capital trial of murder in the first degree and of conspiracy to commit murder in the stabbing death of her estranged husband, Glennie Clark. She was sentenced to life imprisonment for the murder and to ten years' imprisonment for the conspiracy, the latter to commence at the termination of the life sentence. We find no error on the charge of murder in the first degree. However, with regard to the conviction of conspiracy we conclude that the sentencing court's erroneous failure to consider a statutory mitigating factor entitles defendant to a new sentencing hearing.

Evidence presented by the state tended to show that at 11 p.m. on 1 February 1987, defendant was discovered slumped over the steering wheel of a car parked in a movie theatre parking lot.

The police officer who first approached the car saw the body of a white male lying between the front and back seats, his head resting on the back seat. Detecting no vital signs on the male, the officer directed his flashlight beam onto defendant's face. Before he could reach in to check her, she aroused, shaking vigorously and screaming.

When the officer asked defendant what had happened, she replied that both doors had flown open and someone had slammed her head against the steering wheel, rendering her unconscious. Defendant was unable to provide further information as to the assailant, and after she was examined at the hospital, she reiterated this exculpatory explanation at the police station and reduced it to writing. Both the oral and written exculpatory statements were introduced at trial through the testimony of the interviewing officers.

About the same time defendant was being taken from the hospital to police headquarters, another officer interviewed a moviegoer who said he had observed a man later identified as Robert Bacon, Jr., enter defendant's car and depart with her around 8:30 p.m. The officer proceeded to defendant's house, where he was admitted by Robert Bacon, Jr. Bacon permitted the officer to view the bedroom that he shared with defendant. There the officer discovered and seized bloody clothes and shoes, which he brought back to headquarters around 3 p.m. Defendant was then read her rights. An hour later defendant signed a rights waiver form and offered a lengthy inculpatory statement.

In this statement defendant recounted the vicissitudes of marriage to an alcoholic, the couple's eventual separation, and the development of defendant's romantic relationship with Bacon. Defendant went on to describe the origin and evolution of the idea of killing her husband and how the plan was eventually executed.

Much of this statement was reiterated and detailed when defendant took the stand at her trial. She testified that her father had been a heavy drinker and that consequently family life throughout her childhood had been wrought with tension. Immediately after graduating from high school she joined the Marine Corps, where she met and married her first husband. A year and a half after their marriage, her husband left the Marine Corps and lived on unemployment benefits and defendant's earn-

ings, spending his days partying with friends and dissipating most of the couple's money on drugs. He was domineering, violent, and abusive, and defendant reenlisted in 1980 in order to escape the marriage.

Defendant was assigned to Parris Island, where she met Glennie Clark. She became pregnant with his child and married him 5 March 1982, one day after receiving her divorce from her first husband. Towards the end of her pregnancy, Clark's occasional drinking increased to between six and twelve cans of beer a night and a case a day on weekends, and he began to abuse defendant physically. In April or May, Clark was ordered on a twelve-month tour in Japan, and in his letters home to defendant he repeatedly promised that he would drink no more upon his return. The promises proved to be in vain, however, and upon his arrival home he returned to his pattern of excessive drinking and abuse of defendant. That summer, defendant, again pregnant, moved with her son to the house of a girlfriend. But she moved back in with Clark when his promises of reform were accompanied by his enrollment in alcohol rehabilitation and anti-abuse programs. The reform was short-lived. A month after the birth of their second child, the excessive drinking and physical abuse began again. This pattern was repeated with a second, shorter overseas tour and Clark's return to North Carolina and daily inebriation in the summer of 1986.

Defendant, exasperated by her husband's inability to face the fact of his drinking and disgusted with what he had become, made plans to leave Clark, intending to share the expenses of a house with two other women. When one woman backed out, defendant invited Bacon, a friend from work, to fill in.

Defendant left Clark in October, but despite the separation, her husband continued to harass her by telephone, by turns professing his love and pleading with her to return, and berating her and blaming her for creditors' calls. Although he contributed financially to the support of their two children, he did so only sporadically, and defendant was compelled constantly to juggle family bills.

Defendant testified that "the worse things got" between her and her husband, the closer she drew emotionally and romantically to Bacon. Defendant added that she became "real dependent"

on Bacon, and in her anxiety that he not leave her, she was careful not to do or say anything that would make him mad and "would just do whatever he said." Shortly before Christmas, defendant, distressed and unnerved by her husband's incessant intrusion, said to Bacon that she wanted her husband dead. Although she had uttered such remarks before "jokingly," this time Bacon responded after a pause that "it could be arranged." Bacon told defendant he did not wish her to be involved, and he avoided responding to her questions and doubts, saying it was none of her business.

Defendant explained that because her husband rarely left his house, Bacon was unable to seize the opportunity to kill him. In response to Bacon's suggestion that defendant try to get her husband out of the house, she invited Clark out to see a movie, where, drunk, he created a disturbance and eventually left the theatre to await her in the car. Defendant expected to return to find him dead, but Bacon later told her that the nearby presence of policemen had foiled his plan. Bacon then outlined a plot for the following day, from which defendant attempted to dissuade him. Although she testified that she knew the revised plan would not work, defendant said she "didn't care": "No matter what the consequences of that would have been, anything was better than living the way I was living. He was making the decisions and I was just doing what he told me."

Defendant's testimony concluded by detailing the success of the plan the following day. When her husband called the next morning to apologize for his behavior the night before, she arranged another movie date with him for that evening. Defendant drove to the theatre parking lot where she met Bacon, and he accompanied her to the rendezvous with her husband. She told her husband she was giving Bacon a ride home, and in accord with this ruse, she followed Bacon's directions through dark, suburban streets. Bacon, who was in the back seat, reached over the front seat, grabbed the victim, and began stabbing him. Defendant continued driving, returning eventually to the theatre where Bacon exited, deposited his bloody shoes in the car he had left there, and unsuccessfully attempted to render defendant unconscious by ramming her head against the steering wheel. Bacon then thrust her head several times against the door glass, and defendant passed out. Regarding her earlier false statements, defendant

testified that Bacon had told her to say upon discovery that she and her husband had been robbed, that the doors had flown open, and that she had been knocked out and remembered no more.

[1] On appeal, defendant's assignments of error include her contention that the oral and written exculpatory statements made at the police station should not have been admitted because they were the products of custodial interrogation prior to her having been advised as to her constitutional rights as required by *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, *reh'g denied*, 385 U.S. 890, 17 L.Ed. 2d 121 (1966). Defendant contends that her constant accompaniment by police personnel and the fact that the officer who took her from the hospital to police headquarters admitted to being "suspicious" was tantamount to a custodial interrogation.

The trial court held a voir dire hearing on defendant's motion to suppress certain evidence, including these statements. That court found that defendant was taken by rescue squad vehicle to a hospital in the company of a police officer, in accord with the standard police procedure for transporting a victim for medical treatment, and that the officer remained with defendant throughout the half hour of tests and treatment. The trial court noted that defendant was then asked by another officer if she would accompany him to the police station so he could "obtain a more full statement . . . with respect to what had happened and to attempt to identify the perpetrators of this offense." Defendant agreed to do so. The trial court also found that defendant began writing her exculpatory statement around 2 a.m., a half hour after her arrival at police headquarters. She was asked no further questions until the statement was completed, around 3 a.m. At about that time, an officer arrived with the bloody clothes seized from defendant and Bacon's bedroom. Shortly after being confronted with this evidence, defendant was advised of her Miranda rights. The trial court concluded that both oral and written exculpatory statements had been voluntarily made and that "no reasonable person in the defendant's situation at that time would have believed herself to be under arrest or in any way deprived of her liberty."

If after having conducted a voir dire hearing to determine the admissibility of challenged statements, the trial court's find-

ings of fact are supported by competent evidence, these are conclusive and binding on the appellate court. *State v. Thompson*, 287 N.C. 303, 214 S.E. 2d 742 (1975), *death sentence vacated*, 428 U.S. 908, 49 L.Ed. 2d 1213 (1976). The record amply supports the trial court's findings of fact regarding the circumstances surrounding defendant's exculpatory statements. All three officers who were at some time with defendant from the moment she was found to the moment she reiterated the statement at police headquarters testified that they viewed defendant as a victim. The officer who interviewed defendant later at the police station testified that up until the time defendant signed her written exculpatory statement, she could have left had she wanted to. Although the same officer admitted to having been "suspicious" of defendant, he testified that this was his nature. His suspicions intensified as details about an investigation simultaneously being carried out at defendant's house were radioed back to headquarters, but the investigation of the murder of defendant's husband did not actually focus upon defendant until the arrival of the bloody clothes.

"A custodial interrogation is 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" *State v. West*, 317 N.C. 219, 227, 345 S.E. 2d 186, 191 (1986) (quoting *Miranda v. Arizona*, 384 U.S. at 444, 16 L.Ed. 2d at 706). The record solidly supports the trial court's conclusion that defendant was not in custody at any time prior to completely recording her exculpatory statements and that these were voluntarily made. This being true, Miranda warnings were not required. *State v. West*, 317 N.C. 219, 345 S.E. 2d 186. We consequently affirm the trial court's denial of defendant's motion to suppress those statements.

[2] Defendant also contends that her inculpatory statement made an hour later was improperly admitted because interrogation continued despite her request to have an attorney present. It is well established that once an accused expresses her desire "to deal with the police only through counsel, [she] is not subject to further interrogation by the authorities until counsel has been made available to [her]." *Edwards v. Arizona*, 451 U.S. 477, 484-85, 68 L.Ed. 2d 378, 386, *reh'g denied*, 452 U.S. 973, 69 L.Ed. 2d 984 (1981). The trial court's findings of fact following the voir dire

hearing on defendant's motion to suppress indicate, however, that "defendant never invoked her right to counsel. . . . [She] did express some reservations about whether or not she should talk with the officers without first contacting an attorney in that she stated that she did not know what to do." Based on these findings, the trial court concluded that defendant's inculpatory statement was "freely, understandingly, voluntarily, and knowingly given without any promises, threats, rewards, hope of reward, coercion or pressure of any kind," and that it was given after a similarly comprehensively knowing waiver of her constitutional rights.

[3] The trial court's findings are, again, supported by competent evidence in the record. The voir dire testimony of the two officers who read defendant her Miranda rights indicated that although they were convinced that defendant understood her rights as read to her, she was uncertain and ambivalent as to what to do. She indicated that she wanted to talk to them, yet she hesitated to sign the waiver form. She was told repeatedly that she could use the telephone, which was less than six feet away, and, specifically, that she could call a lawyer immediately if she cared to. Eventually, at 3:52, the officers placed a third waiver form before defendant, which she signed, subsequently offering a lengthy inculpatory statement. Although the officers had spoken between themselves within defendant's earshot about the evidence that had accrued against her, and although one of them urged her to tell her side of the story, at no time did the officers initiate questioning or so badger defendant that their "words or actions [would have been] reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 64 L.Ed. 2d 297 (1980). Encouraging a defendant to tell the truth, even after she has asked for a lawyer, does not constitute interrogation nor its "functional equivalent," *State v. Allen*, 323 N.C. 208, 372 S.E. 2d 855 (1988), nor does it render a subsequent confession involuntary, *State v. Dishman*, 249 N.C. 759, 107 S.E. 2d 750 (1959). The opportunity to call an attorney was freely available to defendant. Her indecision and inability to exercise that opportunity cannot by any imaginative leap be construed as an abrogation by the officers of her right to have an attorney present during a custodial interrogation. We hold that the trial court did not err in concluding that defendant's inculpatory statement was admissible.

[4] Defendant next contends that the trial court erred in admitting the testimony of Karen Rosser regarding papers she had found in the house where she lived with defendant and Bacon. Rosser testified that in collecting defendant's personal belongings at the request of defendant's parents, she came upon a folder containing "papers that related to a life insurance policy on Glennie Clark" and in which she saw defendant's name listed first as beneficiary. Defendant notes that admission of this testimony violated the best evidence rule, which requires that the original writing be offered in order to prove its contents. N.C.G.S. § 8C-1, Rule 1002 (1988).

The best evidence rule applies only when the contents of a writing are in question. 2 Brandis on North Carolina Evidence § 191 (3d ed. 1988). The contents of the policy insuring the life of defendant's husband were not in question. Rosser's testimony as to the policy was collateral. *See* N.C.G.S. § 8C-1, Rule 1004(4) (1988). It was offered not to prove contents or terms, but simply to show defendant's knowledge that the policy existed. Further, the actual contents of that insurance policy as well as a military policy insuring the life of defendant's husband were introduced through the testimony of military and civilian insurance personnel, who had consulted their business records and testified that defendant was the primary beneficiary on both policies. Because her testimony was not offered to prove the policy contents, Karen Rosser's testimony regarding those papers was therefore properly determined admissible by the trial court. Even assuming error arguendo, the fact that the actual contents of those policies were before the jury through the testimony of insurance personnel nullified any prejudicial effect Ms. Rosser's testimony might have had upon the outcome of defendant's trial. N.C.G.S. § 15A-1443(a) (1988).

[5] Defendant next contends the trial court erred in permitting the following question by the district attorney:

> [MR. ANDREWS] So Robert tried to put the blame on you, and you are trying to put the blame on him, is that right?
>
> MR. VATCHER: Objection.
>
> MR. ANDREWS: I will withdraw the question, Your Honor.
>
> COURT: Cross examination; objection overruled.

Defendant perceives this question as contravening the rule in *Bruton v. United States*, 391 U.S. 123, 20 L.Ed. 2d 476 (1968), that the government may not introduce into evidence a statement of a codefendant imputing guilt to the defendant where the codefendant does not testify and is not subject to cross-examination. We find *Bruton* principles inapplicable to this mere allusion to a self-exonerating remark of a codefendant. Any arguable error by the trial court in allowing this question was cured by defendant's oral and written statements, both exculpatory and inculpatory, which were before the jury through her testimony and which set forth clearly her role and motives and those of Bacon in her husband's murder. For this reason alone the district attorney's question could have had no possible influence on the jury with regard to the issue of defendant's guilt or innocence. N.C.G.S. § 15A-1443(a) (1988).

Defendant puts forward several assignments of error arising out of the testimony of two psychologists. The first, Dr. J. Thomas Stack, a clinical psychologist, testified that he had conducted a number of diagnostic interviews of defendant and that he found her to be candid, cooperative, of at least average intelligence, and notably submissive. The district attorney objected that the witness's testimony reflecting submissiveness was not relevant, and the trial court dismissed the jury in order to conduct a voir dire. Asked further about defendant's submissive personality trait, Dr. Stack explained that defendant's history as the wife of two abusive husbands had left an imprint on her personality characteristic of "battered woman syndrome." At the conclusion of the voir dire, the court determined that the witness's proffered testimony regarding defendant's submissiveness could be viewed by the jury as corroborative of defendant's own earlier testimony that she "just went along with Bacon," and that "she didn't care anymore."

Dr. Stack then testified extensively before the jury, explaining his diagnosis that, at the time of her husband's murder, defendant was under the influence of an "adjustment reaction" to her years of abuse. This was exhibited generally as a kind of emotional torpor, in which helplessness, submissiveness, and vulnerability were dominant features.

Dr. Stack reported that he had diagnosed defendant as suffering from a disorder he characterized as post-traumatic stress syndrome. He testified in addition that defendant's emotional state at the time of her husband's death was consistent with the disorder known as "battered woman syndrome." Dr. Stack concluded that the effect of these disorders upon defendant's personality was a submissiveness and "vulnerability" so pervasive and overwhelming that one so affected would respond "like a robot" to another's instructions or threats.

Following the testimony of Dr. Stack, defendant offered that of a second clinical psychologist, Dr. Alexander Bory, who on voir dire gave his conclusions concerning a number of psychological tests that had been administered to defendant. Based upon these tests and subsequent interviews, Dr. Bory, like Dr. Stack, recognized in defendant characteristics of the battered woman syndrome, and he observed in defendant's personality "much passivity and a great deal of dependence" and a "need drive" to be controlled. Direct examination of Dr. Bory on voir dire included the following dialogue:

> Q. Doctor, do you have an opinion satisfactory to yourself, and based upon a reasonable degree of psychiatric certainty, whether or not on the night of February 1, 1987, the defendant formed the specific intent to kill Glennie Clark?
>
> . . . .
>
> A. Yes, I do.
>
> Q. All right sir, what is that opinion, Doctor?
>
> A. That she had diminished capacity to think logically and clearly at that time.
>
> Q. What effect, Doctor, did that have on her to form or not form a specific intent to kill her husband; that is the question.
>
> A. I'm not sure I understand the question.
>
> Q. The question is, do you have an opinion as to whether she formed that intent—first, you said you had an opinion?
>
> A. That is correct.

Q. What is your opinion on her ability to form that specific intent?

A. I believe that instead of specific intent, it was more of a fantasy, it just was a derealization; she just would tend to fantasize about that. I don't for a minute believe that she thought the actual act would take place, but that is purely —that is purely my opinion; that is pure conjecture.

At the conclusion of the voir dire, the district attorney challenged the relevance of Dr. Bory's testimony, as he had that of Dr. Stack. The trial court concluded that although Dr. Bory's testimony was relevant, it had "gone beyond" that of Dr. Stack, and its probative value was exceeded by its potential prejudicial effect. The trial court elaborated, finding that defendant's questions sought from Dr. Bory

> [f]irstly . . . an opinion . . . about the substance of whether or not on February 1, 1987, the defendant formed a specific intent to kill; secondly, that the defendant acted with the same intent to kill that Robert Bacon had when he did the act, and thirdly, whether or not the mental condition was affected by Robert Bacon.

The trial court then ruled that Dr. Bory's testimony was inadmissible because "it invades the province of the jury."

[6] The trial court's concern with the fact that, as an "opinion of whether or not the defendant was able to formulate the prerequisite intent," the proffered testimony invaded "the province of the jury" was misplaced. *See State v. Wilkerson*, 295 N.C. 559, 568-69, 247 S.E. 2d 905, 911 (1978). Further, as defendant correctly notes, it has been vitiated by statute. The North Carolina Rules of Evidence state 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 (1988). In the context of expert testimony regarding the mental condition of a defendant at the time of the crime, this Court has noted that 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." *State v. Shank*, 322 N.C. 243, 249, 367 S.E. 2d 639, 644 (1988).

[7] We find, however, that Dr. Bory's proffered testimony was properly excluded, albeit for another reason. Dr. Bory's responses to questions on voir dire were liberally laced with disclaimer and equivocation. By his own admission, his conclusions regarding defendant's mental condition the day of the murder were "purely speculation" and "conjecture," and he indicated no comprehension of the legal significance of "specific intent." Such testimony was thus accurately characterized by the trial court as expert opinion that would *not* have "assist[ed] the trier of fact to understand the evidence or to determine a fact in issue." N.C.G.S. § 8C-1, Rule 702 (1988).

With regard to Dr. Stack's testimony, defendant also contends that the trial court erred in failing to include these requested instructions concerning the effect of her mental condition on her ability to form specific intent to kill on the day of the murder:

> [T]he jury is instructed that in considering the question of specific intent to kill, or lack of specific intent to kill, on the part of the defendant, and the question of whether the defendant shared the same criminal purpose of Robert Bacon, Jr., in the commission of the crime, it should consider the entire personality of the Defendant, her mental, nervous, emotional and physical characteristics as developed in the case. If the jury finds from the evidence that there was such a degree of mental unsoundness existing at the time of the death of Glennie Leroy Clark as to render the Defendant incapable of forming the specific intent to kill as the jury believes the circumstances of this case would reasonably impute to a woman of sound mind, they may consider the degree of mental unsoundness in determining the question of whether the act was first degree murder or second degree murder.

It is the duty of the trial court generally "to declare and explain the law arising on the evidence and to instruct according to the evidence." *State v. Maness*, 321 N.C. 454, 462, 364 S.E. 2d 349, 353 (1988). It is a well-established rule that when a request is made for a specific instruction "which is correct in itself and sup-

ported by evidence, the trial judge, while not required to parrot the instructions . . . must charge the jury in substantial conformity to the prayer." *State v. Davis*, 291 N.C. 1, 14, 229 S.E. 2d 285, 294 (1976) (quoting *State v. Bailey*, 254 N.C. 380, 386, 119 S.E. 2d 165, 170 (1961)). In determining whether to give the substance of an instruction concerning a defense, such as that requested by defendant, the trial court must therefore assess the evidence first for the legal principles it implicates, and second for the sufficiency of the evidence itself.

The instruction requested by defendant met the first prong of this test: it included a correct statement of the law regarding a "mental condition which could have been found to negate the capacity to premeditate and deliberate." *State v. Shank*, 322 N.C. at 250, 367 S.E. 2d at 644.

The second prong of the trial court's test for whether the evidence mandates an instruction requires that the court measure the substantiality of the evidence. "Where a defendant's evidence discloses facts which are legally sufficient to constitute a defense to the crime with which he or she has been charged, the court is required to instruct the jury as to the legal principles applicable to that defense." *State v. Strickland*, 321 N.C. 31, 40, 361 S.E. 2d 882, 887 (1987). The measure of what is "legally sufficient," however, depends upon the defense asserted. For example, this Court has held that a defendant's mere production of evidence that he was intoxicated at the time of the offense is not sufficient to mandate an instruction on the issue of whether he was so intoxicated by the voluntary consumption of alcohol that he did not form a deliberate and premeditated intent to kill. *State v. Mash*, 323 N.C. 339, 372 S.E. 2d 532 (1988). In evaluating whether a defendant is entitled to such an instruction, the trial court must instead inquire whether the evidence shows "that at the time of the killing the defendant's mind and reason were so completely intoxicated and overthrown as to render him *utterly incapable* of forming a deliberate and premeditated purpose to kill." *Id.* at 346, 372 S.E. 2d at 536 (emphasis added) (quoting *State v. Medley*, 295 N.C. 75, 79, 243 S.E. 2d 374, 377 (1978)).

The high threshold for adjudging whether the evidence merits an instruction on the law has long been considered the rule for cases in which voluntary intoxication is offered as a

defense to murder in the first degree. *See, e.g., State v. Mash*, 323 N.C. 339, 372 S.E. 2d 532; *State v. Shelton*, 164 N.C. 513, 79 S.E. 883 (1913); *State v. Murphey*, 157 N.C. 614, 72 S.E. 1075 (1911). The "utterly incapable" threshold and the legal principle that voluntary intoxication is no legal excuse for crime, *e.g., State v. Baldwin*, 276 N.C. 690, 174 S.E. 2d 526 (1970), reflect this Court's recognition of the public policy of this state.

However, for cases in which the defendant offers evidence in support of a defense or mitigation that was *beyond* his control, the test has been less rigorous. This Court has noted that a person is entitled to an instruction on self-defense, for example, "when there is any evidence in the record that it was necessary or reasonably appeared to be necessary to kill in order to protect himself from death or great bodily harm." *State v. Bush*, 307 N.C. 152, 160, 297 S.E. 2d 563, 569 (1982). The general rule mandating instruction on a lesser included offense is similarly that any evidence tending to show the commission of a crime of lesser degree mandates a charge upon the underlying law: "The sole factor determining the judge's obligation to give such an instruction is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense." *State v. Peacock*, 313 N.C. 554, 558, 330 S.E. 2d 190, 193 (1985) (quoting *State v. Wright*, 304 N.C. 349, 351, 283 S.E. 2d 502, 503 (1981)).

When a defendant presents evidence of a mental condition that she contends rendered her incapable of forming the specific intent to kill, neither the "utterly incapable" intoxication test nor the "any evidence" test for self-defense is an appropriate measure of the legal sufficiency of the evidence for purposes of whether to instruct the jury on that issue. Where the defendant's mental defect was beyond his or her control, the policy reasons for posing the higher, "utterly incapable" standard of voluntary intoxication cases do not apply. On the other hand, the trial court should never give instructions that are not supported by a reasonable view of the evidence. *State v. Lampkins*, 283 N.C. 520, 196 S.E. 2d 697 (1973). The rationale has been stated recurrently by this Court: "[E]vidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it was so, is an insufficient foundation for a verdict, and should not be left to the jury." *State v. Vinson*, 63 N.C. 335, 338 (1869),

quoted in State v. Lampkins, 283 N.C. at 524, 196 S.E. 2d at 699; *State v. Gaskins*, 252 N.C. 46, 48-49, 112 S.E. 2d 745, 747 (1960). That "such facts and circumstances as raise only a conjecture or suspicion ought not to be allowed to distract the attention of juries from material matters," *Pettiford v. Mayo*, 117 N.C. 27, 28, 23 S.E. 252, 253 (1895), is particularly pertinent when evidence of defendant's mental condition at the time of the killing is implicated.

[8] We hold that when a defendant requests the trial court to instruct the jury that it may consider the mental condition of the defendant in deciding whether she formed a premeditated and deliberate specific intent to kill the victim, there must be sufficient evidence "reasonably to warrant inference of the fact at issue." *Id.* at 29, 23 S.E. at 253. The proper test is whether the evidence of defendant's mental condition is sufficient to cause a reasonable doubt in the mind of a rational trier of fact as to whether the defendant was capable of forming the specific intent to kill the victim at the time of the killing.

[9] Under this test, we conclude that the trial court in the case sub judice did not err in refusing to instruct the jury that it could consider evidence of defendant's mental disorder as rendering her incapable of forming the specific intent to kill. We bottom this conclusion on a comparison of the substantiality of the evidence in this case with that in *State v. Rose*, 323 N.C. 455, 373 S.E. 2d 426 (1988). In *Rose* the defendant presented the testimony of a forensic psychiatrist that at the time of the murder defendant had been experiencing a psychotic episode caused by an old head injury and by chronic stress, which prevented him from being capable of forming the specific intent to kill. This Court held that the trial court had properly determined this testimony admissible under Rule 704 of the North Carolina Rules of Evidence and that, as such, defendant was entitled to a jury instruction on this element of the crime. In the case sub judice, however, Dr. Stack testified as to an endemic mental condition, but he never suggested that defendant's disorder might have rendered her incapable of forming a premeditated and deliberate specific intent to kill. Further, the mental defects are themselves distinguishable insofar as, in *Rose*, a physical injury initiated the change in the defendant's personality that his expert witness testified rendered him incapable of forming specific intent, whereas in the case sub judice,

the evidence presented by defendant tended to show that her personality disorder had affected her since childhood. Although that disorder appeared to have been exacerbated by the experience of living with abusive, domineering males, defendant had actually twice extricated herself from such situations by moving out. Furthermore, defendant not only physically accompanied Bacon when the latter stabbed her husband, but she arranged the rendezvous and drove the car. The evidence was insufficient to cause a reasonable doubt in the mind of a rational trier of fact as to whether the defendant was capable of forming the premeditated and deliberate specific intent to kill her husband.

[10] Based in large part upon her contention that because of her mental defect she was incapable of forming the specific intent to kill, defendant argues that there was sufficient evidence to support an instruction on murder in the second degree and that the trial court erred in failing to so instruct. Murder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation. *State v. Robbins*, 309 N.C. 771, 309 S.E. 2d 188 (1983). A specific intent to kill, while a necessary constituent of the elements of premeditation and deliberation in first degree murder, is not an element of murder in the second degree or of manslaughter. *State v. Alston*, 295 N.C. 629, 247 S.E. 2d 898 (1978).

In addition to testimony concerning her mental condition, which defendant avers is evidence that she was incapable of forming the specific intent to kill, defendant cites her own testimony that she tried numerous times to talk Bacon out of his intention to kill defendant's husband, and that she behaved more or less robotically, allowing Bacon to make the decisions and "just doing what he told" her.

This Court has stated that "when the State's evidence is clear and positive with respect to each element of the offense charged and there is no evidence showing the commission of a lesser included offense, it is not error for the trial judge to refuse to instruct on the lesser offense." *State v. Hardy*, 299 N.C. 445, 456, 263 S.E. 2d 711, 718-19 (1980). "The *presence* of evidence tending to show commission of a crime of lesser degree is the determinative factor." *State v. Poole*, 298 N.C. 254, 260, 258 S.E. 2d 339, 343 (1979) (Huskins, J., dissenting), *quoted in State v.*

Strickland, 307 N.C. 274, 298 S.E. 2d 645 (1983) (Martin, J., concurring). *See also State v. Wrenn*, 279 N.C. 676, 185 S.E. 2d 129 (1971).

Evidence presented by the state *and* by defendant, including testimony that defendant knew (and for some period of time had known) of Bacon's intent to kill her husband, that she arranged for Bacon to be in the same place at the same time as her husband, and that she was also present at the time of the killing, clearly and positively supported the jury's finding beyond a reasonable doubt that the state had proven each element of the charge of murder in the first degree. The "mere possibility" that the jury might find that a defendant did not premeditate or deliberate—or that she could not form the specific intent to kill—does not lead to the assumption that defendant could be guilty of a lesser offense. *State v. Strickland*, 307 N.C. at 293, 298 S.E. 2d at 658. Here "the evidence belies anything other than a premeditated and deliberate killing." *Id.* The evidence as to each element of the offense charged was clear and positive and not contradicted by any evidence sufficient to cause a rational trier of fact to doubt the state's proof of that element. We hold that the trial court did not err in refusing to charge the jury on murder in the second degree.

[11] Defendant also assigns error in the guilt-innocence phase of her trial for murder to the verdict form submitted to the jury, which proposed two possible verdicts: "Guilty of Murder in the First Degree by Aiding and Abetting," or "Not Guilty." Defendant suggests that the expression of the legal theory upon which a first degree murder conviction would rest placed undue emphasis on that choice, amounting to an expression of the opinion of the trial judge in violation of N.C.G.S. § 15A-1232 (1988). Defendant surmises that in addition, the surplusage may have confused the jury.

The Official Commentary to N.C.G.S. § 15A-1237, which requires that a jury's verdict be in writing, signed by the foreman, and entered in the record of the case, states simply: "It is contemplated that the jury will be given a verdict form setting out the permissible verdicts recited by the judge in his instructions." The trial court in the case sub judice instructed the jury that

> [T]he defendant . . . has been accused of murder in the first degree, which is the unlawful killing of a human being with malice and with premeditation and with deliberation. However, a person may be guilty of first degree murder, although she personally does not do any of the acts necessary to constitute murder in the first degree. Now a person who aids and abets another to commit murder in the first degree is guilty of that crime. You must clearly understand that if she does aid and abet, she is guilty of murder in the first degree just as if she had personally done all of the acts necessary to constitute that crime.

The trial court proceeded scrupulously and at length to outline the elements necessary for proof of both murder in the first degree and murder in the first degree by aiding and abetting, consistently linking the first offense with evidence regarding Bacon and the second with evidence regarding defendant. The phrase "murder in the first degree by aiding and abetting" was repeated more than once in the trial court's jury charge.

In *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979), this Court approved the trial court's specification on the verdict form of underlying theories for murder in the first degree as based upon felony murder or upon premeditation and deliberation. The Court's rationale was that such specification aided the sentencing court to avoid imposing additional punishment on the underlying felony if the jury found the defendant guilty based upon felony murder. Although in this case, appending the basis for murder in the first degree was not necessary for purposes of sentencing, as it was in *Goodman*, the trial court's doing so was supported by N.C.G.S. § 15A-1237 as construed in *Goodman*. Defendant's further contention that appending the legal theory onto the offense charged confused the jury is manifestly without merit. Defendant compares her case to *State v. Lee*, 292 N.C. 617, 234 S.E. 2d 574 (1977), in which this Court found error in submitting a possible verdict of "first degree murder in which a deadly weapon is used." In such a case, the jury could have inferred that proof of the use of a deadly weapon was sufficient to prove murder in the first degree, without proof of premeditation and deliberation. Clearly, the comparison with the case sub judice fails: The possible verdict submitted to the jury here could not have fomented

confusion in the jury as to the elements of the offense charged; on the contrary, its obvious effect was to clarify.

[12] As preface to the parties' closing arguments, the trial judge informed those in the courtroom that he was concerned that the jury not be distracted by the movement of spectators in and out of the room. He consequently warned them that if they wished to leave the courtroom, they should do so immediately, for they would not be allowed to do so after closing arguments began, barring an emergency. Defendant perceives this order as a denial of a "public trial," in violation of the sixth amendment to the United States Constitution and in violation of article I, section 18 of the North Carolina Constitution, which requires that "[a]ll courts shall be open." *See also* N.C. Const. art. I, § 24.

Defendant exaggerates the facts. The trial judge warned the spectators of his intention to restrict public egress for a limited period of time. He did not vacate the courtroom nor bar the courtroom door without due warning to those within and without. The presiding judge is authorized by statute to "impose reasonable limitations on access to the courtroom when necessary to ensure the orderliness of courtroom proceedings." N.C.G.S. § 15A-1034(a) (1988). This was the precise intention announced by the trial judge, and we find absolutely no impropriety in his having done so.

[13] Defendant also assigns error to two questions posed by the district attorney during cross-examination of defendant. In an apparent attempt to undercut defendant's testimony about her abuse at the hands of first a husband who was a drug addict, then one who was an alcoholic, the district attorney asked, "Well, you sort of enjoyed smoking marijuana, didn't you?" Defendant's objection was overruled and defendant responded, "I did on occasion, sir."

The district attorney's question was a bald attempt to attack defendant's credibility with a specific instance of reprehensible conduct short of a conviction. This is prohibited under the North Carolina Rules of Evidence except when such evidence is probative of the witness's credibility. *See* N.C.G.S. § 8C-1, Rule 608(b) (1988). There can be no question that defendant's admission to having smoked marijuana had no conceivable tendency to prove or disprove her truthfulness. *State v. Morgan*, 315 N.C. 626,

340 S.E. 2d 84 (1986); *State v. Rowland*, 89 N.C. App. 372, 366 S.E. 2d 550 (1988), *rev. dismissed*, 323 N.C. 619, 374 S.E. 2d 116 (1988) (cross-examination concerning drug addiction standing alone not probative of defendant's character for truthfulness or untruthfulness). The question and its elicited response were also barred by N.C.R. Evid. 404(b), which prohibits evidence of other crimes, wrongs, or acts to prove the defendant acted in conformity with a character trait those acts exhibit. Neither motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident is implied by defendant's admitted act of smoking marijuana. N.C.G.S. § 8C-1, Rule 404(b) (1988).

The trial court's failure to sustain defendant's objection here was error. However such an error is reversible on appeal only "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) (1988). We can conceive of no such possibility in this case. Overwhelming evidence of defendant's guilt was presented by the state and buttressed by defendant's own testimony. *See State v. Gardner*, 316 N.C. 605, 342 S.E. 2d 872 (1986). In addition, although the fact that defendant may have smoked marijuana might have weakened her characterization as a bystander psychologically injured by a series of drug-abusing males, it had no effect upon the jury's assessment of her personality, as is apparent in the jury's having found as a factor in mitigation of her sentence that defendant's involvement in the killing of her husband had been the product of long-term abuse and emotional disturbance.

At the sentencing hearing for murder in the first degree the jury found the single statutory aggravating circumstance that the murder had been especially heinous, atrocious, or cruel. N.C.G.S. § 15A-2000(e)(9) (1988). The jury found the statutory mitigating circumstance that the murder had been committed while defendant was under the influence of mental or emotional disturbance. N.C.G.S. § 15A-2000(f)(2) (1988). In addition, the jury found the following circumstances that it deemed to have mitigating value: that defendant had no prior history of violent or assaultive conduct, and that defendant had no record of criminal convictions or that she had a record consisting solely of misdemeanors punishable by not more than sixty days' imprisonment (*see* N.C.G.S.

§ 15A-2000(f)(1)); that defendant was vulnerable due to her sense of hopelessness and dependence; that her involvement in the capital felony was the product of long-term abuse and emotional disturbance and the chance involvement with Robert Bacon, Jr.; that all of the victim's wounds had been inflicted by Robert Bacon, Jr.; that at an early stage of the criminal process, defendant had made an oral and written statement confessing her involvement in the capital felony; that defendant was the mother of two children and that up to 1 February 1987 she had had primary responsibility for raising them; that defendant's past behavior indicated the likelihood that she would be able to adapt to prison life in the future; that defendant had displayed good behavior since being placed in jail; that defendant would not pose a danger to society if spared the death penalty; that prior to this capital felony defendant had enjoyed a good character reputation; and that "[an]other circumstance or circumstances arising from the evidence" existed that had mitigating value. Based upon these findings, the jury determined that the mitigating circumstances were sufficient to outweigh the aggravating circumstance and recommended that defendant be sentenced to life imprisonment.

[14] Defendant also takes issue on appeal with regard to the sentence imposed for conviction of conspiracy to commit murder. Defendant was sentenced to ten years' imprisonment, a period of incarceration seven years in excess of the presumptive term for this offense, a Class H felony. N.C.G.S. § 14-2.4(2) (1986); N.C.G.S. § 15A-1340.4(f)(6) (1988). A sentencing court may impose a prison term in excess of the presumptive term for a felony governed by the Fair Sentencing Act only after "consideration of aggravating or mitigating factors, or both." N.C.G.S. § 15A-1340.4(a) (1988). In the case sub judice the sentencing court found as factors in aggravation of the offense of conspiracy to commit murder that defendant had induced others to participate in the commission of the offense, N.C.G.S. § 15A-1340.4(a)(1)(a) (1988), and that the offense was especially heinous, atrocious or cruel, N.C.G.S. § 15A-1340.4(a)(1)(f) (1988). The court found in addition several mitigating factors, but despite uncontradicted evidence presented through defendant's testimony that she had twice been honorably discharged from the armed forces, the court failed to find this statutory mitigating factor. N.C.G.S. § 15A-1340.4(a)(2)(o) (1988).

The sentencing court has a duty to find a statutory mitigating factor when the evidence in support of that factor is uncontradicted, substantial, and manifestly credible. *State v. Spears*, 314 N.C. 319, 333 S.E. 2d 242 (1985). Defendant's testimony on direct examination that she had been honorably discharged from the Marine Corps on two separate occasions was uncontradicted by the state. We hold that the sentencing court's failure to find this mitigating factor was error. Whenever there is such error and a sentence in excess of the presumptive term is imposed, the case must be remanded for a new sentencing hearing. *State v. Daniel*, 319 N.C. 308, 354 S.E. 2d 216 (1987). In concluding that defendant is so entitled, we find it unnecessary to discuss defendant's further assignments of error, including her contention that the trial court erred in finding the factor in aggravation of conspiracy to commit murder that the offense was especially heinous, atrocious, or cruel, upon which we express no opinion.

87CRS1845—murder in the first degree—no error.

87CRS1846—conspiracy to commit murder—new sentencing hearing.

Justice WEBB dissenting.

I dissent. The defendant contended she was unable to form an intent to kill. She offered the testimony of Dr. Alexander Bory on this issue. It is worth noting that Dr. Bory did not have to be an expert to give his opinion as to the defendant's mental condition at the time of the killing. The majority says that this testimony would not have assisted the jury to determine a fact in issue because of the speculative and equivocal nature of Dr. Bory's testimony. Dr. Bory would have testified without equivocation that in his opinion the defendant "had diminished capacity to think logically and clearly at" the time of the killing. This testimony was relevant and should have been admitted. He would also have testified in regard to the defendant's ability to form an intent at the time of the killing, that in his opinion "that instead of specific intent, it was more of a fantasy." After explaining what he meant by using the word "fantasy" Dr. Bory then said "but . . . that is purely my opinion; that is pure conjecture." This is apparently the testimony upon which the majority relies to say

his testimony was speculative. I believe a reading of Dr. Bory's proposed testimony shows that it was his opinion that the defendant could not form the specific intent to kill. He recognized the difficulty in forming such an opinion and said so. It was for the jury to determine the weight of Dr. Bory's testimony. I believe it was error to exclude it.

I also believe it was error for the court not to give the requested instruction as to the defendant's ability to form the specific intent to kill. The majority says, "Where a defendant's evidence discloses facts which are legally sufficient to constitute a defense to the crime with which he or she has been charged, the court is required to instruct the jury as to the legal principles applicable to that defense." *State v. Strickland*, 321 N.C. 31, 40, 361 S.E. 2d 882, 887 (1987). I do not believe this question should be resolved as if the defendant were attempting to interpose a defense which would justify the killing. The burden was on the State to prove an intent to kill and the defendant offered evidence in an attempt to negate this proof by the State. The defendant was not trying to prove a defense which would justify the killing.

The majority, having characterized the defendant's position as an attempt to present a defense which would justify the killing, purports to establish a new rule as to when evidence of this defense requires a jury instruction. Rejecting what it calls the "utterly incapable" test for charging on intoxication as a defense and the "any evidence" test for charging on self-defense, the majority says, "[t]he proper test is whether the evidence of defendant's mental condition is sufficient to cause a reasonable doubt in the mind of a rational trier of fact as to whether the defendant was capable of forming the specific intent to kill the victim at the time of the killing." The majority then evaluated all the evidence, including evidence that the defendant had previously extricated herself from the dominance of males and that she arranged the rendezvous and accompanied Bacon when the stabbing occurred. The majority then concluded there was insufficient evidence to cause a reasonable doubt in the mind of a rational trier of fact as to whether the defendant was capable of forming an intent to kill.

I believe it is error for us to evaluate all the evidence in determining whether there is enough evidence to submit a charge to

the jury on the defendant's ability to form an intent to kill. This is a departure from any practice of this Court of which I am aware. There was certainly no intimation of it in two recent cases which dealt with this subject. *See State v. Rose*, 323 N.C. 455, 373 S.E. 2d 426 (1988); *State v. Shank*, 322 N.C. 243, 367 S.E. 2d 639 (1988).

I believe that if there is competent evidence that a defendant was not capable of forming a specific intent to kill the court should charge on this feature. In this case Dr. J. Thomas Stack, a clinical psychologist, testified to the defendant's emotional state at the time of the killing. He testified that one so vulnerable would respond "like a robot" to another's instructions. A robot does not have a mind of its own. If defendant did not have a mind of her own but simply responded to others, this is evidence she did not form a specific intent to kill. I also believe the testimony of Dr. Bory, which I would hold was erroneously excluded, was evidence the defendant did not form a specific intent to kill. I would hold that it was error for the court not to give the requested charge.

For the above reasons, I also believe it was error not to charge on second degree murder.

I vote for a new trial.

STATE OF NORTH CAROLINA v. JUNIOR CHANDLER

No. 479A87

(Filed 2 March 1989)

1. **Constitutional Law § 65; Criminal Law § 40— fear by child witness—inability to communicate—unavailability—testimony at prior trial**

The trial judge did not err in declaring a four-year-old witness unavailable so as to permit the introduction of a transcript of testimony given by the witness at a prior trial of defendant where the State made a good faith attempt to secure the witness for trial by producing the witness and attempting to elicit her testimony, and the trial judge found that the child was overcome with fear to the extent that she could not respond to questions. Medical testimony was not required for the court's conclusion of unavailability since the witness was not unavailable as the result of an existing medical condition,

and no explanation or verification of such a condition was necessary. N.C.G.S. § 8C-1, Rule 804(a)(4).

2. **Constitutional Law § 65; Criminal Law § 40— right of confrontation—prior testimony of unavailable witness**

Defendant's right of confrontation under the Sixth and Fourteenth Amendments was not violated by the admission of the transcript of an unavailable witness's testimony at a prior trial of defendant on the same charges where defendant was present and represented by counsel at the prior trial.

3. **Criminal Law §§ 89.2, 95— evidence competent for corroboration—limiting instruction not requested—admissibility as substantive evidence not determined**

Testimony by a social worker consisting of statements and drawings made by a child sexual offense victim was admissible to corroborate the child's testimony at trial, to corroborate a doctor's testimony concerning the physical evidence and the child's statements during medical diagnosis and treatment, and to corroborate testimony by an eyewitness. The appellate court was not required to determine whether the social worker's testimony was admissible as substantive evidence merely because no instruction limiting its use to corroboration was requested or given.

4. **Criminal Law § 15.1— change of venue for retrial—interest of justice—inherent power of court**

After a mistrial was declared for failure of the jury to reach a verdict in a case involving sexual offenses, indecent liberties and crime against nature, the trial court properly exercised its inherent power to order a change of venue in the interest of justice by granting the State's motion for change of venue of the retrial where the court found that every prospective juror at the first trial had heard of the case; many of the prospective jurors were related to defendant by blood or marriage; many of the prospective jurors knew and had worked with witnesses for both the State and defendant; a spectator had expressed her views to one of the jurors about the case; in a retrial in the same county, it would be difficult to seat twelve jurors who had not formed an opinion as to the guilt or innocence of defendant; it would be a hardship on the county sheriff to provide the security required at the retrial; it was impossible to separate spectators, witnesses, jurors, or families of defendant and the State's witnesses as they entered and left the courthouse; repairs to the roof of the courthouse resulted in a backlog of cases; retrial of the case in the same county would place an abnormal burden on the court system and the civil and criminal dockets; and the court was personally aware of rumors concerning weapons in the courtroom and contact with jury members.

5. **Constitutional Law § 56; Criminal Law § 15— trial by jury of vicinage—transfer of case to another county**

The transfer of defendant's retrial to a neighboring county did not violate defendant's right under the Sixth Amendment of the U. S. Constitution and Art. I, § 24 of the N. C. Constitution to be tried by a jury of the vicinage where it appeared necessary to the trial judge to move the case to another county in order to provide for a fair trial.

6. **Criminal Law § 92.4— sexual offenses, indecent liberties, and crimes against nature—consolidation for trial**

Indictments charging defendant with seven counts of first degree sexual offense, seven counts of taking indecent liberties with a minor, and seven counts of crime against nature were properly consolidated for trial under N.C.G.S. § 15A-926(a) (1988) where all the crimes were committed while the child victims were in the exclusive care of defendant when he was transporting them to and from a day care center, and defendant's conduct manifests a common scheme or plan to gratify his sexual desire on the bodies of young children who were in his care.

7. **Criminal Law § 92.5— charges involving seven children—refusal to sever—absence of prejudice**

There was no merit to defendant's contention that he was unfairly prejudiced by the trial court's refusal to sever cases involving various sexual offenses against seven different children over a four and one-half month period of time on the ground that the jury would believe he was guilty of all offenses simply because there were so many since the State could still have presented evidence of other similar sex crimes as evidence of a common scheme or plan even if the cases were tried separately. N.C.G.S. § 8C-1, Rule 404(b) (1988).

8. **Rape and Allied Offenses § 4— sexual offenses against children—social worker's use of anatomical dolls—admissibility for corroboration**

A social worker's testimony concerning her use of anatomical dolls during interviews with children who allegedly were sexually abused by defendant was admissible to illustrate the social worker's testimony as to the manner in which the children communicated to her the accounts of sexual abuse and to corroborate the testimony of each child.

9. **Criminal Law § 87.1— leading questions—child sexual offense victims**

The trial court did not err in permitting the State to ask leading questions of children whose ages ranged from two to five years during their testimony about alleged sexual offenses.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from judgments imposing consecutive sentences of life imprisonment entered by *Albright, J.*, at the 30 March 1987 Criminal Session of Superior Court, BUNCOMBE County, upon jury verdicts of guilty of five counts of first degree sexual offense in violation of N.C.G.S. § 14-27.4. Defendant also appeals from judgments sentencing him to a term of years upon his convictions of six counts of taking indecent liberties with a minor, in violation of N.C.G.S. § 14-202.1, and one count of crime against nature, in violation of N.C.G.S. § 14-177. Defendant's motion to bypass the Court of Appeals on the lesser offenses was allowed on 9 September 1987. Heard in the Supreme Court 13 September 1988.

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

Robert G. Karriker and Talmage N. Penland for defendant-appellant.

FRYE, Justice.

Defendant was originally charged in seven bills of indictment with first degree sexual offense against seven children under the age of thirteen years. The State submitted superseding indictments on 20 October 1986 which were returned as true bills by the Madison County Grand Jury charging defendant with seven counts of first degree sexual offense, seven counts of taking indecent liberties with a minor and seven counts of crime against nature. All twenty-one counts were consolidated for trial.

Defendant's first jury trial commenced at the 19 January 1987 Criminal Session of Superior Court, Madison County, Judge James A. Beaty, Jr., presiding. On 2 February 1987, Judge Beaty declared a mistrial because the jury was unable to reach a unanimous verdict. On 13 February 1987, at a Special Session of Madison County Superior Court, Judge Beaty granted the State's Motion for Change of Venue pursuant to N.C.G.S. § 15A-957 and ordered the cases transferred to Buncombe County for trial. The second jury trial commenced at the 30 March 1987 Criminal Session of Buncombe County Superior Court with Judge W. Douglas Albright presiding.

Evidence for the State tended to show that defendant was employed from 1 January to 19 May 1986 by the Madison County Transportation Authority as a driver of a day care van. During the period of January through May 1986, Brandy, Michelle, Quantella, Amanda, Brian, Timmy and Jessica attended the Marshall Day Care Center and rode the van driven by defendant. The ages of the children ranged from two to five years.

Defendant also transported mentally handicapped adult residents of the Mintz Family Care Homes to and from the Madison Sheltered Workshop along with the children attending the Marshall Day Care Center. Defendant picked up the mentally retarded adults from the Sheltered Workshop at 2 p.m. each afternoon,

and arrived at the Marshall Day Care Center between 2:15 p.m. and 2:30 p.m.

Brandy lived within three miles of the day care center and her residence was one of the first stops made by defendant after leaving the center. When she began riding the van, Brandy arrived home around 2:45 p.m. but, after riding the van for a few months, she gradually arrived home later each day. On 24 February 1986, Brandy rode the van home from the day care center. She told her mother, Nancy Burgess, "We've been f - - - - - - ." Brandy's mother punished her for using vulgar language, and removed her from the day care center. The child's genital area, which had been red and irritated during the time she rode the van, cleared up and was no longer red. A few weeks later, Mrs. Burgess saw Brandy simulate sexual acts with her teddy bear.

On or about 17 May 1986, Brandy told her mother how "they" had "hurt her butt" on the day care van and threatened to put the kids on the railroad tracks if they told. Subsequently, Brandy was interviewed by Linda King, a social worker with the Madison County Department of Social Services, who made an appointment for a medical examination for Brandy. Dr. Nancy Rice, a child medical examiner, examined Brandy and found a "markedly dilated" vaginal opening. She testified that normally in a little girl the vaginal opening is closed like a flat line and that Brandy's was "gaping" to the point where Dr. Rice could easily have inserted two fingers in the child's vaginal opening.

Based on Brandy's statements to Linda King which indicated that the other children had been abused, the social worker contacted the families of the children and set up interviews and medical appointments for the children. Dr. Rice examined Brandy, Quantella, Amanda and Michelle and testified at trial that she found that each of the little girls had "markedly dilated vaginal openings, wider than normal for girls their age."

On 26 May 1986, Linda King interviewed Brian who told her that defendant had "placed a pen in his butt" and defendant had placed his hand on Brian's penis. On 28 May 1986, Dr. Gravatt interviewed Timmy who told her [] "Hurt my pee-pee. Touched my butt." Dr. Gravatt examined Jessica on 29 May 1986 and diagnosed Jessica's condition as "suspicious for child abuse." On 29 May 1986, Dr. Rice and Dr. Gravatt separately examined Brandy,

Quantella, Amanda and Michelle. Each of these girls related to the doctors that defendant had penetrated them sexually.

On 29 May 1986, after the medical examinations, Linda King took Brandy, Michelle, Amanda and Quantella to the Redmon Dam area of Madison County where the children directed her to the locations where the events occurred. In their statements to the doctors and the social worker, the children mentioned the mentally retarded adults as being involved in the sexual assaults. SBI Special Agent Lloyd Crisco talked to Pam Coli and Buddy Norton, two of the retarded adults who rode the van. Both independently corroborated the children's statements concerning the abuse and the locations where the incidents of abuse occurred.

At trial, Brandy, Brian, Amanda and Quantella each testified that defendant had touched them in their private parts or penetrated them sexually. Michelle was declared unavailable and her former testimony from the first trial was admitted as substantive evidence. Dr. Gravatt testified that she had examined all seven children and found markedly dilated vaginas in Brandy, Quantella, Amanda and Michelle, and redness in the vaginal area of Jessica. All seven children had described to her how they were sexually penetrated by defendant. Dr. Rice corroborated the medical findings of Dr. Gravatt and testified that she had referred the children to therapy.

Brandy, Brian, Quantella, and Amanda were referred to therapist Phyllis Wells. She testified that each of the four children exhibited behavior which was consistent with that of a sexually abused child. Becky Lasher was the therapist for Michelle and Jessica. Michelle's statement to Ms. Lasher during therapy that defendant had "messed with her butt" and drawings of defendant made by Michelle during therapy were introduced into evidence.

Defendant denied having molested the children, and testified that he never stopped the day care van anywhere around Redmon Dam. Two workers at the Carolina Power and Light Power Plant at the Redmon Dam testified that they had seen the yellow van parked in the road going into the power plant in the same area earlier witnesses had indicated on photographs.

The jury convicted defendant of five counts of first degree sexual offense, six counts of taking indecent liberties with a minor and one count of crime against nature. On 15 April 1987, Judge Albright consolidated three counts of first degree sexual offense for a sentence of life imprisonment; consolidated two counts of first degree sexual offense for an additional sentence of life imprisonment, to be served after the first life sentence; and imposed consecutive sentences of three years for each charge of crime against nature and taking indecent liberties with a minor, for a total of twenty-one years to be served concurrently with the life sentences.

Defendant appeals from the 15 April 1987 judgments, assigning error to one hundred fifty-two (152) rulings of the two trial judges. These assignments of error are brought forward in seven numbered arguments, the first of which is divided into two parts. We shall consider the arguments seriatim.

[1] Defendant first contends that the trial court erred by allowing Michelle Chandler, a key witness for the State, to be withdrawn as a witness and by admitting her testimony from the first trial into evidence. Defendant contends the admission of the former testimony violated his sixth amendment right of confrontation. We find no error in the ruling of the trial court and we hold that defendant's right of confrontation was not violated by the admission of the former testimony.

During the presentation of the State's case, the district attorney called one of the victims, Michelle Chandler, four years of age, as a witness. After the child failed to respond to several questions, the trial judge noted that she appeared to be overcome with fear to the extent that she could not communicate. The court allowed the witness's mother to come to the stand to sit with her. The witness answered several introductory questions but failed to respond to further questioning. The trial judge directed the witness to be withdrawn because of her inability to respond to questions, noting that he did not find her to be an incompetent witness. He later permitted the State to introduce into evidence the transcript of the child's testimony from the first trial.

The sixth amendment to the United States Constitution guarantees an accused the right to confront and cross-examine the witnesses against him. *Ohio v. Roberts*, 448 U.S. 56, 65 L.Ed. 2d

597 (1980); *California v. Green*, 399 U.S. 149, 26 L.Ed. 2d 489 (1970). The sixth amendment right of confrontation is made applicable to the states through the due process clause of the fourteenth amendment, *Pointer v. Texas*, 380 U.S. 400, 13 L.Ed. 2d 923 (1965). A similar guarantee is included in the North Carolina Constitution in article I, section 23.

An exception to the confrontation requirement will be recognized where a witness is unavailable to testify but has testified at a former proceeding subject to cross-examination. *Barber v. Page*, 390 U.S. 719, 722, 20 L.Ed. 2d 255, 258 (1968); *Mattox v. United States*, 156 U.S. 237, 39 L.Ed. 409 (1895); *State v. Grier*, 314 N.C. 59, 331 S.E. 2d 669 (1985); *State v. Prince*, 270 N.C. 769, 154 S.E. 2d 897 (1967). In North Carolina, a trial judge may declare a witness unavailable pursuant to N.C.G.S. § 8C-1, Rule 804(a)(4) which states:

> (a) Definition of unavailability.—Unavailability as a witness includes situations in which the declarant:
>
> . . . .
>
> (4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or . . . .

N.C.G.S. § 8C-1, Rule 804(a)(4) (1986).

Defendant contends that the trial judge erred in admitting the witness's testimony from the prior trial because a determination of unavailability under Rule 804(a)(4) in a criminal case must be supported by medical evidence. Defendant cites several civil cases in which courts of other jurisdictions have required that expert medical testimony support a finding that a witness is unavailable. However, those cases may be distinguished factually on the basis that the witnesses in all of those cases suffered from existing medical conditions which rendered them unavailable for trial and required medical treatment. *See, e.g., Norburn v. Mackie*, 264 N.C. 479, 141 S.E. 2d 877 (1965) (affidavit of doctor submitted stating that witness had recently undergone surgery); *United States v. Keithan*, 751 F. 2d 9 (C.A. Mass. 1984) (eighty-seven-year-old witness with a severe back condition and eighty-three-year-old witness with a heart condition); *People v. Gomez*, 103 Cal. Rptr. 80, 26 C.A. 3d 225 (Cal. App. 1972) (child victim of

sexual assault in state mental hospital and subject to severe mental health problems if forced to testify); *Peterson v. United States*, 344 F. 2d 419 (5th Cir. 1965) (witness unavailable to testify for five to seven months due to complications of pregnancy).

Generally, a witness is unavailable for purposes of the exception to the confrontation requirement when "the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." *Barber v. Page*, 390 U.S. 719, 724-25, 20 L.Ed. 2d 255, 260; *Ohio v. Roberts*, 448 U.S. 56, 74, 65 L.Ed. 2d 597, 613; *State v. Grier*, 314 N.C. at 65, 331 S.E. 2d at 673. At least one other jurisdiction considering the issue in a case somewhat similar to the instant case has concluded that expert medical testimony is not essential to a determination of unavailability and that the definition of unavailability does not require a showing that the witness is permanently disabled from testifying. *See State v. Drusch*, 139 Wis. 2d 312, 407 N.W. 2d 328, *disc. rev. denied*, 140 Wis. 2d 874, 416 N.W. 2d 66 (1987) (no abuse of discretion where trial judge determined, in the absence of medical testimony, that the eight-year-old child witness was unavailable due to the child's tender years and emotional condition). The general rule in North Carolina regarding the standard for determining the competency of a witness to testify requires only that the trial judge rely on his personal observation of the witness's demeanor and responses to questions on voir dire. *State v. Fearing*, 315 N.C. 167, 337 S.E. 2d 551 (1985).

Prior to permitting the child's testimony from the former trial to be introduced, the trial judge agonized over the dilemma presented by the child's inability to testify. When the child gave no response after numerous questions from the prosecutor, the judge responded as follows:

> COURT: I don't believe any further questions would serve any useful purpose. This child is utterly terrified. I've watched her carefully. I've seen her hands tremble and her throat quiver; I've seen the look of fear cover her eyes. On occasion, she's looked at the defendant and dropped her head and lowered her eyes, and I've observed her little legs up here shaking. And although her mother's presence initially calmed her somewhat, whatever information she may possess just is frozen by fear and will not come out, and I don't know

of any point in traumatizing her further at this point, at least. I'm unable to admit her as a competent witness. It appears to me—it simply appears to me that this child, in a very hostile and alien environment for a small child of tender years, is overcome by fear and frozen by fear, and is simply going to be unable to testify, and I suggest that you withdraw her.

Under the circumstances, the judge's declaration that the child "is simply going to be unable to testify," amounts to an implicit declaration of unavailability within the meaning of Rule 804(a)(4). Medical testimony was not required for this conclusion since the witness was not unavailable as the result of an existing medical condition and an explanation or verification of such a condition was unnecessary. The trial judge had the opportunity to observe the demeanor of the witness and her inability to respond to questions. The State fulfilled the constitutional requirement of the confrontation clause by showing a good-faith attempt to secure the witness for trial since the State produced the witness and attempted to elicit her testimony.

[2] It is also well established that when a witness has been declared unavailable, the testimony of that witness at a former trial of the same cause is admissible as substantive evidence. *Barber v. Page*, 390 U.S. 719, 722, 20 L.Ed. 2d 255, 258; *Mattox v. United States*, 156 U.S. 237, 39 L.Ed. 409; *State v. Prince*, 270 N.C. 769, 154 S.E. 2d 897; N.C.G.S. 8C-1, Rule 804(b)(1) (1986). Testimony taken at a prior proceeding is admissible when (1) the witness is unavailable; (2) the proceeding at which the former testimony was given was a former trial of the same cause, or a preliminary stage of the same cause, or the trial of another cause involving the issue and subject matter at which the testimony is directed; and (3) the current defendant was present at the former proceeding and was represented by counsel. *State v. Grier*, 314 N.C. at 65, 331 S.E. 2d at 673.

Portions of Michelle Chandler's testimony at the 19 January 1987 trial were read into evidence at the 30 March 1987 trial. Defendant was present and represented by counsel at both trials. Since the trial court correctly concluded that the witness was unavailable, the former testimony was also properly admitted under the foregoing principles.

[3] In the second part of defendant's first argument, he contends that the trial court erred by admitting the testimony of Becky Lasher, a social worker, which consisted of statements and drawings made by Michelle during therapy sessions. We do not attempt to determine whether the testimony was admissible as substantive evidence under an exception to the rule against hearsay. However, the evidence was admissible as corroboration of the child's testimony at the first trial. It was also admissible to corroborate the testimony of Dr. Gravatt concerning the physical evidence and statements of Michelle made during medical diagnosis and treatment. It also tended to corroborate the testimony of Pam Coli, an eyewitness.

This Court is not required, as defendant suggests, to focus its attention on deciding whether the testimony of Ms. Lasher was admissible as substantive evidence merely because no instruction limiting its use to corroboration was given or requested. The admission of evidence, competent for a restricted purpose, will not be held error in the absence of a request by defendant for a limiting instruction. *State v. Jones*, 322 N.C. 406, 414, 368 S.E. 2d 844, 848 (1988). Such an instruction is not required to be given unless specifically requested by counsel. *State v. Smith*, 315 N.C. 76, 82, 337 S.E. 2d 833, 838 (1985). Since defendant made no request for a limiting instruction, we find no error in the admission of Ms. Lasher's testimony which was competent and admissible for corroborative purposes.

In defendant's second and third arguments, he contends that the trial court erred "by violating the constitutional and common law rights of defendant to a trial by a jury from the area wherein the alleged crimes occurred," and "by violating the statutory right of defendant to venue being laid in the county wherein the alleged crimes occurred."

[4] We first consider defendant's contention that the trial court violated his statutory right to venue being laid in the county wherein the alleged crime occurred. The State originally brought defendant to trial in Madison County. A mistrial was declared after the jury was unable to reach a unanimous verdict. After the judge entered the order declaring a mistrial, the State made a motion for a change of venue for the retrial from Madison County

to Buncombe County. The judge subsequently granted the State's motion for change of venue.

Generally, venue lies in the county where the charged offense occurred. N.C.G.S. § 15A-131(c) (1988). A defendant may move for change of venue for prejudice. N.C.G.S. § 15A-957 (1988). The court has the statutory authority to order a special venire from another county to insure a fair trial. N.C.G.S. § 15A-958 (1988). These statutory limitations on the power of a court to order a change of venue are preempted by the inherent authority of the superior court to order a change of venue in the interest of justice. *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979), *cert. denied*, 448 U.S. 907, *reh'g denied*, 448 U.S. 918 (1980). Furthermore, a motion for change of venue is addressed to the sound discretion of the trial judge and his ruling thereon will not be disturbed on appeal in the absence of a showing of an abuse of discretion. *Id.* at 320, 259 S.E. 2d at 524. In the instant case the State relies on this inherent authority of the court as the basis for the judge's order changing venue.

In *English v. Brigman*, 227 N.C. 260, 41 S.E. 2d 732 (1947), a superior court judge moved the trial on his own motion after finding a fair and impartial trial could not be held in Haywood County. This Court held that a superior court judge on his own motion, in his own discretion and in the furtherance of justice, has the authority to transfer a case from one county to another. "Such power existed at common law, and, therefore, unless specifically denied by statute, still adheres in the courts of the country." *Id.* at 261, 41 S.E. 2d at 732.

In *Barfield*, 298 N.C. 306, 259 S.E. 2d 510, a death case, the defendant originally moved for and obtained a change of venue from Robeson County for reasons of extensive pretrial publicity. The trial judge transferred the case to Scotland County. Subsequently, the district attorney moved that the case be transferred from Scotland County to Bladen County because of the limited number of court sessions in Scotland County and the number of persons awaiting trial there. Although the statutory power to change venue limited the location of the changed venue and provided only for the defendant to be the moving party, this Court upheld the trial judge's transfer of the case from Scotland to Bladen County on the State's motion. The authority for moving

the case was the inherent authority of the court. This Court found no abuse of discretion.

Defendant calls our attention to the rights of citizens of the county to try their own as enunciated in *State v. Vereen*, 312 N.C. 499, 324 S.E. 2d 250 (1985). Both the defendant's right to be tried in the place of the crime and the citizens' rights to see justice done in their own community are important considerations. However, "[t]he legitimate concern of county residents in trying criminal defendants locally is not . . . the test for determining whether venue should be changed." *State v. Jerrett*, 309 N.C. 239, 254, 307 S.E. 2d 339, 347 (1983). A judge has a duty to order a change of venue where, due to the totality of the circumstances, a fair and impartial trial cannot be had in the county of the indictment. *Id.* at 258, 307 S.E. 2d at 349.

In the instant case, the order changing venue contained findings of fact. Defendant did not object to these findings which established that: during jury selection at the first trial every prospective juror indicated having heard of the case; many of the prospective jurors were related to defendant by blood or marriage; many of the prospective jurors knew and had worked with witnesses for both the State and defendant; one juror who was seated became ill and had to see his doctor—one of defendant's chief witnesses; a spectator told the court she had talked to one of the jurors about the case and had expressed her views to him; it was difficult to seat twelve jurors at retrial of this case in Madison County who had not formed an opinion as to the guilt or innocence of defendant; it would have been a hardship on the county sheriff to provide the security required at the retrial; it was impossible to separate spectators, witnesses, jurors, or families of defendant and the State's witnesses as they entered and left the courthouse; while the case was being tried, no district court could be held in the superior courtroom; repairs to the roof of the courthouse resulted in a backlog of cases; retrial of this case in Madison County would place an abnormal burden on the court system, the civil and criminal dockets, and the sheriff's department of Madison County; and, the court was "personally aware of the allegations of rumors of weapons in the courtroom, allegations of rumors of contact with various members of the jury panel, and contact with the jury that was actually seated."

After making these findings, Judge Beaty concluded that the totality of the circumstances justified transferring venue in the best interest of justice. We believe that these findings clearly support Judge Beaty's conclusion and the resulting order granting the State's motion to change the venue from Madison County. We find no abuse of discretion in his order granting the change of venue.

[5] Nevertheless, defendant contends that the sixth amendment to the United States Constitution[1] and article I, section 24 of the North Carolina Constitution[2] give him the right to be tried by a jury of the vicinage, which he asserts to be Madison County. Section 24 of article I of the North Carolina Constitution is an embodiment of the common law right to a trial by a jury from the vicinage or the neighborhood within which the crime was allegedly committed, and violation of this right is considered violation of a constitutional right, defendant contends. Assuming, *arguendo*, the correctness of defendant's contentions, the North Carolina cases cited to support the contentions also supply the answers to them in this case. In *State v. Cutshall*, 110 N.C. 538, 15 S.E. 261 (1892), this Court interpreted section 13, now section 24 of article I of the North Carolina Constitution, as follows:

> Not only has section 13 been construed to guarantee to every person . . . a trial by jury in all cases, which were so triable at common law . . . but a trial by his peers of the vicinage, unless, after indictment, it should appear to the judge necessary to remove the case to some neighboring county in order to secure a fair trial.

Id. at 543-44, 15 S.E. at 262 (emphasis added). As the underlined portion of the opinion discloses, the right to be tried by one's peers of the vicinage is subject to the ability to secure a fair trial. Both defendant and the State are entitled to a fair trial and a fair

1. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. Const. amend. VI.

2. "No person shall be convicted of any crime but by the unanimous verdict of a jury in open court. The General Assembly may, however, provide for other means of trial for misdemeanors, with the right of appeal for trial de novo." N.C. Const. art. I, § 24.

trial requires an impartial jury. As amply demonstrated by the trial judge's findings, it appeared necessary to Judge Beaty in this case "to remove the case to some neighboring county in order to secure a fair trial." Thus, the removal of the cases to Buncombe, a neighboring county, does not violate the constitutional prohibition.

Defendant cites *State v. Vereen*, 312 N.C. 499, 324 S.E. 2d 250, for the purpose of showing that "county residents have a significant interest in seeing criminals who commit local crimes being brought to justice. For this reason, only in rare cases should a trial be held in a county different from the one in which the crime was allegedly committed." *Id.* at 511, 324 S.E. 2d at 258. We agree. This is one of those rare cases as shown by the findings of fact in the order transferring this case from Madison County to Buncombe County for trial. We find no violation of defendant's sixth amendment rights and no violation of his rights under article I, section 24 of the North Carolina Constitution.

In defendant's fourth and fifth arguments he contends that the trial court erred (1) in granting the State's motion to consolidate the offenses for trial, and (2) in denying defendant's motion to sever, made prior to trial and again at the close of the State's evidence. Consolidation of the offenses for trial is controlled by statute:

> 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.

N.C.G.S. § 15A-926(a) (1988).

[6] The State's written motion for consolidation set forth the names and ages of the alleged victims, the crimes charged and dates of the alleged offenses, together with allegations that the crimes were all part of a series of transactions pursuant to a scheme or plan of the defendant to gratify his sexual desires on the bodies of the young children in his care as driver of the Madison County Transportation Authority van. The motion also indicated that because of the young ages of the children, the State was unable to prove the exact dates and times the crimes

occurred, but would be able to prove the crimes occurred between 1 January and 19 May 1986. Judge Beaty allowed the motion to consolidate prior to the first trial, and Judge Albright allowed the motion prior to the second trial.

Public policy favors consolidation because it expedites the administration of justice, reduces congestion of trial dockets, conserves judicial time, lessens the burden upon citizens who must sacrifice both time and money to serve upon juries and avoids the necessity of recalling witnesses who will be called upon to testify only once if the cases are consolidated. *State v. Boykin*, 307 N.C. 87, 296 S.E. 2d 258 (1982). The decision of whether to consolidate or sever cases for trial is within the discretion of the trial judge and will not be disturbed absent a showing of abuse of discretion. *State v. Silva*, 304 N.C. 122, 282 S.E. 2d 449 (1981). We find no abuse of discretion in the instant case. All the crimes were committed while the children were in the exclusive care of defendant while he was transporting them from their homes to the day care center and returning them home in the afternoon. Defendant's conduct manifests a common scheme or plan of defendant and it appears that the cases were properly joined under the statute.

[7] Nevertheless, defendant contends that the trial court committed error by denying his motions to sever made prior to trial and again at the close of the State's evidence. Defendant contends that the consolidation of the offenses resulted in unfair prejudice to him since the offenses involved seven different children and a four and one-half month period of time, making it difficult to defend the case since the jury would believe he was guilty of all offenses because there were so many.

Severance of offenses is governed by N.C.G.S. § 15A-927(b) (1988). Whether defendant's motion is made before trial or during the trial, the court must grant a severance of offenses if "it is found necessary to achieve a fair determination of the defendant's guilt or innocence of each offense." *Id.* If the motion for severance is made during the trial, "[t]he court must consider whether, in view of the number of offenses charged and the complexity of the evidence to be offered, the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense." N.C.G.S. § 15A-927(b)(2) (1988). On a motion to sever, the question before the trial court is:

> [W]hether the offenses are so separate in time and place and so distinct in circumstances as to render consolidation unjust and prejudicial. Whether offenses should be joined is a matter addressed to the sound discretion of the trial judge. His ruling will be overturned only upon a showing that he abused his discretion. (Citations omitted.)

State v. Bracey, 303 N.C. 112, 117, 277 S.E. 2d 390, 394 (1981).

In *State v. Street*, 45 N.C. App. 1, 262 S.E. 2d 365, *cert. denied*, 301 N.C. 104, 273 S.E. 2d 311 (1980), the court held consolidation was proper where children were molested in defendant's home over a five-month period. In *Street*, the Court of Appeals relied on the test for severance as stated in *State v. Johnson*, 280 N.C. 700, 704, 187 S.E. 2d 98, 101 (1972), which is "whether the offenses are so separate in time or place and so distinct in circumstances as to render a consolidation unjust and prejudicial to defendant." To the same effect, *see State v. Effler*, 309 N.C. 742, 752, 309 S.E. 2d 203, 209 (1983) (joinder of two cases of sex crimes against different children on 15 May and 8 June 1982 upheld as not being "so separate in time or place or so distinct in circumstance that consolidation unjustly or prejudicially hindered or deprived defendant of his ability to defend one or the other of the charges").

Defendant contends that failure to sever the cases for trial unfairly prejudiced him because consolidation made it difficult to defend the case and tended to make the jury believe he was guilty of all offenses simply because there were so many. This contention has no merit because if the cases were tried separately the State could still have presented evidence of other similar sex crimes as evidence of a common scheme or plan. N.C.G.S. § 8C-1, Rule 404(b) (1988). *See also State v. Gordon*, 316 N.C. 497, 342 S.E. 2d 509 (1986); *State v. DeLeonardo*, 315 N.C. 762, 340 S.E. 2d 350 (1986); *State v. Craven*, 312 N.C. 580, 324 S.E. 2d 599 (1985); *State v. Arnold*, 314 N.C. 30, 333 S.E. 2d 34 (1985). We hold, therefore, that defendant has failed to show any prejudice, or an abuse of discretion by the trial judge.

[8] Defendant's sixth argument is that the trial court erred by allowing Linda King to testify concerning her use of anatomical dolls during interviews with the children. Drs. Rice and Gravatt testified with respect to the use of anatomical dolls and this testi-

mony was admitted into evidence under N.C.G.S. § 8C-1, Rule 803(4) as statements made for diagnosis and treatment. Defendant argues that Ms. King's testimony was neither corroborative of the two doctors' testimony, since their testimony was purely for diagnosis and treatment, nor was it corroborative of the children's testimony because their testimony did not concern the use of the anatomical dolls.

The courts of this State have allowed the use of anatomical dolls in sexual abuse cases to illustrate the testimony of child witnesses. "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." *State v. Fletcher*, 322 N.C. 415, 421, 368 S.E. 2d 633, 637 (1988). *See 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; *State v. Smith*, 315 N.C. 76, 337 S.E. 2d 833. Any party may introduce evidence for the purpose of illustrating the testimony of a witness. *See* N.C.G.S. § 8-97 (1986 & Cum. Supp. 1988); 1 Brandis, North Carolina Evidence § 34 (3d rev. ed. 1988). "Slight variations between the corroborating statement and the witness' testimony will not render the statement inadmissible." *State v. Riddle*, 316 N.C. 152, 157, 340 S.E. 2d 75, 78 (1986).

Even though the dolls were used in the instant case to illustrate the testimony of the social worker rather than the abused children, the evidence was still admissible. The demonstration illustrated the social worker's testimony as to the manner in which the children communicated, during the interviews, the accounts of sexual abuse. The social worker's demonstration of what she observed each child do with the dolls also corroborated the testimony of each child. We find no error in admitting this evidence.

[9] In defendant's seventh and final argument he contends that the trial court abused its discretion by allowing the State to use leading questions in examining child witnesses and to ask questions suggestive of facts not yet in evidence. Defendant asserts that leading questions are permitted only when the witness has difficulty understanding the question. Prior to questioning, the trial court found that each child was competent and capable as a

witness. Thus, defendant contends, there was no basis for leading questions. We do not agree.

It is within the sound discretion of the trial judge to allow leading questions on direct examination, and in cases involving children or an inquiry into delicate subjects such as sexual matters, the judge is accorded wide latitude to exercise that discretion. *State v. Wilson*, 322 N.C. 91, 96, 366 S.E. 2d 701, 704 (1988). *See State v. Williams*, 303 N.C. 507, 279 S.E. 2d 592 (1981); *State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229 (1974). The children in the instant case were extremely young; their ages ranged from two to five years. Additionally, the children were required to testify about sexual matters which, for young children, are presumably difficult to understand or communicate without assistance. Leading questions were necessary in order to elicit from them details of alleged offenses. We find no abuse of discretion.

We conclude that defendant has had a fair trial, free of prejudicial error. His convictions, and the sentences entered thereon, remain undisturbed.

No error.

STATE OF NORTH CAROLINA v. MARCELLE ANTONIO BOGLE

No. 307A88

(Filed 2 March 1989)

1. **Criminal Law § 111.1; Narcotics § 4.5— willful blindness—inconsistent with North Carolina law**

The trial court erred in a prosecution for trafficking in marijuana by instructing the jury on willful blindness. Willful blindness is inconsistent with North Carolina law in that our jury instruction as to circumstances from which knowledge may be inferred is far broader than the limited concept of willful blindness; the instruction in this case erroneously informed the jury that the evidence showing deliberate avoidance of knowledge was, alone, a sufficient basis for finding knowledge.

2. **Criminal Law § 111.1; Narcotics § 4.5— willful blindness instruction—erroneously given—prejudicial**

Erroneously giving a willful blindness instruction in a prosecution for trafficking in marijuana was prejudicial where the only contested issue was

whether defendant knew the marijuana was in the truck; the only instruction on knowledge was the willful blindness instruction; and defendant acknowledged that the circumstances of the case raised an inference that he knew the marijuana was in the truck, although that inference was contradicted by other evidence presented by defendant which appeared to carry some weight with the jury, as demonstrated by the circumstances of the jury's deliberations.

3. **Criminal Law § 117.5— trafficking in marijuana—failure to instruct on character trait of being law-abiding—error**

The trial court erred in a prosecution for trafficking in marijuana by failing to instruct that defendant's evidence of the particular character trait of being law-abiding could be considered as substantive evidence of his innocence. The character trait of being law-abiding is pertinent in virtually all criminal cases, and testimony that ". . . there was nothing before this" did not address only the fact that defendant had no prior arrests or convictions, but was simply a statement to the effect that there was nothing before the current charge which would have indicated that defendant was not a law-abiding person. N.C.G.S. § 8C-1, Rule 404(a)(1).

4. **Criminal Law § 117.5— trafficking in marijuana—character trait of being law-abiding—substantive evidence**

Defendant in a prosecution for trafficking in marijuana was entitled to an instruction on his character trait of being law-abiding as substantive evidence of his innocence where defendant requested the instruction and there was competent evidence of the trait.

5. **Criminal Law § 34— character trait of being law-abiding—lack of prior convictions—not admissible**

Evidence of a lack of prior convictions was not admissible in a prosecution for trafficking in marijuana to show the character trait of being law-abiding where the evidence presented was neither in the form of reputation nor of an opinion and was not of the character contemplated in N.C.G.S. § 8C-1, Rule 405(a). Evidence of the lack of prior convictions is not evidence of the character trait of being law-abiding, but only of the fact that one has not been convicted.

6. **Criminal Law § 85.1— trafficking in marijuana—reputation for truthfulness and honesty—could not be considered as substantive evidence**

The trial court in a prosecution for trafficking in marijuana correctly refused to give defendant's requested instruction that evidence of defendant's reputation for truthfulness and honesty could be considered as substantive evidence of defendant's innocence. The traits of truthfulness and honesty are not pertinent character traits to the crime of trafficking in marijuana by possession or transportation. N.C.G.S. § 8C-1, Rule 404.

Justice WEBB concurring.

APPEAL as of right by defendant pursuant to N.C.G.S. § 7A-30(2) from a divided panel of the Court of Appeals, reported at 90 N.C. App. 277, 368 S.E. 2d 424 (1988), on the issue of a

"willful blindness" jury instruction. On discretionary review pursuant to N.C.G.S. § 7A-31 on an additional issue of evidence of character traits as substantive evidence of defendant's innocence. The divided panel found no error in the judgment entered by *Phillips, J.*, at the 29 June 1987 Criminal Session of Superior Court, NORTHAMPTON County, upon convictions by a jury of trafficking in marijuana by possession and trafficking by transporting. Heard in the Supreme Court 16 November 1988.

Lacy H. Thornburg, Attorney General, by Howard E. Hill, Assistant Attorney General, for the State.

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

MEYER, Justice.

This case presents two questions of first impression to this Court. The first question is whether the trial court erred in giving a jury instruction on willful blindness. We hold that it did and order a new trial. The second question is whether the defendant was entitled to a jury instruction that the evidence of his character trait of being "law-abiding" could be considered as substantive evidence of his innocence. We hold that he was entitled to the instruction.

Since we award defendant a new trial, we relate only the facts necessary for an understanding of the issues on appeal.

On 7 April 1987 at 12:30 p.m. defendant Marcelle Antonio Bogle was driving a pickup truck from Florida to New York on I-95 North. At about 12:30 p.m. a North Carolina State Trooper stopped him for speeding near the Virginia line in Northampton County. Defendant consented to a search of the truck—a 1987 Toyota with a camper top. Packed behind several chairs and some other household goods in the back of the truck, the trooper found five cardboard boxes sealed with duct tape. The boxes contained large plastic garbage bags filled with marijuana, totaling 176 pounds.

Defendant was arrested and subsequently charged with two counts of violating N.C.G.S. § 90-95(h)(1)(b): trafficking in marijuana by possession and trafficking in marijuana by transporting

100 pounds or more but less than 2,000 pounds. At trial defendant entered a plea of not guilty.

To convict defendant of the charged offenses, the State was required to prove that defendant knowingly possessed and transported the marijuana found in the truck. *See State v. Weldon*, 314 N.C. 401, 403, 333 S.E. 2d 701, 702 (1985).

The State's evidence tended to show that the defendant's possession was "knowing." Trooper Harbeson, who had stopped defendant for speeding, testified that after having been advised of his rights, defendant told him that "[t]hey told me to tell the police this was my uncle's truck." When Harbeson asked defendant if he knew what Harbeson had been searching for, defendant replied, "I knew what you were looking for." Defendant also testified, however, that he had not known the marijuana was in the truck. He had been hired by a fellow Jamaican he knew only as "Tony" to drive the truck to New York for $1,000 plus expenses. The truck was registered in the name of a third person. Defendant further testified that he had not known what was in the back of the truck until the trooper unpacked the back, opened the boxes, and discovered the marijuana inside them.

Defendant's uncle, Byrum Townsend, testified that defendant had a good reputation for law-abidingness, for truth and veracity, and for honesty.

At the charge conference, the prosecution requested that the trial court's charge to the jury contain willful blindness instructions based upon *United States v. Jewell*, 532 F. 2d 697 (9th Cir.) (en banc), *cert. denied*, 426 U.S. 951, 49 L.Ed. 2d 1188 (1976).[1]

1. In *Jewell* the United States Court of Appeals for the Ninth Circuit held that the term "knowingly" in the federal Drug Control Act includes not only positive knowledge, but also "a mental state in which the defendant is aware that the fact in question is highly probable but consciously avoids enlightenment." *Id.* at 704. The court held that the jury should be instructed "(1) that the required knowledge is established if the accused is aware of a high probability of the existence of the fact in question, (2) unless he actually believes it does not exist." *Id.* n.21.

The court refined its decision in *United States v. Murrieta-Bejarano*, 552 F. 2d 1323 (9th Cir. 1977), by holding that a "*Jewell* instruction should not be given in every case where a defendant claims a lack of knowledge, but only in those comparatively rare cases where, in addition, there are facts that point in the direction of deliberate ignorance." *Id.* at 1325.

Defendant objected to the proposed instructions on two grounds: (1) because "it does not comport with the law of North Carolina"; and (2) alternatively, because the evidence failed to support a willful blindness instruction.

The trial judge gave a willful blindness instruction on each charge.[2] No other instructions were given with respect to the element of knowledge. Before the jury retired, defendant renewed his earlier objections.

I.

[1] Defendant objected to the *Jewell* instruction, arguing that a willful blindness instruction was improper because the willful blindness doctrine "does not comport with the law of North Carolina." We agree. Such an instruction is error, regardless of the language used.

The willful blindness doctrine permits a jury to find that a defendant has knowledge of the material facts because he has deliberately chosen to remain ignorant of illegal activity that would have been disclosed by further investigation. *United States v. Jewell*, 532 F. 2d 697, 704 (9th Cir.). Willful blindness is inferred when the jury finds (1) the defendant is aware of the high probability of the existence of a fact, (2) but acts with a conscious pur-

2. The trial court instructed the jury with respect to the element of knowledge as follows:

> [T]he term "knowingly possessed" in this case and under this criminal statute, is not limited to positive knowledge. But when the defendant is aware that the fact in question is highly probable, includes the state of mind of one who does not possess positive knowledge merely and only because he consciously avoids so—let me correct myself—so the required knowledge is established if the defendant is aware of a high probability of the existence of the fact in question unless he actually believes it not to exist and consciously avoids enlightenment.
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> . . . .
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> . . . [T]he term "knowingly transported" in this criminal statute is not limited to positive knowledge. But includes—but when the defendant is aware that the fact in question is highly probable, it includes the state of mind of one who does not possess positive knowledge only because he consciously avoids it. So, the required knowledge is established if the defendant is aware of a high probability of the existence of the fact in question, unless he actually believes it not to exist and consciously avoids enlightenment.

pose to avoid the truth, (3) unless he actually believes the fact not to exist. *Id.* n.21.

The willful blindness doctrine is primarily recognized by English authorities. *Id.* at 705 (Kennedy, J. (now a Justice of the United States Supreme Court), dissenting). "A classic illustration of this doctrine is the connivance of an innkeeper who deliberately arranges not to go into his back room and thus avoids visual confirmation of the gambling he believes is taking place.[3]" *Id.* (n.3: "*See, e.g., Bosley v. Davies*, [1875] L.R. 1 Q.B. 84"). It has been incorporated by some federal courts as a basis for the inference of "knowledge" when knowledge of the existence of a particular fact is an element of an offense. *See, e.g., United States v. Krowen*, 809 F. 2d 144 (1st Cir. 1987).

Our Court of Appeals concluded that the doctrine of willful blindness is consistent with the law of North Carolina. We disagree.

Knowledge is a mental state that may be proved by offering circumstantial evidence to prove a contemporaneous state of mind. Jurors may infer knowledge from all the circumstances presented by the evidence. It "may be proved by the conduct and statements of the defendant, by statements made to him by others, by evidence of reputation which it may be inferred had come to his attention, and by [other] circumstantial evidence from which an inference of knowledge might reasonably be drawn." *State v. Boone*, 310 N.C. 284, 294-95, 311 S.E. 2d 552, 559 (1984). Thus, our jury instruction as to circumstances from which knowledge may be inferred is far broader than the limited concept of willful blindness. A willful blindness instruction as given here fails to adequately instruct the jury on the concept of inferred "knowledge" when knowledge is an element of the offense.

A trial judge is required by N.C.G.S. § 15A-1231 and N.C.G.S. § 15A-1232 to instruct the jury on the law arising on the evidence. This includes instruction on the elements of the crime. Knowledge is a substantive feature of the crime charged here. Failure to instruct upon all substantive or material features of the crime charged is error. *State v. Loftin*, 322 N.C. 375, 368 S.E. 2d 613 (1988) (error to fail to instruct on defense of accident); *State v. Shaw*, 322 N.C. 797, 370 S.E. 2d 546 (1988) (no error to fail to instruct on identification where instructions as a whole made

clear that the jury must find beyond a reasonable doubt defendant committed the burglary); *State v. Fearing*, 304 N.C. 471, 284 S.E. 2d 487 (1981) (error to fail to instruct that defendant knew the object he hit was a person); *State v. Ferrell*, 300 N.C. 157, 265 S.E. 2d 210 (1980) (prejudicial error to fail to instruct on the lesser included offense of voluntary manslaughter and on the defense of self-defense); *State v. Ward*, 300 N.C. 150, 266 S.E. 2d 581 (1980) (prejudicial error to fail to instruct that defendant's act caused the death and on mens rea—defendant must intend his act of shooting victim); *State v. Mercer*, 275 N.C. 108, 165 S.E. 2d 328 (1969) (prejudicial error to fail to charge on the implications of unconsciousness); *State v. Ardrey*, 232 N.C. 721, 62 S.E. 2d 53 (1950) (prejudicial error to fail to charge on lesser degrees of assault with a deadly weapon with intent to kill).

These cases demonstrate that all substantive and material features of the crime with which a defendant is charged must be addressed in the trial court's instructions to the jury. The instruction given in this case erroneously informs the jury that the evidence showing deliberate avoidance of knowledge is, alone, a sufficient basis for a finding of knowledge. Because the "willful blindness" jury instructions given here failed to adequately address the material element of knowledge, there was error. We hold that the willful blindness instruction is inconsistent with North Carolina law, and thus the trial court erred in giving such an instruction to the jury.[3]

[2] Moreover, we are persuaded that there is a reasonable possibility that "but for" the instruction the jury would have reached a different result at trial. The only contested issue in the case was whether the defendant "knew" the marijuana was in the truck. The only instruction given on "knowledge" was the willful blindness instruction. Defendant acknowledged that the circumstances of the case raised an inference that he knew the marijuana was in the truck. However, that inference was contradicted by other evidence presented by defendant which appeared to carry some weight with the jury, as demonstrated by the circumstances of

3. For criticism of the doctrine, see *United States v. Jewell*, 532 F. 2d at 705 (9th Cir.), and *Andrews v. Florida*, 536 So. 2d 1108, 13 Fla. L. Weekly 2735 (Fla. Dist. Ct. App. 1988) (en banc) (Stone, J., concurring in part and dissenting in part).

the jury's deliberations. The jury deliberated several hours; it twice asked the judge to be permitted to review defendant's testimony. The jury foreman passed a note to the judge in which he stated that some of the jurors could not come to a decision without this testimony. At the time of the jury's request, the judge polled the jury; the vote was eight to four. These facts raise the reasonable possibility that, had the judge not given the willful blindness instruction, the jury would not have found beyond a reasonable doubt that defendant knew that the marijuana was in the truck and would have reached a different result. N.C.G.S. § 15A-1443(a) (1988). Accordingly, we hold that the error in giving the willful blindness instruction entitles defendant to a new trial. Having decided this issue on this ground, it is unnecessary to consider other grounds argued by defendant on the first assignment of error in his brief.

II.

[3] Because the issues raised in defendant's second assignment of error are likely to recur on retrial, we elect to consider them. Defendant contends, and we agree, that the trial court erred in failing to instruct that his evidence of the particular character trait of being "law-abiding" could be considered as substantive evidence of his innocence.

At trial defendant presented evidence through his uncle Byrum Townsend. When asked if he knew his nephew's reputation for being a law-abiding citizen, Mr. Townsend responded, "I would say excellent. Because there was nothing before this incident." At the jury charge conference, defendant requested the court to instruct the jury that the evidence of defendant's character trait of being law-abiding be considered as substantive evidence of his innocence. The trial judge erroneously refused to give the requested instruction on law-abidingness.

N.C.G.S. § 8C-1, Rule 404(a)(1) provides:

> (a) *Character evidence generally.*—Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused.—Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same[.]

N.C.G.S. § 8C-1, Rule 404(a)(1) (1988).

This rule, which became effective 1 July 1984, has significantly changed North Carolina practice. *State v. Squire*, 321 N.C. 541, 546, 364 S.E. 2d 354, 357 (1988). Under our prior practice, the only method for introducing evidence of character was by general reputation. *Id.* Under the new rule, an accused may no longer offer evidence of undifferentiated, overall "good character," but may now only introduce evidence of "pertinent" traits of his character. *Id.*

In determining whether a more general trait of character such as law-abidingness is admissible in a criminal case, we have concluded that the term "pertinent" is generally synonymous with "relevant in the context of the crime charged." *Id.* at 548, 364 S.E. 2d at 358. Using this analysis, this Court has previously held that the character trait of law-abidingness is "pertinent" in virtually all criminal cases. *Id.* Evidence of law-abidingness tends to establish circumstantially that defendant did not commit the crime charged. *Id.*

The Court of Appeals recognized that the character trait of law-abidingness is "pertinent." *State v. Bogle*, 90 N.C. App. 277, 285, 368 S.E. 2d 424, 429. However, it concluded that Mr. Townsend's testimony concerning defendant's law-abidingness was not competent since his "answer was clearly based on defendant's lack of prior arrests or convictions." It held that since "this answer is the only evidence in the record that is even arguably competent as substantive character evidence," the trial court did not err in refusing to give the instruction on law-abidingness. *Id.* We disagree.

Defendant's uncle, Mr. Townsend, responded to the question, "Do you know his [defendant's] reputation for being a law-abiding citizen?" with the answer, "I would say excellent." Then he continued, "Because there was nothing before this incident." We do not understand the latter remark to address only the fact that defendant had no prior arrests or convictions. Rather, it is simply a statement to the effect that there was nothing before the current

charge that would have indicated that defendant was not a law-abiding person. Rule 405(a) permits testimony in the form of reputation or opinion. It does not exclude a witness' opinion of a defendant's reputation for law-abidingness merely because that opinion is accompanied by a statement such as the one here.

The State objects for the first time on the appeal of this action to the lack of a foundation laid by defendant before the admission of this testimony. It contends that the record is devoid of any evidence that Mr. Townsend had gleaned knowledge about defendant's "'reputation' for . . . law-abidingness from Townsend's contacts with members of the community in which defendant lived or worked." The record shows that the State failed to object at trial to the foundation laid by defendant for Mr. Townsend's reputation testimony. The evidence, having been offered without objection, was properly admitted.

[4] Having determined that such evidence was properly admitted, we next consider if defendant was entitled to an instruction on this evidence of his law-abidingness. It is the duty of the trial judge to instruct the jury on all substantial features of a case. *State v. Higgenbottom*, 312 N.C. 760, 764, 324 S.E. 2d 834, 838 (1985). When a defendant offers evidence of a pertinent character trait, he is entitled to have the jury consider this evidence as substantive evidence bearing directly upon the issue of his guilt or innocence. *See State v. Peek*, 313 N.C. 266, 328 S.E. 2d 249 (1985). A court is not required to charge on this feature of the case, however, unless defendant requests it. *State v. Martin*, 322 N.C. 229, 236, 367 S.E. 2d 618, 623 (1988). *See generally* 1 Brandis on North Carolina Evidence § 108, at 400 n.94 (2d rev. ed. 1982 & Cum. Supp. 1986). As previously noted, evidence of a defendant's character trait of law-abidingness is relevant in virtually any criminal prosecution. *State v. Squire*, 321 N.C. 541, 548, 364 S.E. 2d 354, 358. This relevance goes to the substantive question of defendant's guilt of the crime charged. *Id.* at 546-47, 364 S.E. 2d at 357. In determining whether a defendant is entitled to an instruction to that effect, the facts of the case are to be viewed in the light most favorable to him. *State v. McCray*, 312 N.C. 519, 324 S.E. 2d 606 (1985). Accordingly, since defendant requested the instruction, and since Mr. Townsend's testimony was competent evidence of defendant's character for the relevant trait of law-abidingness, we hold that defendant was entitled to an instruction

on his character trait of law-abidingness as substantive evidence of his innocence. It is for the jury to assess the weight of this evidence.

[5] We next address defendant's argument that he offered other evidence which should have been admitted to show his law-abidingness. Two law enforcement officers and defendant himself testified that defendant had no prior convictions. The Court of Appeals concluded that the lack of a prior criminal conviction was not in the form of reputation or opinion testimony, and since "the Rules of Evidence limit the methods of proving character to testimony as to reputation and testimony in the form of an opinion," this evidence was not competent character evidence. *State v. Bogle*, 90 N.C. App. 277, 285, 368 S.E. 2d 424, 429. We agree. The evidence presented was neither in the form of reputation nor of an opinion and not of the character contemplated in Rule 405(a). We conclude that testimony of defendant and of the police officers of defendant's absence of convictions was not admissible as substantive evidence of defendant's innocence, not only because it was not in the proper form, but also for the reason that evidence of the lack of prior convictions is not evidence of a "trait of character" but is merely evidence of a fact. It does not address a trait of defendant's character. Whereas being "law-abiding" addresses one's *trait of character* of abiding by all laws, a lack of convictions addresses only the *fact* that one has not been convicted of a crime. Many clever criminals escape conviction. Accordingly, we conclude that the evidence of a lack of convictions should not have been admitted as character evidence.

[6] Finally, we address yet another of defendant's arguments. Defendant's uncle testified that defendant's reputation for "truth and veracity" and "honesty" was very good. While the trial judge correctly admitted the evidence of defendant's truthfulness and honesty and agreed to charge (and did subsequently charge) that the evidence of truthfulness and honesty was admissible on the issue of defendant's credibility, he refused to give the requested instruction that evidence of these character traits could be considered as substantive evidence of defendant's innocence.

Special rules govern the admission of character evidence. While Rule 404 provides for the circumstances in which character evidence is admissible, Rule 405 provides for the form in which it

may be presented.[4] Rule 404(a) is a general rule of exclusion, prohibiting the introduction of character evidence to prove that a person acted in conformity with that evidence of character. One of the exceptions to Rule 404(a) permits the accused to offer evidence of a "pertinent trait of his character" as circumstantial proof of his innocence. N.C.G.S. § 8C-1, Rule 404(a)(1) (1988).

In construing what the legislature meant by a "pertinent" trait of character, we stated in *State v. Squire* "[u]nder the present rule, an accused must tailor his character evidence to a 'pertinent' trait . . . relevant in the context of the crime charged." *State v. Squire*, 321 N.C. 541, 548, 364 S.E. 2d 354, 358. In criminal cases, in order to be admissible as a "pertinent" trait of character, the trait must *bear a special relationship to* or *be involved in* the crime charged. N.C.G.S. § 8C-1, Rule 404 commentary (1988) (citing 1 Brandis on North Carolina Evidence § 114 (1982)). Thus, in the case of a defendant charged with a crime of violence, the peaceable character of the defendant would be "pertinent"; or in a case of embezzlement, the honesty of the defendant would be "pertinent." *Id.* In these examples, the character trait bears a special relationship to or is involved in the crime charged.

This interpretation of the word "pertinent" is consistent with the rule of statutory construction which restrictively construes exceptions to a general rule of exclusion. Rule 404(a), as a general rule, excludes character evidence. Therefore, the language of its exception permitting the accused to offer evidence of a "pertinent" trait should be restrictively construed.

We note also that this interpretation of the term "pertinent" creates no internal inconsistencies in our Rules of Evidence. Rule 402, the general rule of admissibility, provides that "[a]ll relevant

4. Rule 405 provides:

> (a) *Reputation or opinion.*—In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. . . .
>
> (b) *Specific instances of conduct.*—In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

N.C.G.S. § 8C-1, Rule 405 (1988).

evidence is admissible, except as otherwise provided . . . by these rules." N.C.G.S. § 8C-1, Rule 402 (1988). Although this interpretation of the term "pertinent" in Rule 404(a)(1) may result in the exclusion of what could otherwise be considered "relevant" evidence, the language of Rule 402 expressly permits this exclusion of relevant evidence where "otherwise provided . . . by these rules."

On the authority of a Fifth Circuit case, *United States v. Jackson*, 588 F. 2d 1046, 1055 (5th Cir.), *cert. denied*, 442 U.S. 941, 61 L.Ed. 2d 310 (1979), our Court of Appeals concluded that the crimes charged in this case did not involve dishonesty or deception on the part of defendant, and therefore truthfulness and honesty were not traits of character pertinent to the crimes with which defendant was charged. Accordingly, it found no error in the trial court's refusal to instruct that the evidence of defendant's truthfulness and honesty could be considered as evidence of his innocence. We agree.

Truthfulness and honesty are closely related concepts. Webster's Ninth New Collegiate Dictionary defines "truthful" as "telling or disposed to tell the truth." Webster's Ninth New Collegiate Dictionary 1268 (1988). It defines "honest" as "free from fraud or deception." *Id.* at 579. In common usage, a person is "truthful" if he *speaks* the truth. He is "honest" if his *conduct*, including his speech, is free from fraud or deception. Neither trafficking by possession nor by transporting marijuana necessarily involves being untruthful or engaging in fraud or deception. Consequently, we hold that the traits of truthfulness and honesty are not "pertinent" character traits to the crime of trafficking in marijuana by possession or transportation.

A further reason exists to follow the decision in *United States v. Jackson*, 588 F. 2d 1046 (5th Cir.): there is merit in uniformity of interpretation of similar rules by state and federal courts. The commentary to Rule 102 (purpose and construction of our Rules of Evidence) notes that federal precedents are not binding on our courts in construing the rules.[5] However, "[u]niformity

5. Although the commentaries printed with the North Carolina Rules of Evidence were not enacted into law, the General Assembly instructed the Revisor of Statutes to print the commentary with each rule so that it could be used to clarify legislative intent. 1983 N.C. Sess. Laws ch. 701, § 2. Accordingly, we are not bound

of evidence rulings in the courts of this State and federal courts is one motivating factor in adopting these rules and should be a goal of our courts in construing those rules that are identical." N.C.G.S. § 8C-1, Rule 102 commentary (1988).

Based on the error in instructing the jury on defendant's willful blindness, the verdict and judgment of the trial court are vacated, and we reverse the decision of the Court of Appeals and remand the case to the Court of Appeals for further remand to the Superior Court, Northampton County, for a new trial.

Reversed and remanded.

Justice WEBB concurring.

I agree with the majority that it is error requiring a new trial for the superior court to have charged on willful blindness. I believe this is so because it relieved the State of proving knowledge, which is an essential element of the case.

I disagree with the majority as to its treatment of testimony that the defendant had no prior convictions. If this testimony had been in the proper form I believe it should have been considered as substantive evidence. I believe it is more likely that a person with no prior convictions will not commit a crime than a person who has prior convictions.

I also disagree with the majority in its holding that the defendant's reputation for truth and honesty is irrelevant to the crimes for which he was tried. It is evident to me that a truthful and honest person is not as likely to traffic in marijuana as one who is not truthful and honest. I would hold that the court should have charged on this evidence.

The majority has ordered a new trial for the defendant and I concur in this result.

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by the commentary but give it substantial weight in our efforts to discern legislative intent. *State v. Hosey*, 318 N.C. 330, 337-38 n.2, 348 S.E. 2d 805, 809-10 n.2 (1986); *State v. Kim*, 318 N.C. 614, 620 n.3, 330 S.E. 2d 347, 351 n.3 (1986).

STATE OF NORTH CAROLINA v. WAYNE FIELDS

No. 302A88

(Filed 2 March 1989)

Criminal Law § 5.2; Homicide § 7.1 — murder case — instruction on unconsciousness required

The trial court in a first degree murder case erred in refusing to instruct the jury on the defense of unconsciousness or automatism where members of defendant's family testified to a substantial history going back to defendant's childhood of defendant's acting as if he were "in his own world," and a clinical psychologist testified that in his opinion defendant was in a disassociative state and unable to exercise conscious control of his physical actions at the moment of the fatal shooting, and that defendant was acting like a robot or automaton. While there was evidence that defendant had been drinking on the night of the shooting, there was no evidence of the extent of his drinking or that his allegedly unconscious behavior resulted from voluntary drug or alcohol use.

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 *Winberry, J.*, at the 19 January 1988 Criminal Session of Superior Court, EDGECOMBE County. Heard in the Supreme Court 14 December 1988.

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

Jimmie R. Keel for defendant-appellant.

WHICHARD, Justice.

Defendant was convicted of first degree murder after a non-capital trial. The trial court sentenced him to life imprisonment. We award a new trial for error in refusing a requested jury instruction.

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

Connie Williams, defendant's half-sister, testified that she had been dating Isaiah Barnes, the victim, for two years at the time of his death. On 18 September 1986 the couple was drinking liquor at Robert Cobb's house. Defendant and his girlfriend were also at Cobb's house. Defendant left and returned alone several

hours later. Defendant gave Cobb a piece of paper, then shot Barnes twice. Barnes was sitting on a trunk unarmed when defendant shot him. Williams testified that Barnes sometimes beat her but had not touched her that evening. On cross-examination, Williams denied that Barnes had grabbed or touched her prior to the shooting.

Cobb testified that defendant and his girlfriend were at his house when Williams and Barnes arrived. Defendant offered Williams a drink and left soon thereafter. Before leaving, defendant "played some numbers" with Cobb. Williams and Barnes also left Cobb's house, but returned later that evening. Williams and Barnes were sitting on a trunk in Cobb's bedroom, drinking and talking. Cobb and his friend, Joyce Ann Pettaway, also were talking in the bedroom. Defendant entered the bedroom about midnight. He called Cobb by a nickname, "Snow." Defendant asked Cobb to keep the ticket for the numbers he had played, saying, "If I hit, I want you to get the money and keep it until you see me." Cobb asked why defendant could not keep it himself, and defendant answered, "You'll see."

Defendant and Barnes had not spoken to one another. Defendant then walked around the foot of the bed, pulled a gun out of his belt, and shot Barnes. Barnes fell on the floor. Pettaway cried, "Oh, Lord have mercy. Please don't shoot that man anymore." Defendant turned toward her and said, "Shut up," then shot Barnes again as he lay on the floor gasping for breath. Cobb told defendant to get out of his house because he was calling "the law." Defendant said, "Okay, Snow," and walked out.

Wallace Fields, defendant's brother, testified on defendant's behalf. He recounted the difficult circumstances of their childhood. Their stepfather, called "Dump," drank regularly and beat the children and their mother. They had little money and were often hungry. When Dump was on a rampage, the mother and children would often sleep outside to avoid him.

One night when defendant was fourteen, Dump held a knife to defendant's mother's throat and threatened to kill her. Defendant grabbed a gun and shot Dump, killing him. Wallace Fields testified that up to the time of this incident defendant was a normal boy who liked to play and go to school. After the shooting, defendant had nightmares and became "a different person," acting

as if he were "in his own world." Defendant was extremely devoted to his mother, helping her cook and clean and giving her money.

Wallace Fields further testified that his sister, Connie Williams, had become a different person since beginning her relationship with Barnes. She often appeared bruised and beaten and cared little for her appearance.

Willard Mills, defendant's stepbrother, also testified regarding defendant's devotion to his mother. Mills stated that Connie Williams became dependent on alcohol or drugs and lost all interest in her family and appearance after she became involved with Barnes. Defendant and his brothers were worried about Connie and frequently discussed how to help her.

Mills reported that defendant had become very morose after the childhood shooting incident. As defendant grew older, Mills advised him to put it all behind him and join the service. While in service, another soldier performed a trick in which the soldier put lighter fluid in his mouth, lit it, and blew out the flames. Defendant saw his stepfather's face in the flames and ran away. He was hospitalized for several months following this episode.

Mills testified that defendant was concerned about Barnes' drinking and tried to persuade him to stop, but that defendant bore Barnes no malice. Ten days after shooting Barnes, defendant called Mills. Mills picked up defendant at the bus station and took him to the Tarboro police station to turn himself in.

Agnes Williams, defendant's mother, testified that defendant's nerves had been bad ever since the incident with Dump. Defendant had a nervous breakdown in the service and was never the same afterward. Defendant's nerves were "just racked all to pieces" over Connie Williams' problems.

Dr. Evans Harrell, a psychologist, testified on defendant's behalf. His credentials included a bachelor's degree from the University of the South, a master's degree in psychology from the University of Florida, and a Ph.D. in clinical psychology from the University of Florida. He was also a diplomate in psychology, which he described as "analogous to being board certified in a medical specialty."

Dr. Harrell had obtained a personal and family history from defendant and members of his family. He stated that after defendant killed Dump he felt very protective toward his mother and sisters. Defendant felt guilty about the family being left without a father figure, and he tried to assume that role. Defendant suffered from frequent nightmares featuring Dump and often felt Dump's presence even when awake. In Dr. Harrell's opinion, defendant suffered from post-traumatic stress disorder and certain of his behavior was characteristic of a disassociative state. Dr. Harrell described a disassociative state as a sudden temporary alteration in the state of consciousness, during which defendant would not remember what happened and did not intend to do anything, "like his mind and his body weren't connected."

Dr. Harrell recounted what defendant related to him about the killing of Isaiah Barnes. Defendant told Dr. Harrell he had tried to get his sister Connie to leave Cobb's house that night because he was worried about her drinking. Connie's arm was bandaged from a burn which she attributed to an accident but which defendant and the family suspected Barnes inflicted. Defendant saw Barnes reach out and grab Connie, and Connie grimaced in pain. At this point defendant pulled out the gun and shot Barnes. Defendant told Dr. Harrell he had not planned to kill Barnes, had not thought of killing Barnes, and even as he shot him, was not thinking of killing Barnes. Defendant denied any memory of firing a second shot. Instead, defendant was seeing Dump and his mother "and all of these things flashing before [him] in a blur."

With this narrative as the basis of his opinion, Dr. Harrell testified that defendant perceived Barnes to be treating Connie the same way Dump had treated defendant's mother. This perception triggered a disassociative state in defendant the night of the killing. In Dr. Harrell's opinion, defendant did not plan or intend to shoot Barnes and was unable to exercise conscious control of his physical actions at that moment. Dr. Harrell concluded, "I think he was acting sort of like a robot. He was acting like an automaton."

Dr. Harrell testified that defendant told him he had been drinking on the night of the shooting but did not tell him how much he had had to drink.

Defendant assigns error to the trial court's refusal to instruct the jury on the defense of unconsciousness. This defense, also called automatism, has been defined

> as connoting the state of a person who, though capable of action, is not conscious of what he is doing. It is to be equated with unconsciousness, involuntary action [and] implies that there must be some attendant disturbance of conscious awareness. Undoubtedly automatic states exist and medically they may be defined as conditions in which the patient may perform simple or complex actions in a more or less skilled or uncoordinated fashion without having full awareness of what he is doing.

F. Whitlock, *Criminal Responsibility and Mental Illness* 119-20 (1963) (quoted in W. LaFave and A. Scott, *Criminal Law* § 4.9, at 382 (2d ed. 1986)). The rationale underlying the defense was explained as follows in *State v. Mercer*, 275 N.C. 108, 165 S.E. 2d 328 (1969), *overruled on other grounds, State v. Caddell*, 287 N.C. 266, 215 S.E. 2d 348 (1975), the first case recognizing the defense in this jurisdiction: "The absence of consciousness not only precludes the existence of any specific mental state, but also excludes the possibility of a voluntary act without which there can be no criminal liability." *Id.* at 116, 165 S.E. 2d at 334 (quoting 1 Wharton's Criminal Law and Procedure § 50, at 116 (1957)).

Defendant's evidence tended to show that immediately preceding and during the killing of his victim he was unconscious. Family members testified to a substantial history going back to defendant's childhood of defendant's acting as if he were "in his own world." In the context of this testimony, and on the basis of a personal and family history obtained from defendant and members of his family, Dr. Harrell testified that in his opinion defendant suffered from post-traumatic stress disorder and was prone to experiencing disassociative states. In Dr. Harrell's opinion, defendant was in a disassociative state when he shot the victim. Dr. Harrell testified:

> Q: All right. Now, based upon everything you've been told, and everything that,—and your history that you took from Wayne Fields—Do you have an opinion as to whether he was conscious of what he was doing at the time that the gun was fired on September 18, 1986?

A: I think he may have been conscious of it. He may have been conscious of it in the sense of—I mean, he remembers that part of it. But, he doesn't, but he, but when you ask him, you know, he doesn't—I mean, he remembers that it happened, but he didn't plan for it to happen. He didn't do it intentionally. And he doesn't even remember what happened immediately after that.

. . .

Q: Now, Doctor, again, based on all of the history and everything that you know about this case, do you have an opinion as to whether Wayne Field's [sic]—at the time of the firing of the gun on September 18th, 1986,—was able to exercise conscious control of his physical actions at that moment?

A: Yes, I do have an opinion.

Q: What is that opinion?

A: I don't think that he was. I mean, I think he was acting sort of like a robot. He was acting like an automaton.

On cross-examination, Dr. Harrell testified:

A: He remembers everything up to the point that Isaiah reached out for Connie's arm and Connie grimaced. He remembers everything until then. Or I'm not, I'm not contending that he doesn't remember.

Q: The only thing he essentially forgets is the shooting, isn't that true?

A: Okay. Well, what, when he goes into the altered state of consciousness, is when Isaiah reached out and grabs Connie's arm and Connie grimaces, and this whole past life and material that is so similar in his mind to what he's seen, flashes before him, then he engages in a motor action. . . . But, I'm not contending that his state of mind was anything different from yours and mine that evening up until the moment I've just described.

This testimony, if believed, permits a jury finding that defendant was unable to exercise conscious control of his physical actions when he shot the victim. "Where a defendant's evidence discloses facts which are legally sufficient to constitute a defense to the

crime with which he or she has been charged, the court is required to instruct the jury as to the legal principles applicable to that defense." *State v. Strickland*, 321 N.C. 31, 40, 361 S.E. 2d 882, 887 (1987). "What weight, if any, is to be given such evidence, is for determination by the jury." *Mercer*, 275 N.C. at 116, 165 S.E. 2d at 334. Defendant thus was entitled to the unconsciousness or automatism instruction. *See* N.C.P.I.—Crim. 302.10 (1986).

In *Mercer*, we quoted with approval from *People v. Wilson*, 66 Cal. 2d 749, 427 P. 2d 820, 59 Cal. Rptr. 156 (1967), which approved a jury instruction stating that the defense of unconsciousness

> does not apply to a case in which the mental state of the person in question is due to insanity, mental defect or voluntary intoxication resulting from the use of drugs or intoxicating liquor, but applies only to cases of the unconsciousness of persons of sound mind as, for example, somnambulists or persons suffering from the delirium of fever, epilepsy, a blow on the head or the involuntary taking of drugs or intoxicating liquor, and other cases in which there is no functioning of the conscious mind and the person's acts are controlled solely by the subconscious mind.

Mercer, 275 N.C. at 118, 165 S.E. 2d at 336. The defendant in *Mercer* testified that his mind was blank when he shot his estranged wife. He last remembered her hollering at him to get off her porch or she would call the police. His next recollection was of standing on the porch holding the pistol. *Id.* at 114-15, 165 S.E. 2d at 333. We held that defendant was entitled to an instruction on unconsciousness as a complete defense. *Id.* at 115, 119, 165 S.E. 2d at 334, 336.

In *State v. Caddell*, 287 N.C. 266, 215 S.E. 2d 348 (1975), defendant introduced evidence of both insanity and unconsciousness. We stated:

> The defenses of insanity and unconsciousness are not the same in nature, for unconsciousness at the time of the alleged criminal act need not be the result of a disease or defect of the mind. As a consequence, the two defenses are not the same in effect, for a defendant found not guilty by reason of

> unconsciousness, as distinct from insanity, is not subject to commitment to a hospital for the mentally ill.

Id. at 285, 215 S.E. 2d at 360.

In two subsequent cases we found no error in the refusal to instruct the jury on the unconsciousness defense when the defendant's allegedly unconscious behavior resulted from voluntary drug or alcohol use. In *State v. Williams*, 296 N.C. 693, 252 S.E. 2d 739 (1979), we said:

> In view of the overwhelming evidence that defendant's mental state at the time of the commission of the offenses in question was brought about by his excessive consumption of intoxicants, we hold that the trial court did not err in refusing to instruct the jury on the defense of unconsciousness.

Id. at 701, 252 S.E. 2d at 744. We quoted this passage with approval in a case in which all the evidence showed that defendant's allegedly unconscious behavior was caused by voluntary consumption of the drug known as "angel dust." *State v. Boone*, 307 N.C. 198, 209, 297 S.E. 2d 585, 592 (1982).

In *State v. Jerrett*, 309 N.C. 239, 307 S.E. 2d 339 (1983), the defendant broke into a home, shot the husband, stole money and ammunition, and abducted the wife. At the wife's request, the defendant called the rescue squad before leaving the house. Several times the wife disobeyed the defendant's commands without adverse consequences. The wife was able to convince the defendant to allow her to drive the car. The defendant told her to drive to Tennessee, but she drove toward town, convincing him that the car needed gas and the only place to get it was at a convenience store. Once there, he allowed her to get out of the car, despite the presence of a police car. The wife was able to communicate her situation to a police officer, who arrested the defendant. The defendant did not resist and handed the officer his gun. *Id.* at 243-46, 307 S.E. 2d at 341-42.

The defendant in *Jerrett* testified that he had experienced "blackouts" since serving in Vietnam. These blackouts would last for hours; he would drive, walk, and talk to people while unconscious, but would later remember nothing. He once pushed his sister to the floor while unconscious. He testified that on the

night of the murder he was experiencing a blackout up to the time the officer arrested him in the convenience store.

The defendant's parents there both testified that they had witnessed his blackouts on numerous occasions since his return from Vietnam. A psychiatrist testified that he was familiar with post-traumatic stress disorder but did not diagnose defendant as suffering from the syndrome. In the psychiatrist's opinion the defendant would have been capable of forming the intent to commit the acts with which he was charged. *Id.* at 246-48, 307 S.E. 2d at 342-43.

Based on this evidence, we held that the trial court should have given the requested instruction on unconsciousness. *Id.* at 266, 307 S.E. 2d at 353.

Pursuant to the foregoing authorities, defendant's evidence here likewise merited the requested instruction on unconsciousness or automatism. While there was evidence that defendant had been drinking on the night of the shooting, there was no evidence of the extent of his drinking or that his allegedly unconscious behavior resulted from voluntary drug or alcohol use. As noted above, family members testified to a substantial history going back to defendant's childhood of defendant's acting as if he were "in his own world." In the context of this testimony, and on the basis of a personal and family history obtained from defendant and family members, Dr. Harrell clearly testified that in his opinion defendant was unable to exercise conscious control of his physical actions at the moment of the fatal shooting. He stated further: "I think he was acting sort of like a robot. He was acting like an automaton. . . . [W]hen he goes into the altered state of consciousness, . . . then he engages in a motor action." This testimony, combined with the family members' testimony, if accepted by the jury, "exclude[d] the possibility of a voluntary act without which there can be no criminal liability." *Mercer*, 275 N.C. at 116, 165 S.E. 2d at 334 (quoting 1 Wharton's Criminal Law and Procedure § 50, at 116 (1957)). Therefore, an instruction on the legal principles applicable to the unconsciousness or automatism defense was required. *See Strickland*, 321 N.C. at 40, 361 S.E. 2d at 887.

This Court stated in *Caddell* that the defenses of insanity and unconsciousness "are not the same in effect, for a defendant

found not guilty by reason of unconsciousness, as distinct from insanity, is not subject to commitment to a hospital for the mentally ill." *Caddell*, 287 N.C. at 285, 215 S.E. 2d at 360. This statement is potentially misleading. Such a defendant is subject to involuntary commitment to a facility for the mentally ill if found, in a civil commitment proceeding, to be "mentally ill and either dangerous to himself or others or in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness." N.C.G.S. § 122C-261(a) (1986). *See* generally N.C.G.S. § 122C-251 *et seq.* (1986).

Because defendant's other assignments of error are unlikely to recur upon retrial, we do not discuss them.

New trial.

ARTIE S. BARNES v. THE SINGER COMPANY AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

No. 375A88

(Filed 2 March 1989)

Master and Servant § 108— unemployment compensation—plant moved to more distant site—voluntary leaving of job

Plaintiff in an unemployment compensation case left her work involuntarily where plaintiff commuted daily with her brother-in-law forty-four miles round trip from her home to the Singer plant in Lenoir, plaintiff had an outstanding work record, plaintiff did not own a motor vehicle and was not licensed to operate a motor vehicle, defendant Singer decided to remove its plant for business reasons eleven miles further from plaintiff's home, plaintiff worked through the last day the plant was at the original location, and plaintiff thereafter had no transportation to work because her brother-in-law worked for another company and could not drive her the additional eleven miles. An employee does not leave work voluntarily when the termination is caused by events beyond the employee's control or when the acts of the employer cause the termination.

Justice MEYER dissenting.

APPEAL by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 90 N.C. App. 659, 369 S.E. 2d 646 (1988), which affirmed a judgment entered by

Rousseau, J., at the 27 April 1987 session of Superior Court, WILKES County, affirming the decision of the Employment Security Commission denying plaintiff's claim for unemployment compensation benefits. Heard in the Supreme Court 15 November 1988.

Legal Services of the Blue Ridge, by Louise Ashmore, and Richard Tarrier for plaintiff-appellant.

T. S. Whitaker, Chief Counsel, and James A. Haney, Staff Attorney, for Employment Security Commission of North Carolina, defendant-appellee.

MARTIN, Justice.

The question on this appeal is whether plaintiff is entitled to unemployment compensation. We conclude that she is and, therefore, reverse the decision of the Court of Appeals.

The evidence is basically undisputed. It shows that plaintiff had been employed by the Singer Company for more than twelve years. Although she commuted daily with her brother-in-law forty-four miles round trip from her home in Moravian Falls to the Singer plant in Lenoir, plaintiff had an outstanding work record with Singer. Plaintiff did not own a motor vehicle and was not licensed to operate a motor vehicle. After twelve years on the job, she was earning $5.85 per hour.

For business reasons Singer decided to remove its plant to Whitlock, eleven miles farther from Moravian Falls, making plaintiff's daily commute sixty-six miles. Plaintiff worked through 25 July 1986, the last day the plant was at the Lenoir location. Thereafter plaintiff had no transportation to work because her brother-in-law worked for another company in Lenoir and could not drive her the additional eleven miles to the Singer plant at Whitlock. Although plaintiff tried to secure other transportation to the new plant, she was unable to do so. Plaintiff did not work for Singer after the plant was moved.

Upon successive reviews the superior court and the Court of Appeals affirmed the Commission's denial of benefits to plaintiff.

No party contends that the claimant is not eligible for benefits pursuant to N.C.G.S. § 96-13. The battleground of this

case is whether the claimant is disqualified for benefits under N.C.G.S. § 96-14(1).

The issues before us are whether plaintiff voluntarily quit her job with Singer and, if so, whether she did so with good cause attributable to her employer, Singer. N.C.G.S. § 96-14(1) (1988). At the threshold we note that N.C.G.S. § 96-14(1A), defining what constitutes a voluntary leaving, was effective 28 June 1988 and is not applicable to this appeal. 1987 N.C. Sess. Laws (Reg. Sess., 1988) ch. 999, §§ 4, 5.

The test in this jurisdiction for disqualification from unemployment benefits has two prongs: did the employee leave work voluntarily, and if so, did she do so without good cause attributable to the employer. *In re Poteat v. Employment Security Comm.*, 319 N.C. 201, 353 S.E. 2d 219 (1987); N.C.G.S. § 96-14(1) (1988).

It is elementary that the controlling principle in statutory interpretation is that the statute must be given the meaning the legislature intended. *In re Watson*, 273 N.C. 629, 161 S.E. 2d 1 (1968). Where the legislature, as here, has enacted within the statute itself a guide to its interpretation, that guide is to be considered by the courts in the construction of the act. *Id.* The General Assembly has enacted the following guide to the interpretation of chapter 96 of the General Statutes:

> As a guide to the interpretation and application of this Chapter, the public policy of this State is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this State. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief

> assistance. The legislature, therefore, declares that in its considered judgment the public good and the general welfare of the citizens of this State require the enactment of this measure, under the police powers of the State, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own.

N.C.G.S. § 96-2 (1988).

Under this guidance, the statute must be construed to provide benefits to one who becomes involuntarily unemployed, who is physically able to work, available for work at suitable employment, and who, although actively seeking work, is unable to find such employment through no fault of her own. *In re Watson*, 273 N.C. 629, 161 S.E. 2d 1. Disqualification for benefits under the statute must be strictly construed in favor of the claimant. *Id.* The employer has the burden to show that the claimant is disqualified from receiving benefits. *Intercraft Industries Corp. v. Morrison*, 305 N.C. 373, 289 S.E. 2d 357 (1982). This Court must determine whether the law was properly applied to the facts. *Id.*

We turn first to the issue of whether plaintiff voluntarily left her employment with Singer. "Voluntary" means "[u]nconstrained by interference; unimpelled by another's influence; spontaneous; acting of oneself. . . . [r]esulting from free choice," Black's Law Dictionary 1413 (5th ed. 1979), "[a]rising from one's own free will," The American Heritage Dictionary 1436 (1980).

We hold that plaintiff left her work involuntarily. In ruling to the contrary, the Commission misapplied the law to the facts. An employee does not leave work voluntarily when the termination is caused by events beyond the employee's control or when the acts of the employer caused the termination. *In re Poteat v. Employment Security Comm.*, 319 N.C. 201, 353 S.E. 2d 219. Here the acts of the employer in removing the plant eleven miles to Whitlock caused plaintiff to be unable to continue her employment. Singer, by moving its plant, caused plaintiff's commuting distance to be increased fifty percent and in effect destroyed plaintiff's ability to go from her home to the job site. The moving of the plant was beyond the plaintiff's control. Her leaving work was in response to the removal of the plant by Singer and not an act of her own free will. Thus, the external motivating factor

causing the termination of plaintiff's employment was not of her own doing but done by Singer for its own benefit. All the evidence was to the effect that plaintiff wanted to continue to work for Singer but, despite her best efforts, could not physically or economically do so.

The policy of our state is that the compulsory reserves required by the statute "be used for the benefit of persons unemployed through no fault of their own." N.C.G.S. § 96-2. Plaintiff is such a person. The employer has failed to carry its burden under the law that plaintiff is disqualified from receiving benefits.

Other jurisdictions have reached the same result in analogous cases. *E.g., Guillory v. Office of Employment Sec.*, 525 So. 2d 1197 (La. App. 1988) (employee forced to travel more than fifty miles round trip after employer relocated plant had "good and legal" cause for leaving work); *Ross v. Rutledge*, 338 S.E. 2d 178 (W.Va. 1985) (employer's removal of work site an additional distance of 19.8 miles constituted substantial unilateral change in conditions of employment creating compelling reasons for claimant's terminating employment); *Bingham v. Am Screw Products*, 398 Mich. 546, 248 N.W. 2d 537 (1976) (where Kentucky worker left Michigan job because of inadequate housing, he was not later disqualified for unemployment benefits when he declined job offer from the Michigan employer because the job was too far from his Kentucky residence); *Matter of Smith*, 267 A.D. 468, 46 N.Y.S. 2d 774 (1944) (claimant entitled to benefits when her homeworker's certificate not renewed and she had no transportation to factory thirteen miles away); *Industrial Com. v. Para*, 111 Colo. 69, 137 P. 2d 405 (1943) (miners entitled to unemployment benefits when mine closed by employer and work offered at another site 175 miles away).

Having resolved this appeal upon the "voluntariness" prong of the test to determine disqualification for unemployment benefits, we do not find it necessary to discuss the second prong of "good cause attributable to the employer." The decision of the Court of Appeals is reversed and this cause is remanded to that court for remand to the Employment Security Commission for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Justice MEYER, dissenting.

I am unable to agree with the majority's statement that "[t]he employer has the burden to show that the claimant is disqualified from recovering benefits." The statement comes from *Intercraft Industries Corp. v. Morrison*, 305 N.C. 373, 376, 289 S.E. 2d 357, 359 (1982), a 4 to 3 opinion which cites as its authority a 1954 decision in the Pennsylvania intermediate court of appeals, *Kelleher Unempl. Compensation Case*, 175 Pa. Super. 261, 104 A. 2d 171 (1954). The same Pennsylvania court, in a case decided subsequently, seriously criticized the decision in *Kelleher* and in fact held that "[t]here is no burden upon the employer to establish ineligibility." *Gagliardi Unempl. Compensation Case*, 186 Pa. Super. 142, 153, 141 A. 2d 410, 416 (1958). The court explained in *Gagliardi* the intent of its earlier language in *Kelleher:*

> In *Kelleher Unemployment Compensation Case*, it was said that the burden is upon the employer to show circumstances which would bring a claimant under the condemnation of the disqualifying provisions of the Unemployment Compensation Act. This is true only in the sense that without evidence to the contrary, it is to be assumed that the disqualifying provisions are not applicable. There is no burden upon the employer to establish ineligibility.

Id. (citation omitted).

In another case decided by the same court in the same year, the court said:

> [Claimant] argues that the employer has the burden of rebutting the presumption that the employe is entitled to benefits, relying on *Kelleher Unemployment Compensation Case*, 175 Pa. Superior Ct. 261, 104 A. 2d 171. However, that case was criticized in *Gagliardi Unemployment Compensation Case*, 186 Pa. Superior Ct. 142, 143 A. 2d 410, wherein Judge Woodside said: "There is no burden on the employer to establish ineligibility". Rather, it is the duty of the unemployment compensation authorities to fairly develop all the relevant facts.

Davis Unempl. Compensation Case, 187 Pa. Super. 116, 118, 144 A. 2d 452, 454 (1958) (citation omitted).

The Pennsylvania Superior Court which decided this case apparently no longer hears appeals in unemployment compensation cases, and the appellate jurisdiction in such cases has been transferred to the Commonwealth Court of Pennsylvania. Several cases more recently decided by the Commonwealth Court of Pennsylvania are instructive. In *Lee v. Unempl. Comp. Bd. of Review*, 42 Pa. Commw. 461, 401 A. 2d 12 (1979), the claimant was held to have voluntarily quit her job when she did not return to work after the employer relocated its plant a distance of eleven miles (the same distance as in the case at bar). In *McCann v. Unempl. Comp. Bd. of Review*, 35 Pa. Commw. 628, 386 A. 2d 1086 (1978), the court affirmed a decision disqualifying a claimant who was held to have voluntarily quit his job rather than commute thirty-six miles to a new job site after the employer relocated.

A few decisions by our Court of Appeals have held, as does the majority in this case, that the burden is on the employer to show that the claimant is disqualified to recover benefits. *See, e.g., McGaha v. Nancy's Styling Salon*, 90 N.C. App. 214, 368 S.E. 2d 49, *disc. rev. denied*, 323 N.C. 174, 373 S.E. 2d 110 (1988); *Umstead v. Employment Security Commission*, 75 N.C. App. 538, 331 S.E. 2d 218, *disc. rev. denied*, 314 N.C. 675, 336 S.E. 2d 853 (1985).

In my opinion, there is no burden on the employer to prove that an employee is disqualified to receive benefits, nor should there be. It makes little sense to cast the burden on the employer to prove a negative. The burden should be upon the party who is in the best position to prove the matter in question. Here, it is the claimant who can best prove the crucial fact, not yet established in this case, that transportation to the new plant site is, in a practical sense, unavailable to her. It is impractical to place upon the employer the burden of showing, for instance, what efforts the claimant has made to find someone else with whom to ride; or that the claimant does not have, and is practically unable to obtain, the financial resources to pay someone to take her back and forth to work; or that she cannot buy a car; or that she cannot obtain a driver's license.

It is only infrequently that justice tolerates an uneven playing field for parties to a legal controversy. A rule which tilts the scales in favor of either the claimant or the employer was never

intended by our legislature when it enacted the Unemployment Compensation Act. The fairer and therefore better rule was enunciated by the Pennsylvania court in *Gagliardi Unempl. Compensation Case*, 186 Pa. Super. 142, 153, 141 A. 2d 410, 416, as follows:

> It is the duty of the employer and the employe to present the relevant facts to the unemployment compensation officials truthfully and accurately, and then it is for those officials to determine the eligibility of the claimant. It is the duty of the board to develop all the relevant facts, regardless of whether or not such facts are presented voluntarily by the claimant and the employer . . . .

Such should be the rule in this state, and this Court should announce it to be so.

Neither before the Appeals Referee nor the Commission did the claimant argue that she had quit her job involuntarily (the basis upon which the majority has decided the case). Instead, claimant argued that she quit work with good cause attributable to the employer. The focus of the hearing in this case seems to have been whether alternative transportation to the new work place was reasonably available to the claimant. The facts established at the hearing before the Commission do not permit the claimant to recover under the facts of this case. The Commission made no finding on the crucial question of whether transportation was unavailable to the claimant. This is not at all surprising, as it has not been established, for instance, that the claimant has made reasonable efforts to find another ride, that claimant is unable to hire her brother-in-law (or someone else) to drive her to and from the new plant location, that she is unable to obtain a driver's license, or that she cannot buy a car. The failure to establish such facts means that, at least at this point, it has not been established that the claimant is unable, in a practical sense, to reasonably continue her work at the new work place, which is only eleven more miles distant than the old work place.

I vote to affirm the Court of Appeals. As an alternative, I would remand this case to the Commission to the end that it make proper findings as to whether other means of transportation either were or were not reasonably available to the claimant.

Justice MITCHELL joins in this dissenting opinion.

GEORGE L. PROCTOR, ADMINISTRATOR OF THE ESTATE OF JOYCE BATTS PROCTOR v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY AND BOBBY F. JONES, ADMINISTRATOR C.T.A. OF THE ESTATE OF WILLIAM GRAY EDWARDS, JR.

No. 384A88

(Filed 2 March 1989)

Insurance § 69.1— required underinsured motorist coverage—failure of policy to state existence or amount—coverage equal to liability coverage

Where an insurer failed to comply with former N.C.G.S. § 20-279.21(b)(4) (1983) and an automobile liability policy in which underinsured motorist coverage was required because the insured had not rejected such coverage did not state the existence or amount of such coverage, the statute required underinsured motorist coverage equal to the maximum liability coverage provided by the policy.

Justice MEYER dissenting.

APPEAL of right pursuant to N.C.G.S. § 7A-30 of the decision of a divided panel of the Court of Appeals, 90 N.C. App. 746, 370 S.E. 2d 258 (1988), affirming a judgment entered by *Wright, J.*, in the Superior Court, EDGECOMBE County, on 2 November 1987. Heard in the Supreme Court on 15 November 1988.

Bridgers, Horton & Rountree, by Charles S. Rountree, for the plaintiff appellee.

Poyner & Spruill, by Diane Dimond and Mary Beth Forsyth Johnston, for the defendant appellant.

MITCHELL, Justice.

The sole question presented by this appeal is what amount of underinsured motorist coverage is required by law when an insurer has not complied with N.C.G.S. § 20-279.21(b)(4) and the liability insurance policy in which the underinsured motorist coverage is required does not state the existence or the amount of such coverage. The trial court and the majority in the Court of Appeals concluded that under such circumstances the statute, as

it was written at the time relevant to this case,[1] required underinsured motorist coverage equal to the maximum liability coverage provided by the policy. We affirm.

The facts controlling this case were stipulated by the parties in the trial court. The plaintiff's decedent, Joyce Batts Proctor, was killed in a traffic accident on 27 September 1984 while driving a van owned by Country Manor Antiques, a partnership in which she was a partner. The wrongful death of the plaintiff's decedent was caused by the negligence of William Gray Edwards, Jr., who was driving another vehicle involved in the accident. Edwards was covered by a liability insurance policy with maximum coverage limits of $25,000 per person and $50,000 per accident. The plaintiff's decedent was covered by a policy issued to Country Manor Antiques by the defendant, North Carolina Farm Bureau Mutual Insurance Co., with maximum liability coverage limits for wrongful death of $100,000 per person and $300,000 per accident, as well as uninsured motorist coverage.

Neither Country Manor Antiques nor the plaintiff's decedent had ever rejected underinsured motorist coverage in the policy issued by the defendant, as required by N.C.G.S. § 20-279.21(b)(4) if underinsured motorist coverage was not to be provided. The defendant had written the policy with a clause purportedly requiring that the insured request underinsured motorist coverage before it would be provided. The defendant now concedes that the clause contradicted N.C.G.S. § 20-279.21(b)(4) and that, by operation of the statute, underinsured motorist coverage was provided in its policy covering the plaintiff's decedent, even though premiums had never been paid for such coverage.

The plaintiff, George L. Proctor, administrator of Joyce Proctor's estate, sued the defendant insurance company for proceeds from the underinsured motorist coverage provided in its policy by

1. At the time of this accident, the statute provided in pertinent part:

> [Motor vehicle liability insurance policies] shall . . . provide underinsured motorist coverage, to be used only with policies that are written at limits that exceed those prescribed by subdivision (2) of this section and that afford uninsured motorist coverage as provided by subdivision (3) of this subsection, but *not to exceed* the policy limits for automobile bodily injury *liability* as specified in the owner's policy.

N.C.G.S. § 20-279.21(b)(4) (1983) (emphasis added).

operation of the statute. The trial court granted summary judgment for the plaintiff in the amount of $75,000. The plaintiff's wrongful death damages had been found to be in excess of $100,000. After determining that the $100,000 per person maximum liability coverage of the policy issued by the defendant was the amount of underinsured motorist coverage required by the statute, the trial court deducted from that amount Edwards' maximum liability coverage of $25,000 to arrive at the $75,000 that the defendant owed the plaintiff, such deduction also being provided for by the statute as it was then written.

The defendant contends that the statute as written at the time of the accident was not intended to provide the maximum amount of underinsured motorist coverage in cases such as this where the insurer failed to comply with the statute and the existence and amount of such coverage were not stated in the policy. The defendant contends that when underinsured motorist coverage was provided solely by operation of the former version of the statute, it was only provided at the minimum level of underinsured motorist coverage offered by the insurer at the time, which in this case would have been $50,000. That is particularly appropriate in this case, the defendant contends, because the insured had opted to purchase only the minimum amount of *uninsured* motorist coverage. Accordingly, the defendant argues that the trial court should have awarded the plaintiff only $25,000, after deducting Edwards' $25,000 liability limit from the $50,000 minimum underinsured motorist coverage offered by the defendant.

The language of the statute was not explicit as to the amount of underinsured motorist coverage required at the time of this accident. Absent the insured's rejection of such coverage, the statute as written at that time required underinsured motorist coverage in all insurance policies that provided more than the statutory minimum liability coverage and which included uninsured motorist coverage. The statute provided that the underinsured motorist coverage was "not to exceed" the policy limits for automobile bodily injury liability as specified in the owner's policy. The statute's only other reference to the amount of such coverage was in its formula for the limit of the insurer's payment under such coverage, the limit then being "only the difference between the limits of the liability insurance [of the underinsured motorist] that is applicable and the limits of the underinsured

motorist coverage as specified in the owner's policy." N.C.G.S. § 20-279.21(b)(4) (1983).[2]

In order to determine what level of coverage the statute as formerly written was intended to mandate under the circumstances of this case, we must look to the purpose of the statute and the needs it was intended to address. The purpose of this State's compulsory motor vehicle insurance laws, of which the underinsured motorist provisions are a part, was and is the protection of innocent victims who may be injured by financially irresponsible motorists. *See Nationwide Mutual Insurance Co. v. Chantos*, 293 N.C. 431, 238 S.E. 2d 597 (1977).

The innocent plaintiff's damages in this case were in excess of $100,000, of which only $25,000 was recoverable (the plaintiff actually recovered less) from the liability coverage of the underinsured motorist who caused the accident. The defendant insurance company, which created the ambiguity confronting us in this case by its failure to comply with the statute, asks this Court to resolve the ambiguity in its favor. That would provide the plaintiff with an additional $25,000—$50,000 underinsured motorist coverage, less the $25,000 liability limit of the underinsured motorist's policy—leaving in excess of $50,000 in damages uncompensated by operation of the statute.

Under the plaintiff's interpretation of the statute's requirements at the time of the accident, adopted by the trial court and the Court of Appeals, the statute would provide $100,000 of underinsured motorist coverage—an amount equal to the liability coverage in the defendant's policy—for the death of this innocent victim of a tortfeasor who was financially unable to make full compensation. Thus, the general purpose of the statute would be served better and more fully by the plaintiff's interpretation. Furthermore, such an interpretation is consistent with the principle that the remedial compulsory motor vehicle insurance statutes

2. The statute's ambiguity as to the amount of underinsured motorist coverage to be mandated under all circumstances, including when the policy does not comply with the statute as in this case, has now been clarified by the legislature. Subsection (b)(4) was amended effective 1 October 1985 to require in all cases that underinsured motorist coverage be "in an amount *equal to* the policy limits for automobile bodily injury liability as specified in the owner's policy." N.C.G.S. § 20-279.21(b)(4) (Cum. Supp. 1988) (emphasis added).

should be liberally construed to accomplish the beneficial purpose intended by the legislature. *See Moore v. Hartford Fire Insurance Co.*, 270 N.C. 532, 155 S.E. 2d 128 (1967).

As pointed out by the Court of Appeals, the legislature made the level of underinsured motorist coverage a function of *liability coverage*, not a function of *uninsured coverage* as urged by the defendant. 90 N.C. App. at 748, 370 S.E. 2d at 259. This is true under both the former version of the statute, which provided that underinsured motorist coverage would not exceed liability coverage, and under the current statute, which expressly provides that the limits of the two coverages are to be equal. This statutory relationship between underinsured motorist and liability coverages is further evidence that the former version of the statute, under these circumstances, was intended to provide compensation to the innocent victim in an amount up to the limit of the liability coverage in the defendant's policy covering the victim —the only limit on underinsured motorist coverage found in the statute as it was then written.

Unless they expressly say so, amendments to statutes are not *necessarily* clarifications of legislative intent. Nevertheless, the fact that the legislature has amended N.C.G.S. § 20-279.21(b)(4) since the accident in this case to mandate underinsured motorist coverage *equal to* liability coverage in all cases is some additional evidence that the statute's general purpose, which has not been changed, is best served when the statute is interpreted to provide the innocent victim with the fullest possible protection. That calls for underinsured motorist coverage up to the limit of the liability coverage.

The defendant in this case must be held responsible for issuing a policy that purported to include requirements that violated the provisions of N.C.G.S. § 20-279.21(b)(4) regulating critical aspects of the defendant's business. The defendant admits its responsibility for failing to comply with the statute. The defendant nevertheless asks this Court to give the statute a construction that would result in the least possible protection for the innocent victim of an underinsured tortfeasor, such result arising from the ambiguity created by the defendant's violation of the statute by failing to write underinsured motorist coverage into the policy. This would undermine the intent and purpose of the

statute, and we reject the construction of the statute proposed by the defendant.

For the foregoing reasons, we conclude that under the circumstances of this case, the statute as written at the time of the accident required that the victim of an underinsured tortfeasor have underinsured motorist coverage equal to the liability limits of the policy covering the victim, unless the victim had rejected such coverage. N.C.G.S. § 20-279.21(b)(4) (1983). Therefore, we affirm the decision of the Court of Appeals, which affirmed the trial court's summary judgment for the plaintiff in the amount of $75,000.

Affirmed.

Justice MEYER dissenting.

Underinsured motorist coverage is not required by law, since the insured may reject it. The repealed statute that governs this case, as well as the current statute, requires that the carrier offer underinsured coverage only to the holders of liability policies which exceed the minimum compulsory amounts of liability insurance. Even the currently effective statute, which provides that underinsured coverage must be offered in the amount of the upper limits of the owner's liability policy, does not *require* the motorist to carry such insurance since he may reject the same simply by electing not to purchase the coverage.

I agree with the majority that, because of the erroneous language in its policy, Farm Bureau should be held to have provided underinsured motorist coverage in this case. I differ from the majority as to the amount of coverage applicable. In my opinion, Farm Bureau should be held to have provided $50,000 in underinsured coverage for the death of the plaintiff's decedent, which, after the $25,000 credit for sums recovered from the tort-feasor, would leave a net liability of $25,000.

Recovery in this additional amount of $25,000 does equity in this case. It cannot be said that Mrs. Proctor had an expectation of receiving the higher coverage. The statute in effect at the time the policy was purchased certainly did not explicitly so provide. Nor can any such expectation have arisen from the words of the policy. Though the policy provisions relating to underinsured cov-

erage were totally erroneous, they served specifically to notify the insured that the policy did not provide any underinsured coverage at all. Nor can any such expectation be said to have arisen from any inquiry made to the company by the insured. The erroneous policy provisions clearly informed the insured that if underinsured coverage was desired, she should make inquiry of her agent, and she made no such inquiry. Nor can any such expectation be said to have arisen from the fact that the insured purchased more than the minimum amount of *un*insured coverage, because she did not. No evidence whatsoever has been produced which would suggest that the insured wanted or expected higher underinsured limits than the required minimum compulsory liability coverage.

While the statute has now been amended to specifically tie the amount of underinsured coverage to the amount of the liability coverage purchased by the insured and while there are probably only a few cases yet to be decided under the old statute, it is important to decide this case correctly. I vote to reverse the decision of the Court of Appeals.

STATE OF NORTH CAROLINA v. JAMES THURMAN WOODARD

No. 331A88

(Filed 2 March 1989)

1. Homicide § 18 — murder — premeditation and deliberation — evidence sufficient

The court did not err in a prosecution for first degree murder by denying defendant's motion to dismiss, based on allegedly insufficient evidence of premeditation and deliberation, where there was evidence of prior threats, that defendant had searched for the victim and followed her home after waiting for her outside a hotel, had long disapproved of the victim seeing other men, and the victim did not strike or shout at the defendant just prior to the shooting and in fact had her back to defendant and was walking away.

2. Homicide § 27.1 — murder — sudden passion — not sufficient for charge on manslaughter

The trial court did not err in a prosecution for first degree murder by denying defendant's request for an instruction on manslaughter on the theory that defendant killed the victim in the heat of passion where there was no evidence that the sudden passion was produced by adequate provocation. The fact that the victim, who was not the defendant's spouse, was dating other

men was not adequate provocation to reduce this homicide from murder to manslaughter.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment entered by *Barnette, J.*, at the 28 March 1988 Criminal Session of Superior Court, WAKE County, sentencing defendant to life imprisonment upon his conviction by a jury of murder in the first degree. Heard in the Supreme Court 15 November 1988.

Lacy H. Thornburg, Attorney General, by G. Lawrence Reeves, Associate Attorney General, for the State.

Johnny S. Gaskins for defendant-appellant.

FRYE, Justice.

In a non-capital trial, defendant was convicted of murder in the first degree and sentenced to life imprisonment. He contends that the trial court erred by denying his motion to dismiss the charge of murder in the first degree and by refusing to instruct the jury on the lesser included offense of voluntary manslaughter. We find no error in defendant's trial.

The evidence for the State tended to show the following: Defendant and the victim, Elizabeth Langley Poole, also known as Sue Poole, dated periodically during the year preceding the victim's death. The victim also dated other men during this time and defendant occasionally made threats toward her and the other men she dated. Defendant was jealous of these other men and did not want the victim to see them. The victim's sister testified that during the last few months of the victim's life defendant stated that he loved the victim "better than anything that he had seen on this earth and he said that if he couldn't have her, nobody else would; that he would see her dead in hell first . . . ." On another occasion, in the sister's presence, defendant threatened to kill both the victim and her ex-husband, whom she was dating, if he caught them together in the ex-husband's trailer. Another witness, Susan Ramey, who dated the defendant from December 1986 until February 1987, testified that on several occasions defendant told her "if he could not have Sue Poole that no one would have her."

The State's evidence further indicates that on the evening of 23 September 1987, around 9:15 p.m., the victim went to the Sheraton Hotel with a man. She told her nephew to tell defendant, if he called, that she was asleep. Defendant later called around 9:45 p.m., but did not believe the victim was at home and asleep. He drove to the victim's house and noticed that her car was not there. He suspected she was with another man. He then rode to the Sheraton Hotel and waited after noticing the victim's car. Defendant then followed the victim home. The two cars were traveling fast and arrived at the victim's home around 11 p.m. The victim and defendant talked in her yard. The victim's niece testified that she could not hear everything that was said, but could tell that the victim was telling defendant she did not want to see him again, not to call her, and that she wanted him to leave her alone.

Defendant led the victim to a flower bed a few feet away. He grabbed her arm, and she tried to pull away. Defendant put his arm around her and hugged and kissed her. She pulled away, turned her back to defendant, and appeared to be coming towards her nephew and niece who were on the porch. Defendant then shot the victim in the back of the head killing her.

Defendant testified that he removed a pistol from the victim's automobile while it was parked in front of the Sheraton Hotel; that he placed the pistol in his truck and followed the victim to her home; that he shot the victim because he was upset with her and jealous; and that he loved her and did not intend to harm her.

[1] Defendant first contends that the trial court committed prejudicial error by refusing to dismiss the charge of murder in the first degree since there was insufficient evidence to support a conviction on this charge.

Because defendant introduced evidence in his own behalf, he waived his motion to dismiss made at the close of the State's evidence. N.C.G.S. § 15-173 (1983); *State v. Bullard*, 312 N.C. 129, 322 S.E. 2d 370 (1984). We, therefore, only consider defendant's motion to dismiss at the close of all the evidence. *See State v. Leonard*, 300 N.C. 223, 266 S.E. 2d 631 (1980).

The applicable law regarding a defendant's motion for dismissal has been discussed previously by this Court:

> 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).

State v. Bullard, 312 N.C. 129, 160, 322 S.E. 2d 370, 387.

Defendant was charged with and convicted of murder in the first degree. Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. *State v. Judge*, 308 N.C. 658, 303 S.E. 2d 817 (1983). Defendant contends that there was insufficient evidence of premeditation and deliberation to submit murder in the first degree to the jury. Premeditation is defined as thought beforehand for some length of time, however short. *State v. Myers*, 299 N.C. 671, 263 S.E. 2d 768 (1980). Deliberation

> imports the execution of an intent to kill in a cool state of blood without legal provocation, and in furtherance of a fixed design . . . . An unlawful killing is deliberate and premeditated if done pursuant to a fixed design to kill, notwithstanding that defendant was angry or in an emotional state at the time, unless such anger or emotion was such as to disturb the faculties and reason.

Id. at 677, 263 S.E. 2d at 772-73. Moreover, it must be remembered that:

> Ordinarily, premeditation and deliberation must be proved by circumstantial evidence. Some circumstances to be considered are: "(1) want of provocation on the part of the deceased, (2) conduct and statements of the defendant before and after the killing, (3) threats made against the victim by defendant, (4) ill will or previous difficulty between the parties, and (5) evidence that the killing was done in a brutal manner." *State v. Calloway*, 305 N.C. 747, 751, 291 S.E. 2d 622, 625-26 (1982).

State v. Saunders, 317 N.C. 308, 312-13, 345 S.E. 2d 212, 215 (1986).

In applying the foregoing principles of law to the facts in the instant case, we find no error in the trial court's refusal to grant defendant's motion to dismiss at the close of all the evidence. There was evidence of prior threats and evidence that defendant searched for the victim and followed her home after he waited for the victim outside a hotel. Ill will or previous difficulty between defendant and the victim was shown by the evidence that defendant had long disapproved of the victim's seeing other men. Lack of provocation on the part of the victim was shown by evidence that the victim did not strike or shout at defendant just prior to the shooting. In fact, the victim had her back to defendant and was walking away. The circumstantial evidence, taken in the light most favorable to the State, was clearly sufficient to take the case to the jury on the essential elements of premeditation and deliberation. Thus, we reject defendant's first contention.

[2] In a written motion, defendant requested that the jury be instructed on the possible verdict of guilty of manslaughter on the theory that defendant killed the victim in the heat of passion

caused by provocation adequate to negate the element of malice. The trial judge denied the motion and submitted possible verdicts of murder in the first or second degree or not guilty. Defendant now contends that the trial judge erred by not submitting a possible verdict of voluntary manslaughter for consideration by the jury.

"One who kills a human being under the influence of sudden passion, produced by adequate provocation, sufficient to negate malice, is guilty of manslaughter." *State v. Robbins*, 309 N.C. 771, 777, 309 S.E. 2d 188, 191 (1983). Voluntary manslaughter is a lesser included offense of murder in the first degree. *State v. Jones*, 299 N.C. 103, 261 S.E. 2d 1 (1980). A jury must be instructed on a lesser included offense only when evidence has been introduced from which the jury could properly find that the defendant had committed the lesser included offense. *State v. Jones*, 291 N.C. 681, 231 S.E. 2d 252 (1977).

Assuming *arguendo* that there was some evidence from which a jury could find that defendant acted under a sudden heat of passion when he shot the victim, merely acting under the heat of passion is not enough to negate malice so as to reduce murder to manslaughter. Such sudden heat of passion must arise upon what the law recognizes as adequate provocation. *See State v. Ward*, 286 N.C. 304, 210 S.E. 2d 407 (1974), *death penalty vacated mem.*, 428 U.S. 903, 49 L.Ed. 2d 1207 (1976) (trial court correctly refused to charge on voluntary manslaughter where defendant killed her boyfriend of three years while he was entertaining her rival in the den of his home on an evening when he had invited defendant to visit). In the instant case, the fact that the victim, who was not defendant's spouse, was dating other men is not adequate provocation to reduce this homicide from murder to manslaughter. Since there was no evidence from which the jury could properly find that defendant killed the victim while under the influence of sudden passion, *produced by adequate provocation*, sufficient to negate malice, the trial judge did not err in refusing to instruct the jury that it could find the defendant guilty of voluntary manslaughter. In defendant's trial we find

No error.

STATE OF NORTH CAROLINA v. EDWARD FRANKLIN BALL

No. 250A88

(Filed 2 March 1989)

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

The State's evidence of premeditation and deliberation was sufficient to support defendant's conviction of first degree murder of his estranged wife where it tended to show that at 10:00 a.m. on the day of the shooting, defendant decided to kill his wife and himself; he wrote a letter to the wife's mother saying that he had made up his mind "to be with her forever," meaning that he was going to kill his wife and himself; defendant met his wife that afternoon and was carrying a loaded semi-automatic pistol when he got into her car; he removed the gun from his pocket and told her that he was going to kill them both; some time later, the wife jumped from the car and ran into a nearby hospital, screaming that defendant had a gun and was going to shoot her; as the wife crouched behind a desk, begging him not to shoot her, defendant fired at least three shots into her back, pausing between shots; and when defendant surrendered to the police, he told them that he was the one who had shot his wife.

2. **Criminal Law § 89.2; Constitutional Law § 75— post-arrest statements—testimony by defendant required before admission—self-incrimination—harmless error**

The trial court in a murder case did not err in the denial of defendant's request to admit his post-arrest statements to the police prior to his testimony because there is no right to corroboration in advance of the testimony of a witness. Even if the trial court infringed upon defendant's Fifth Amendment right against self-incrimination by requiring him to testify as a prerequisite to introducing his statement, the error was harmless beyond a reasonable doubt where the record shows that defendant wanted and intended to testify; defendant got both his post-arrest statement and his testimony before the jury; and defendant has not shown how a different order of presentation, or the admission of his statement as substantive rather than corroborative evidence, would have aided his case.

3. **Homicide § 25— first degree murder—failure to give requested instructions—pattern jury instructions sufficient**

The trial court in a first degree murder case did not err by failing to give defendant's requested instructions on malice, intent to kill, and premeditation and deliberation where the court gave defendant's requested instructions in substance by giving the pattern jury instructions on those elements of first degree murder.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) (1986) from the imposition of a sentence of life imprisonment upon his

conviction of first degree murder before *Stephens, J.*, at the 19 January 1988 Criminal Session of Superior Court, WAKE County. Heard in the Supreme Court 13 February 1989.

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

Narley L. Cashwell and Cheryl M. Swart for defendant-appellant.

WHICHARD, Justice.

In a capital trial, defendant was convicted of the first degree murder of Joyce Ball. At the sentencing hearing, the jury found no aggravating circumstances and recommended a sentence of life imprisonment. We find no error.

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

Defendant and his wife, Joyce Ball, separated in April 1986. Defendant moved to Florida and Ms. Ball continued to live in Wake County with their child.

Around 19 October 1986 defendant returned to Wake County looking for his wife. During the following week they talked on the telephone several times and they met to talk once. Defendant was upset and angry that she was living with another man.

On 24 October 1986, sometime after 5:30 p.m., witnesses saw Ms. Ball running across the parking lot of Raleigh Community Hospital. Defendant was running after her. Ms. Ball ran through the front door of the hospital. She screamed, "[C]all the police, call the police, help, help, oh, my God, he's got a gun and he's going to shoot me." She ran around a desk and crouched behind it, screaming, "[P]lease don't kill me, please don't shoot me, please, please." As she screamed, defendant held the gun with both hands, pointed it at her back and fired a shot. She screamed. Defendant fired three more shots into her back, pausing a couple of seconds between the shots. Ms. Ball died from bullet wounds to her heart.

Defendant left the hospital and went to a building under construction beside the hospital. During a police search of that building, defendant gave himself up to police officers. Defendant told the officers, "I'm the one you're looking for. I shot her."

Defendant made a post-arrest statement to police. He said that he made up his mind around 10:00 a.m. on the day of the shooting that he was going to kill his wife. He also said that at the time he and his wife were sitting in her car together he had made up his mind to kill her and then kill himself. Defense counsel introduced this statement at trial.

Defendant testified in his own behalf. He stated that he was upset and angry that his wife was living with another man. On 24 October 1986, at about 10:00 a.m., he decided to kill his wife and himself. He wrote a letter to Ms. Ball's mother saying, "I made my mind up to be with her forever." He testified that he meant by this that he planned to kill his wife and kill himself.

Defendant testified that he met his wife at about 5:30 p.m. He had a loaded semi-automatic pistol in his back pocket and intended to kill her, then kill himself. Defendant and his wife parked their cars in the parking lot of Raleigh Community Hospital. Defendant got in his wife's car. After they had been in her car for a while, he took the pistol out of his pocket and told her that he intended to kill her and to kill himself. Defendant testified that they talked for about thirty to forty minutes and that he told her he could not kill her because he loved her and did not want things to end that way. Sometime thereafter, Ms. Ball jumped out of the car and ran. He ran after her into the hospital. Defendant testified that he shot her but did not intend to kill her.

[1] Defendant first contends that the trial court erred in failing to grant his motion to dismiss the first degree murder charge. He argues that the State's evidence failed to show premeditation and deliberation.

Premeditation and deliberation are necessary elements of first degree murder based upon premeditation and deliberation (rather than felony murder). *State v. Jackson*, 317 N.C. 1, 23, 343 S.E. 2d 814, 827 (1986), *vacated on other grounds*, 479 U.S. 1077, 94 L.Ed. 2d 133 (1987). Premeditation means that the defendant thought out the act beforehand for some length of time, however short. *Id.* "Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation." *Id.* The State may prove the elements of pre-

meditation and deliberation by circumstantial evidence as well as by direct evidence. *Id.* Among the circumstances to be considered in determining whether a defendant acted after premeditation and deliberation are the want of provocation by the victim, the defendant's conduct and statements before and after the killing, threats and declarations by the defendant before and during the course of the occurrence giving rise to the death of the victim, and the nature and number of the victim's wounds. *Id.*

The evidence in this case shows that at 10:00 a.m. on the day of the shooting defendant decided to kill the victim and himself. He wrote a letter to the victim's mother saying that he had made up his mind "to be with her forever," meaning that he was going to kill the victim and himself. Defendant met his wife that afternoon. He was carrying a loaded semi-automatic pistol when he got into her car. He removed the gun from his pocket and told her that he was going to kill them both. Sometime later, Ms. Ball jumped from the car and ran into the hospital, screaming that defendant had a gun and was going to shoot her. As she crouched behind a desk, begging him not to shoot her, defendant fired at least three shots into her back, pausing between shots. When defendant surrendered to police, he told them that he was the one who had shot her. This evidence is sufficient to support a jury finding of premeditation and deliberation. Therefore, the trial court did not err in denying defendant's motion to dismiss.

[2] Defendant next contends that the trial court erred in denying his request to admit his post-arrest statement to the police prior to his testimony. After the State presented evidence, the trial court considered defendant's request to introduce his post-arrest statement into evidence prior to defendant's taking the stand. Defense counsel stated:

> We intend to call the police officers first and put the statement in evidence, and then listen to the tapes, and what we will do from there we don't know, but we don't intend to call the defendant first, but I can assure the Court, as far as it can be assured, that the defendant is planning to testify. He wants to testify.
>
> I have no reason to believe he won't.

> As you know, and as everybody knows, . . ., it's his decision, but I have absolutely no reason to believe that he won't testify and I know at least at this point he wants to and we are planning to.

The court asked defendant whether he intended to testify in his own behalf. He answered "[y]es, sir." The court ruled that it would allow defendant's post-arrest statement to come in for corroborative purposes, but that defendant would have to testify prior to the admission of the statement.

Defendant argues that his post-arrest statement was admissible as substantive evidence under Rule 803(3) of the North Carolina Rules of Evidence. He also argues that by requiring him to testify as a prerequisite to introducing his statement, the court violated his Fifth Amendment right against self-incrimination.

This Court has held that "[t]here is no right to corroboration in advance" of the testimony of a witness. *State v. Hinson*, 310 N.C. 245, 256, 311 S.E. 2d 256, 264, *cert. denied*, 469 U.S. 839, 83 L.Ed. 2d 78 (1984). Even if defendant had that right, he has not shown prejudicial error. To show prejudicial error, defendant must show that there is a reasonable possibility that had the error not been committed, a different result would have been reached at trial. N.C.G.S. § 15A-1443(a) (1988); *State v. Martin*, 322 N.C. 229, 238-39, 367 S.E. 2d 618, 623-24 (1988). Defendant has not shown that a reasonable possibility exists that a different result would have been reached had he been allowed to introduce his statement before taking the stand. Further, even assuming that the court infringed upon defendant's Fifth Amendment right against self-incrimination, the error was harmless beyond a reasonable doubt. *See State v. Autry*, 321 N.C. 392, 400, 364 S.E. 2d 341, 346 (1988) (error infringing upon a defendant's constitutional rights entitles him or her to a new trial unless the error was harmless beyond a reasonable doubt). The record shows that defendant wanted to testify and intended to testify. The court did not force defendant to testify, nor did it refuse to allow him to introduce his post-arrest statement into evidence. Defendant got both his post-arrest statement and his testimony before the jury. He has not shown how a different order of presentation, or the admission of his statement as substantive rather than corrobora-

tive evidence, would have aided his case. His contention therefore has no merit.

[3] Finally, defendant contends that the trial court erred in its guilt phase instructions to the jury by failing to give defendant's requested instructions on malice, intent to kill, and premeditation and deliberation. The trial court instead gave the pattern jury instructions on these elements of first degree murder. *See* N.C.P.I. Crim. 206.10 (1987). Defendant does not argue that the instructions given were erroneous, but that his requested instructions are more complete and "in keeping with appellate authorities." We have held that a trial court is not required to give a requested instruction verbatim. Rather, when the request is correct in law and supported by the evidence, the court must give the instruction in substance. *State v. Avery*, 315 N.C. 1, 33, 337 S.E. 2d 786, 804 (1985); *State v. Monk*, 291 N.C. 37, 54, 229 S.E. 2d 163, 174 (1976). We have examined defendant's requested instructions and the instructions given here. Because the trial court gave defendant's requested instructions in substance, we find no error.

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

No error.

STATE OF NORTH CAROLINA v. HARVEY LEE GREEN, JR.

No. 385A84

(Filed 2 March 1989)

Constitutional Law § 60; Jury § 7.14— murder—hearing on use of peremptory challenges—defendant may present evidence—prosecutor may not be cross-examined

The trial court erred in an evidentiary hearing held in a first degree murder prosecution on the prosecutor's use of peremptory challenges by not allowing defendant to introduce evidence at the hearing, even though the State conceded that there was a prima facie case of purposeful discrimination. The court correctly ruled that defendant did not have the right to cross-examine the prosecutor.

State v. Green

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from judgments imposing two sentences of death entered by *Watts, J.*, at the 11 June 1984 Session of Superior Court, PITT County. Heard in the Supreme Court 11 February 1988; additional arguments heard 22 August 1988.

The defendant pled guilty to two counts of first degree murder and two counts of common law robbery. He was tried by a jury as to punishment and the jury recommended he be sentenced to die on both the murder convictions. Two death sentences were imposed and the defendant appealed.

Lacy H. Thornburg, Attorney General, by Joan H. Byers, Special Deputy Attorney General, for the State (original brief and argument); Lacy H. Thornburg, Attorney General, by James J. Coman, Senior Deputy Attorney General, William N. Farrell, Jr., Special Deputy Attorney General, Joan H. Byers, Special Deputy Attorney General, and Barry S. McNeill, Assistant Attorney General, for the State (supplemental brief and argument).

Malcolm Ray Hunter, Jr., Appellate Defender, by David W. Dorey, Assistant Appellate Defender, for defendant appellant (original brief and argument); Malcolm Ray Hunter, Jr., Appellate Defender, by David W. Dorey, Assistant Appellate Defender, and Louis D. Bilionis, Assistant Appellate Defender, for defendant appellant (supplemental brief and argument).

E. Ann Christian and Robert E. Zaytoun for North Carolina Academy of Trial Lawyers, amicus curiae.

John A. Dusenbury, Jr. for North Carolina Association of Black Lawyers, amicus curiae.

WEBB, Justice.

The defendant has brought forward twenty-three assignments of error. In this opinion we shall discuss one of them.

The defendant assigned error to the procedure used to determine an issue in regard to racial discrimination in the selection of the jury. After this case was tried the United States Supreme Court rendered its opinions in *Batson v. Kentucky*, 476 U.S. 79, 90 L.Ed. 2d 69 (1986) and *Griffith v. Kentucky*, 479 U.S. 314, 93 L.Ed. 2d 649 (1987). In *Batson* the United States Supreme Court over-

ruled *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 exercises of peremptory challenges at trial. *See State v. Jackson*, 322 N.C. 251, 368 S.E. 2d 838 (1988) for a more complete discussion of *Batson*. After the decision in *Batson*, this Court ordered the case remanded to the Superior Court of Pitt County for an evidentiary hearing on the issue of the prosecutor's use of peremptory challenges.

The court ruled at the hearing that the defendant would not be allowed to cross-examine the district attorney who prosecuted the case and that the defendant would not be allowed to put on evidence. The prosecuting attorney then explained his reasons for exercising peremptory challenges. The court made findings of fact and concluded that the district attorney's reasons for exercising peremptory challenges were racially neutral. The court denied the defendant's motion for a new trial.

We held in *Jackson* that the defendant does not have the right to cross-examine the prosecuting attorney at a *Batson* hearing. It was not error for the court not to allow such a cross-examination in this case.

We hold, however, that it was error for the court to deny the defendant the right to introduce evidence at the hearing. The State argues that because the State conceded there was a prima facie case of purposeful discrimination, there was nothing further for the defendant to prove. The State says that all that was left to do was for the prosecuting attorney to state his reasons for using the peremptory challenges which was done. The court could then accept or reject the reasons advanced by the district attorney.

We believe a *Batson* hearing should encompass more than contended by the State in this case. If the defendant can put on evidence which tends to rebut the State's contentions he should be allowed to do so. If the case for discrimination is stronger than can be shown by the pattern of strikes in the present case, the defendant should have the benefit of this showing. The State also argues that the defendant did not show he had any evidence which was relevant and no prejudice has been shown by the refusal to allow him to present evidence. The defendant's attorneys

offered affidavits at the hearing which contained the names of people they would call as witnesses on this issue. We hold the defendant should have been allowed to offer whatever evidence he may have had tending to rebut the State's contentions.

We remand the case to the Superior Court of Pitt County for a new hearing on the *Batson* issue. The superior court will make findings of fact and conclusions of law after this hearing and certify its order back to this Court. We shall then determine the defendant's other assignments of error if it is necessary to do so.

Remanded.

STATE OF NORTH CAROLINA v. HAROLD EUGENE McSWAIN

No. 354A88

(Filed 2 March 1989)

1. **Criminal Law § 75.9— murder—incriminating statement—findings support conclusion that statement voluntary and understanding**

The trial court's conclusion in a prosecution for first degree murder that defendant's pretrial statement to detectives was voluntary and understanding was supported by findings that defendant was fully advised of his constitutional rights, that he agreed to make a statement, and that he was not coerced by any threat or hope of reward to make a statement.

2. **Criminal Law § 164— murder—motion to dismiss—speedy trial not raised at trial—may not be asserted on appeal**

Defendant in a murder prosecution could not assert on appeal that his motion to dismiss should have been granted for speedy trial violations where defendant did not raise that issue at trial.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a life sentence entered by *Rousseau, J.*, at the 14 December 1987 Session of Superior Court, GUILFORD County. Heard in the Supreme Court 14 February 1989.

The defendant was tried for first degree murder. The evidence tended to show that just after midnight on 1 September 1986, Wade Hickman and Robin Brown Sauls were standing on a sidewalk in Greensboro. Dwayne Brooks, Michael Garner and Lisa Mebane were on the other side of the street. The defendant ap-

proached Brooks and asked if he knew the man standing across the street. Brooks replied in the negative. The defendant crossed the street and walked toward Hickman. Hickman told Robin Sauls to step back. The defendant then said to Hickman, "[M.F.], do you remember me passing you up on the street?" Hickman replied, "No, I don't know what you talking about." The defendant said, "Man, you know what I'm talking about." The defendant took a handgun out of his pocket, pointed it at Hickman's head and fired it. Hickman fell to the ground. This was witnessed by Robin Sauls and Dwayne Brooks. Michael Garner and Lisa Mebane heard the shot and saw Hickman fall. Hickman was dead when the police arrived.

Robin Sauls later picked the defendant's picture out of a photographic lineup. The defendant was arrested on 12 September, and confessed to the crime.

The jury found the defendant guilty of first degree murder. No evidence of aggravating circumstances was introduced and the defendant was sentenced to life in prison.

Lacy H. Thornburg, Attorney General, by David F. Hoke, Associate Attorney General, for the State.

E. Raymond Alexander, Jr. for defendant appellant.

WEBB, Justice.

[1] The defendant first assigns error to the court's denial of his motion to suppress his pre-trial statement to two detectives of the City of Greensboro Police Department. After a voir dire hearing on this motion to suppress, the court made the following findings of facts and conclusions of law:

> After hearing the evidence on voir dire offered by the State and the defendant, the Court makes the following findings of fact:
>
> That on September 12, 1986, at 12:33 p.m., the defendant was brought into the interrogation room of the Greensboro Police Department by Detective Schmidt and Detective Smith; that at that time, the defendant was advised that he had a right to remain silent, that anything he said would be used against him; that he had a right to talk with an at-

torney; if he could not afford an attorney, one would be appointed to represent him; and that if he wanted to make a statement, he could stop at any time he wanted to.

The defendant stated he had a ninth grade education, that he drank a six-pack of beer the night before; that the defendant was not under the influence at that time; that no promises were made to him; no threats were made;

During the interrogation, he was given food and allowed to go to the restroom;

That the defendant then signed a written waiver of his rights, stating that he understood his rights; that he did not want an attorney; and that he would make a statement;

That the officer then took a handwritten statement from the defendant; that after writing out the statement, the officer read the statement back to the defendant; that the defendant made some corrections on the statement and initialed it, and that the defendant signed the statement.

Based on the foregoing, the Court concludes that the defendant freely, voluntarily and knowingly waived his rights to an attorney, and voluntarily and knowingly agreed to make a statement; that the defendant in fact did make a statement to the police officers, that was recorded by the police officers; that the defendant did in fact sign that statement; and that the defendant did in fact sign the waiver of rights.

The Court further concludes that the statement given to the officers on September the 12th of 1986, shortly after 12:33 p.m., is admissible in the trial of this case.

The defendant does not argue that the findings of fact are not supported by the evidence. He does argue that the findings of fact do not support the conclusions of law that the defendant made his statement voluntarily and understandingly. We disagree.

The court found as facts that the defendant was fully advised of his constitutional rights, that he agreed to make a statement and that he was not coerced by any threat or hope of reward to make a statement. This supports a conclusion that the statement

was freely, voluntarily and understandingly made. *See State v. Bishop*, 272 N.C. 283, 158 S.E. 2d 511 (1968). This assignment of error is overruled.

[2] The defendant next assigns error to the court's denial of his motions to dismiss made at the close of the State's evidence and at the close of all the evidence. The defendant argues that these motions should have been granted because his rights under the Speedy Trial Act were violated. However, the defendant did not raise this issue at trial. At the close of the State's evidence, when the defendant moved to dismiss, the court asked if the motion was "[f]or failure of the State to make out a case?" The defendant answered in the affirmative, and stated that he did not want to be heard. At the close of all the evidence, the defendant merely renewed his earlier motion and indicated that he did not want to be heard. The defendant cannot now assert that the court erred in failing to dismiss the case for a violation of the Speedy Trial Act. In order for an appellant to assert a statutory or constitutional right on appeal, the issue must have been presented to the trial court. *State v. Horner*, 310 N.C. 274, 311 S.E. 2d 281 (1984). Other than the most fundamental error, "no . . . error ought to be the subject of appellate review unless it has been first suggested to the trial judge in time for him to avoid it or to correct it . . . ." Rule 10(a), N.C. Rules of Appellate Procedure (commentary). This assignment of error is overruled.

In the trial we find

No error.

JAMES W. FOSTER v. BARBARA DANIEL FOSTER

No. 285PA88

(Filed 2 March 1989)

ON discretionary review of the decision of the Court of Appeals, 90 N.C. App. 265, 368 S.E. 2d 26 (1988), affirming the judgment entered by *Fuller, J.*, in District Court, DAVIE County, on 16 September 1987. Heard in the Supreme Court 13 February 1989.

Petree, Stockton & Robinson, by Kenneth S. Broun, Lynn P. Burleson and Barbara E. Brady, for the plaintiff-appellee.

Martin and Van Hoy, by Henry P. Van Hoy, II and G. Wilson Martin, Jr., for the defendant-appellant.

PER CURIAM.

Discretionary review improvidently allowed.

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

ALSTON v. MONK

No. 565P88.

Case below: 92 N.C. App. 59.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 2 March 1989.

BEAM v. BEAM

No. 33A89.

Case below: 92 N.C. App. 509.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues allowed 2 March 1989.

BRANDT v. BRANDT

No. 75A89.

Case below: 92 N.C. App. 438.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues allowed 2 March 1989.

BROOKS v. BROOKS

No. 51P89.

Case below: 92 N.C. App. 598.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 March 1989.

CLARK v. DICKSTEIN

No. 9P89.

Case below: 92 N.C. App. 207.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 2 March 1989.

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

HARWOOD v. JOHNSON

No. 37PA89.

Case below: 92 N.C. App. 306.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 2 March 1989. Petitions by defendant Williams for discretionary review pursuant to G.S. 7A-31 and for writ of supersedeas allowed 2 March 1989.

IN RE APPROVAL OF A CERTIFICATE OF NEED FOR QUALITY CARE HOME HEALTH

No. 586P88.

Case below: 92 N.C. App. 114.

Motion by Dept. of Human Resources to dismiss appeal by FCHDHHA for lack of significant public interest allowed 2 March 1989. Petition by FCHDHHA for discretionary review pursuant to G.S. 7A-31 denied 2 March 1989.

KNIGHT v. KNIGHT

No. 493P88.

Case below: 91 N.C. App. 444.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 March 1989.

MEYERS v. DEPT. OF HUMAN RESOURCES

No. 84P89.

Case below: 92 N.C. App. 193.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 March 1989. Petition by defendant for writ of supersedeas and temporary stay denied 2 March 1989.

MILAM v. MILAM

No. 575P88.

Case below: 92 N.C. App. 105.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 March 1989.

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

MONTGOMERY v. BRYANT SUPPLY CO.

No. 570P88.

Case below: 91 N.C. App. 734.

Petition by plaintiffs Holiday and Edwards for discretionary review pursuant to G.S. 7A-31 denied 2 March 1989.

SELECTIVE INS. CO. v. NCNB

No. 544A88.

Case below: 91 N.C. App. 597.

Petition by State of N. C. for writ of certiorari to the North Carolina Court of Appeals denied 2 March 1989.

SHREVE v. DUKE POWER

No. 545P88.

Case below: 91 N.C. App. 586.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 2 March 1989 for the limited purpose of entering the following order. The decision of the Court of Appeals dismissing the appeal is reversed, and the cause is remanded to the Court of Appeals for consideration of the appeal on the merits.

SIGMON v. TIMMERMAN INS. SERVICE

No. 44P89.

Case below: 92 N.C. App. 382.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 March 1989.

STATE v. ATTMORE

No. 68P89.

Case below: 92 N.C. App. 385.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 March 1989.

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

STATE v. CANNON

No. 21A89.

Case below: 92 N.C. App. 246.

Petition by defendant Cannon for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues denied 2 March 1989. Motion by the State to dismiss appeal by defendant Cannon for lack of significant public interest denied 2 March 1989.

Motion by the State to dismiss appeal by defendant Redmon for lack of substantial constitutional question allowed 2 March 1989. Petition by defendant Redmon for discretionary review pursuant to G.S. 7A-31 allowed as to sentencing issue only 2 March 1989.

STATE v. COLVIN

No. 11P89.

Case below: 92 N.C. App. 152.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 March 1989.

STATE v. DAVIS

No. 100A89.

Case below: 92 N.C. App. 627.

Petition by Attorney General for temporary stay allowed 28 February 1989.

STATE v. DILLINGHAM

No. 25P89.

Case below: 92 N.C. App. 596.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied and stay dissolved 2 March 1989.

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

STATE v. GRAY

No. 88P89.

Case below: 92 N.C. App. 245.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 2 March 1989.

STATE v. HENDERSON

No. 12P89.

Case below: 92 N.C. App. 245.

Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 2 March 1989. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 March 1989.

STATE v. KEARNEY

No. 83P89.

Case below: 92 N.C. App. 599.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 March 1989.

STATE v. PARKER

No. 583P88.

Case below: 92 N.C. App. 102.

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 2 March 1989.

STATE v. STETSON

No. 24P89.

Case below: 92 N.C. App. 597.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 March 1989.

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

STATE v. VANDIVER

No. 101P89.

Case below: 92 N.C. App. 695.

Petition by Attorney General for temporary stay allowed 28 February 1989.

STATE v. WILLIAMS

No. 99P89.

Case below: 92 N.C. App. 752.

Petition by Attorney General for temporary stay allowed 28 February 1989. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 2 March 1989. Petition by Attorney General for writ of supersedeas denied and temporary stay dissolved 2 March 1989.

STATE EX REL. RHODES v. GASKILL

No. 548PA88.

Case below: 91 N.C. App. 639.

Motion by defendant to dismiss appeal for lack of substantial constitutional question denied 2 March 1989. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 2 March 1989.

STATE EX REL. RHODES v. SIMPSON

No. 525PA88.

Case below: 91 N.C. App. 517.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 2 March 1989.

TELEPHONE SERVICES, INC. v.
GENERAL TELEPHONE CO. OF THE SOUTH

No. 585P88.

Case below: 92 N.C. App. 90.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 March 1989.

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

WEAVER v. EARLY

No. 581PA88.

Case below: 92 N.C. App. 115.

Petition by several defendants for discretionary review pursuant to G.S. 7A-31 allowed 2 March 1989.

WILSON v. STATE RESIDENCE COMMITTEE OF U.N.C.

No. 2P89.

Case below: 92 N.C. App. 355.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 March 1989.

STATE OF NORTH CAROLINA v. JUDY ANN LAWS NORMAN

No. 161PA88

(Filed 5 April 1989)

Homicide § 28.1— self-defense—sleeping victim—battered spouse syndrome

The evidence in a first degree murder prosecution did not entitle defendant to jury instructions on either perfect or imperfect self-defense where defendant presented evidence of a long history of physical and mental abuse by her husband due to his alcoholism; unsuccessful efforts to obtain help from authorities; expert testimony that defendant fit the profile of battered wife syndrome and that she had felt that she had no choice but to use deadly force against her husband; and defendant had pointed a pistol at the back of her sleeping husband's head, cleared a jam, shot her husband in the back of the head as he still lay sleeping, felt her husband's chest and determined that he was still breathing and making sounds, and then shot him twice more in the back of the head. There was no evidence that at the time of the killing defendant reasonably believed herself to be confronted by circumstances which necessitated her killing her husband to save herself from imminent death or great bodily harm. Even assuming that defendant was entitled to an instruction on imperfect self-defense, failure to give such an instruction was harmless error because defendant was found guilty of voluntary manslaughter. Requiring jury instructions on perfect self-defense in such situations would tend to make opportune homicide lawful as a result of mere subjective predictions of indefinite future assaults and circumstances.

Justice MARTIN dissenting.

ON discretionary review of the decision of the Court of Appeals, 89 N.C. App. 384, 366 S.E. 2d 586 (1988), setting aside a judgment entered by *Gardner, J.*, in the Superior Court, RUTHERFORD County, on 5 March 1987, and awarding the defendant a new trial. Heard in the Supreme Court on 16 November 1988.

Lacy H. Thornburg, Attorney General, by Steven F. Bryant, Assistant Attorney General, and Jeffrey P. Gray, Assistant Attorney General, for the appellant State.

Robert W. Wolf and Robert L. Harris for the defendant appellee.

MITCHELL, Justice.

The defendant was tried at the 16 February 1987 Criminal Session of Superior Court for Rutherford County upon a proper indictment charging her with the first degree murder of her hus-

band. The jury found the defendant guilty of voluntary manslaughter. The defendant appealed from the trial court's judgment sentencing her to six years imprisonment.

The Court of Appeals granted a new trial, citing as error the trial court's refusal to submit a possible verdict of acquittal by reason of perfect self-defense. Notwithstanding the uncontroverted evidence that the defendant shot her husband three times in the back of the head as he lay sleeping in his bed, the Court of Appeals held that the defendant's evidence that she exhibited what has come to be called "the battered wife syndrome" entitled her to have the jury consider whether the homicide was an act of perfect self-defense and, thus, not a legal wrong.

We conclude that the evidence introduced in this case would not support a finding that the defendant killed her husband due to a reasonable fear of imminent death or great bodily harm, as is required before a defendant is entitled to jury instructions concerning either perfect or imperfect self-defense. Therefore, the trial court properly declined to instruct the jury on the law relating to self-defense. Accordingly, we reverse the Court of Appeals.

At trial, the State presented the testimony of Deputy Sheriff R. H. Epley of the Rutherford County Sheriff's Department, who was called to the Norman residence on the night of 12 June 1985. Inside the home, Epley found the defendant's husband, John Thomas Norman, lying on a bed in a rear bedroom with his face toward the wall and his back toward the middle of the room. He was dead, but blood was still coming from wounds to the back of his head. A later autopsy revealed three gunshot wounds to the head, two of which caused fatal brain injury. The autopsy also revealed a .12 percent blood alcohol level in the victim's body.

Later that night, the defendant related an account of the events leading to the killing, after Epley had advised her of her constitutional rights and she had waived her right to remain silent. The defendant told Epley that her husband had been beating her all day and had made her lie down on the floor while he slept on the bed. After her husband fell asleep, the defendant carried her grandchild to the defendant's mother's house. The defendant took a pistol from her mother's purse and walked the short distance back to her home. She pointed the pistol at the

back of her sleeping husband's head, but it jammed the first time she tried to shoot him. She fixed the gun and then shot her husband in the back of the head as he lay sleeping. After one shot, she felt her husband's chest and determined that he was still breathing and making sounds. She then shot him twice more in the back of the head. The defendant told Epley that she killed her husband because "she took all she was going to take from him so she shot him."

The defendant presented evidence tending to show a long history of physical and mental abuse by her husband due to his alcoholism. At the time of the killing, the thirty-nine-year-old defendant and her husband had been married almost twenty-five years and had several children. The defendant testified that her husband had started drinking and abusing her about five years after they were married. His physical abuse of her consisted of frequent assaults that included slapping, punching and kicking her, striking her with various objects, and throwing glasses, beer bottles and other objects at her. The defendant described other specific incidents of abuse, such as her husband putting her cigarettes out on her, throwing hot coffee on her, breaking glass against her face and crushing food on her face. Although the defendant did not present evidence of ever having received medical treatment for any physical injuries inflicted by her husband, she displayed several scars about her face which she attributed to her husband's assaults.

The defendant's evidence also tended to show other indignities inflicted upon her by her husband. Her evidence tended to show that her husband did not work and forced her to make money by prostitution, and that he made humor of that fact to family and friends. He would beat her if she resisted going out to prostitute herself or if he was unsatisfied with the amounts of money she made. He routinely called the defendant "dog," "bitch" and "whore," and on a few occasions made her eat pet food out of the pets' bowls and bark like a dog. He often made her sleep on the floor. At times, he deprived her of food and refused to let her get food for the family. During those years of abuse, the defendant's husband threatened numerous times to kill her and to maim her in various ways.

The defendant said her husband's abuse occurred only when he was intoxicated, but that he would not give up drinking. She said she and her husband "got along very well when he was sober," and that he was "a good guy" when he was not drunk. She had accompanied her husband to the local mental health center for sporadic counseling sessions for his problem, but he continued to drink.

In the early morning hours on the day before his death, the defendant's husband, who was intoxicated, went to a rest area off I-85 near Kings Mountain where the defendant was engaging in prostitution and assaulted her. While driving home, he was stopped by a patrolman and jailed on a charge of driving while impaired. After the defendant's mother got him out of jail at the defendant's request later that morning, he resumed his drinking and abuse of the defendant.

The defendant's evidence also tended to show that her husband seemed angrier than ever after he was released from jail and that his abuse of the defendant was more frequent. That evening, sheriff's deputies were called to the Norman residence, and the defendant complained that her husband had been beating her all day and she could not take it anymore. The defendant was advised to file a complaint, but she said she was afraid her husband would kill her if she had him arrested. The deputies told her they needed a warrant before they could arrest her husband, and they left the scene.

The deputies were called back less than an hour later after the defendant had taken a bottle of pills. The defendant's husband cursed her and called her names as she was attended by paramedics, and he told them to let her die. A sheriff's deputy finally chased him back into his house as the defendant was put into an ambulance. The defendant's stomach was pumped at the local hospital, and she was sent home with her mother.

While in the hospital, the defendant was visited by a therapist with whom she discussed filing charges against her husband and having him committed for treatment. Before the therapist left, the defendant agreed to go to the mental health center the next day to discuss those possibilities. The therapist testified at trial that the defendant seemed depressed in the hospital, and that she expressed considerable anger toward her husband. He

testified that the defendant threatened a number of times that night to kill her husband and that she said she should kill him "because of the things he had done to her."

The next day, the day she shot her husband, the defendant went to the mental health center to talk about charges and possible commitment, and she confronted her husband with that possibility. She testified that she told her husband later that day: "J. T., straighten up. Quit drinking. I'm going to have you committed to help you." She said her husband then told her he would "see them coming" and would cut her throat before they got to him.

The defendant also went to the social services office that day to seek welfare benefits, but her husband followed her there, interrupted her interview and made her go home with him. He continued his abuse of her, threatening to kill and to maim her, slapping her, kicking her, and throwing objects at her. At one point, he took her cigarette and put it out on her, causing a small burn on her upper torso. He would not let her eat or bring food into the house for their children.

That evening, the defendant and her husband went into their bedroom to lie down, and he called her a "dog" and made her lie on the floor when he lay down on the bed. Their daughter brought in her baby to leave with the defendant, and the defendant's husband agreed to let her baby-sit. After the defendant's husband fell asleep, the baby started crying and the defendant took it to her mother's house so it would not wake up her husband. She returned shortly with the pistol and killed her husband.

The defendant testified at trial that she was too afraid of her husband to press charges against him or to leave him. She said that she had temporarily left their home on several previous occasions, but he had always found her, brought her home and beaten her. Asked why she killed her husband, the defendant replied: "Because I was scared of him and I knowed when he woke up, it was going to be the same thing, and I was scared when he took me to the truck stop that night it was going to be worse than he had ever been. I just couldn't take it no more. There ain't no way, even if it means going to prison. It's better than living in that. That's worse hell than anything."

The defendant and other witnesses testified that for years her husband had frequently threatened to kill her and to maim her. When asked if she believed those threats, the defendant replied: "Yes. I believed him; he would, he would kill me if he got a chance. If he thought he wouldn't a had to went to jail, he would a done it."

Two expert witnesses in forensic psychology and psychiatry who examined the defendant after the shooting, Dr. William Tyson and Dr. Robert Rollins, testified that the defendant fit the profile of battered wife syndrome. This condition, they testified, is characterized by such abuse and degradation that the battered wife comes to believe she is unable to help herself and cannot expect help from anyone else. She believes that she cannot escape the complete control of her husband and that he is invulnerable to law enforcement and other sources of help.

Dr. Tyson, a psychologist, was asked his opinion as to whether, on 12 June 1985, "it appeared reasonably necessary for Judy Norman to shoot J. T. Norman?" He replied: "I believe that . . . Mrs. Norman believed herself to be doomed . . . to a life of the worst kind of torture and abuse, degradation that she had experienced over the years in a progressive way; that it would only get worse, and that death was inevitable . . . ." Dr. Tyson later added: "I think Judy Norman felt that she had no choice, both in the protection of herself and her family, but to engage, exhibit deadly force against Mr. Norman, and that in so doing, she was sacrificing herself, both for herself and for her family."

Dr. Rollins, who was the defendant's attending physician at Dorothea Dix Hospital when she was sent there for evaluation, testified that in his opinion the defendant was a typical abused spouse and that "[s]he saw herself as powerless to deal with the situation, that there was no alternative, no way she could escape it." Dr. Rollins was asked his opinion as to whether "on June 12th, 1985, it appeared reasonably necessary that Judy Norman would take the life of J. T. Norman?" Dr. Rollins replied that in his opinion, "that course of action did appear necessary to Mrs. Norman."

Based on the evidence that the defendant exhibited battered wife syndrome, that she believed she could not escape her husband nor expect help from others, that her husband had threat-

ened her, and that her husband's abuse of her had worsened in the two days preceding his death, the Court of Appeals concluded that a jury reasonably could have found that her killing of her husband was justified as an act of perfect self-defense. The Court of Appeals reasoned that the nature of battered wife syndrome is such that a jury could not be precluded from finding the defendant killed her husband lawfully in perfect self-defense, even though he was asleep when she killed him. We disagree.

The right to kill in self-defense is based on the necessity, real or reasonably apparent, of killing an unlawful aggressor to save oneself from *imminent* death or great bodily harm at his hands. *State v. Gappins*, 320 N.C. 64, 357 S.E. 2d 654 (1987). Our law has recognized that self-preservation under such circumstances springs from a primal impulse and is an inherent right of natural law. *State v. Holland*, 193 N.C. 713, 718, 138 S.E. 8, 10 (1927).

In North Carolina, a defendant is entitled to have the jury consider acquittal by reason of *perfect* self-defense when the evidence, viewed in the light most favorable to the defendant, tends to show that at the time of the killing it appeared to the defendant and she believed it to be necessary to kill the decedent to save herself from imminent death or great bodily harm. *State v. Gappins*, 320 N.C. at 71, 357 S.E. 2d at 659. That belief must be reasonable, however, in that the circumstances as they appeared to the defendant would create such a belief in the mind of a person of ordinary firmness. *Id.* Further, the defendant must not have been the initial aggressor provoking the fatal confrontation. *Id.* A killing in the proper exercise of the right of *perfect* self-defense is always completely justified in law and constitutes no legal wrong.

Our law also recognizes an *imperfect* right of self-defense in certain circumstances, including, for example, when the defendant is the initial aggressor, but without intent to kill or to seriously injure the decedent, and the decedent escalates the confrontation to a point where it reasonably appears to the defendant to be necessary to kill the decedent to save herself from imminent death or great bodily harm. *State v. Mize*, 316 N.C. 48, 340 S.E. 2d 439 (1986); *State v. Wilson*, 304 N.C. 689, 285 S.E. 2d 804 (1982). Although the culpability of a defendant who kills in the exercise of *imperfect* self-defense is reduced, such a defendant is *not*

justified in the killing so as to be entitled to acquittal, but is guilty at least of voluntary manslaughter. *State v. Mize*, 316 N.C. at 52, 340 S.E. 2d at 441.

The defendant in the present case was not entitled to a jury instruction on either perfect or imperfect self-defense. The trial court was not required to instruct on *either* form of self-defense unless evidence was introduced tending to show that at the time of the killing the defendant reasonably believed herself to be confronted by circumstances which necessitated her killing her husband to save herself from *imminent* death or great bodily harm. *Id.* No such evidence was introduced in this case, and it would have been error for the trial court to instruct the jury on *either* perfect or imperfect self-defense. *See State v. Gappins*, 320 N.C. 64, 73, 357 S.E. 2d 654, 660 (1987); *State v. Mize*, 316 N.C. 48, 53, 340 S.E. 2d 439, 442 (1986); *State v. Spaulding*, 298 N.C. 149, 157, 257 S.E. 2d 391, 396 (1979); *State v. Marshall*, 208 N.C. 127, 129, 179 S.E. 427, 428 (1935); *State v. Kidd*, 60 N.C. App. 140, 142, 298 S.E. 2d 406, 408 (1982), *disc. rev. denied*, 307 N.C. 700, 301 S.E. 2d 393 (1983); *State v. Dial*, 38 N.C. App. 529, 531, 248 S.E. 2d 366, 367 (1978); 40 C.J.S. *Homicide* § 123(b) (1944).

The jury found the defendant guilty only of voluntary manslaughter in the present case. As we have indicated, an instruction on imperfect self-defense would have entitled the defendant to nothing more, since one who kills in the exercise of imperfect self-defense is guilty at least of voluntary manslaughter. Therefore, even if it is assumed arguendo that the defendant was entitled to an instruction on imperfect self-defense—a notion we have specifically rejected—the failure to give such an instruction was harmless in this case. Accordingly, although we recognize that the imminence requirement applies to both types of self-defense for almost identical reasons, we limit our consideration in the remainder of this opinion to the issue of whether the trial court erred in failing to instruct the jury to consider acquittal on the ground that the killing was justified and, thus, lawful as an act of *perfect* self-defense.

The killing of another human being is the most extreme recourse to our inherent right of self-preservation and can be justified in law only by the utmost real or apparent necessity brought about by the decedent. For that reason, our law of self-defense

has required that a defendant claiming that a homicide was justified and, as a result, inherently lawful by reason of perfect self-defense must establish that she reasonably believed at the time of the killing she otherwise would have immediately suffered death or great bodily harm. Only if defendants are required to show that they killed due to a reasonable belief that death or great bodily harm was imminent can the justification for homicide remain clearly and firmly rooted in necessity. The imminence requirement ensures that deadly force will be used only where it is necessary as a last resort in the exercise of the inherent right of self-preservation. It also ensures that before a homicide is justified and, as a result, not a legal wrong, it will be reliably determined that the defendant reasonably believed that absent the use of deadly force, not only would an unlawful attack have occurred, but also that the attack would have caused death or great bodily harm. The law does not sanction the use of deadly force to repel simple assaults. *State v. Watkins*, 283 N.C. 504, 196 S.E. 2d 750 (1973).

The term "imminent," as used to describe such perceived threats of death or great bodily harm as will justify a homicide by reason of perfect self-defense, has been defined as "immediate danger, such as must be instantly met, such as cannot be guarded against by calling for the assistance of others or the protection of the law." Black's Law Dictionary 676 (5th ed. 1979). Our cases have sometimes used the phrase "about to suffer" interchangeably with "imminent" to describe the immediacy of threat that is required to justify killing in self-defense. *State v. Holland*, 193 N.C. 713, 718, 138 S.E. 8, 10 (1927).

The evidence in this case did not tend to show that the defendant reasonably believed that she was confronted by a threat of imminent death or great bodily harm. The evidence tended to show that no harm was "imminent" or about to happen to the defendant when she shot her husband. The uncontroverted evidence was that her husband had been asleep for some time when she walked to her mother's house, returned with the pistol, fixed the pistol after it jammed and then shot her husband three times in the back of the head. The defendant was not faced with an instantaneous choice between killing her husband or being killed or seriously injured. Instead, *all* of the evidence tended to show that the defendant had ample time and opportunity to resort to other

means of preventing further abuse by her husband. There was no action underway by the decedent from which the jury could have found that the defendant had reasonable grounds to believe either that a felonious assault was imminent or that it might result in her death or great bodily injury. Additionally, no such action by the decedent had been underway immediately prior to his falling asleep.

Faced with somewhat similar facts, we have previously held that a defendant who believed himself to be threatened by the decedent was not entitled to a jury instruction on either perfect or imperfect self-defense when it was the defendant who went to the decedent and initiated the final, fatal confrontation. *State v. Mize*, 316 N.C. 48, 340 S.E. 2d 439 (1986). In *Mize*, the decedent Joe McDonald was reported to be looking for the defendant George Mize to get revenge for Mize's alleged rape of McDonald's girl friend, which had exacerbated existing animosity between Mize and McDonald. After hiding from McDonald for most of the day, Mize finally went to McDonald's residence, woke him up and then shot and killed him. Mize claimed that he feared McDonald was going to kill him and that his killing of McDonald was in self-defense. Rejecting Mize's argument that his jury should have been instructed on self-defense, we stated:

> Here, although the victim had pursued defendant during the day approximately eight hours before the killing, defendant Mize was in no imminent danger while McDonald was at home asleep. When Mize went to McDonald's trailer with his shotgun, it was a new confrontation. Therefore, even if Mize believed it was necessary to kill McDonald to avoid his own imminent death, that belief was unreasonable.

316 N.C. at 53, 340 S.E. 2d at 442 (citations omitted). The same reasoning applies in the present case.

Additionally, the lack of any belief by the defendant—reasonable or otherwise—that she faced a threat of imminent death or great bodily harm from the drunk and sleeping victim in the present case was illustrated by the defendant and her own expert witnesses when testifying about her subjective assessment of her situation at the time of the killing. The psychologist and psychiatrist replied affirmatively when asked their opinions of whether killing her husband "appeared reasonably necessary" to the de-

fendant at the time of the homicide. That testimony spoke of no *imminent* threat nor of any fear by the defendant of death or great bodily harm, imminent or otherwise. Testimony in the form of a conclusion that a killing "appeared reasonably necessary" to a defendant does not tend to show all that must be shown to establish self-defense. More specifically, for a killing to be in self-defense, the perceived necessity must arise from a reasonable fear of imminent death or great bodily harm.

Dr. Tyson additionally testified that the defendant "believed herself to be doomed . . . to a life of the worst kind of torture and abuse, degradation that she had experienced over the years in a progressive way; that it would only get worse, and that death was inevitable." Such evidence of the defendant's speculative beliefs concerning her remote and indefinite future, while indicating she had felt generally threatened, did not tend to show that she killed in the belief—reasonable or otherwise—that her husband presented a threat of *imminent* death or great bodily harm. Under our law of self-defense, a defendant's subjective belief of what might be "inevitable" at some indefinite point in the future does not equate to what she believes to be "imminent." Dr. Tyson's opinion that the defendant believed it was necessary to kill her husband for "the protection of herself and her family" was similarly indefinite and devoid of time frame and did not tend to show a threat or fear of *imminent* harm.

The defendant testified that, "I knowed when he woke up, it was going to be the same thing, and I was scared when he took me to the truck stop that night it was going to be worse than he had ever been." She also testified, when asked if she believed her husband's threats: "Yes. . . . [H]e would kill me if he got a chance. If he thought he wouldn't a had to went to jail, he would a done it." Testimony about such indefinite fears concerning what her sleeping husband might do at some time in the future did not tend to establish a fear—reasonable or otherwise—of *imminent death or great bodily harm* at the time of the killing.

We are not persuaded by the reasoning of our Court of Appeals in this case that when there is evidence of battered wife syndrome, neither an actual attack nor threat of attack by the husband at the moment the wife uses deadly force is required to justify the wife's killing of him in perfect self-defense. The Court

of Appeals concluded that to impose such requirements would ignore the "learned helplessness," meekness and other realities of battered wife syndrome and would effectively preclude such women from exercising their right of self-defense. 89 N.C. App. 384, 392-393, 366 S.E. 2d 586, 591-592 (1988). *See* Mather, *The Skeleton in the Closet: The Battered Woman Syndrome, Self-Defense, and Expert Testimony*, 39 Mercer L. Rev. 545 (1988); Eber, *The Battered Wife's Dilemma: To Kill Or To Be Killed*, 32 Hastings L.J. 895 (1981). Other jurisdictions which have addressed this question under similar facts are divided in their views, and we can discern no clear majority position on facts closely similar to those of this case. *Compare, e.g., Commonwealth v. Grove*, 363 Pa. Super. 328, 526 A. 2d 369, *appeal denied*, 517 Pa. 630, 539 A. 2d 810 (1987) (abused wife who killed her sleeping husband not entitled to self-defense instruction as no immediate threat was posed by the decedent), *with State v. Gallegos*, 104 N.M. 247, 719 P. 2d 1268 (1986) (abused wife could claim self-defense where she walked into bedroom with gun and killed husband who was awake but lying on the bed).

The reasoning of our Court of Appeals in this case proposes to change the established law of self-defense by giving the term "imminent" a meaning substantially more indefinite and all-encompassing than its present meaning. This would result in a substantial relaxation of the requirement of real or apparent necessity to justify homicide. Such reasoning proposes justifying the taking of human life not upon the reasonable belief it is necessary to prevent death or great bodily harm—which the imminence requirement ensures—but upon purely subjective speculation that the decedent probably would present a threat to life at a future time and that the defendant would not be able to avoid the predicted threat.

The Court of Appeals suggests that such speculation would have been particularly reliable in the present case because the jury, based on the evidence of the decedent's intensified abuse during the thirty-six hours preceding his death, could have found that the decedent's passive state at the time of his death was "but a momentary hiatus in a continuous reign of terror by the decedent [and] the defendant merely took advantage of her first opportunity to protect herself." 89 N.C. App. at 394, 366 S.E. 2d at 592. Requiring jury instructions on perfect self-defense in such

situations, however, would still tend to make opportune homicide lawful as a result of mere subjective predictions of indefinite future assaults and circumstances. Such predictions of future assaults to justify the defendant's use of deadly force in this case would be entirely speculative, because there was no evidence that her husband had ever inflicted any harm upon her that approached life-threatening injury, even during the "reign of terror." It is far from clear in the defendant's poignant evidence that any abuse by the decedent had ever involved the degree of physical threat required to justify the defendant in using deadly force, even when those threats were imminent. The use of deadly force in self-defense to prevent harm other than death or great bodily harm is excessive as a matter of law. *State v. Hunter*, 315 N.C. 371, 338 S.E. 2d 99 (1986).

As we have stated, stretching the law of self-defense to fit the facts of this case would require changing the "imminent death or great bodily harm" requirement to something substantially more indefinite than previously required and would weaken our assurances that justification for the taking of human life remains firmly rooted in real or apparent necessity. That result in principle could not be limited to a few cases decided on evidence as poignant as this. The relaxed requirements for perfect self-defense proposed by our Court of Appeals would tend to categorically legalize the opportune killing of abusive husbands by their wives solely on the basis of the wives' testimony concerning their subjective speculation as to the probability of future felonious assaults by their husbands. Homicidal self-help would then become a lawful solution, and perhaps the easiest and most effective solution, to this problem. *See generally* Rosen, *The Excuse of Self-Defense: Correcting A Historical Accident on Behalf of Battered Women Who Kill*, 36 Am. U.L. Rev. 11 (1986) (advocating changing the basis of self-defense acquittals to *excuse* rather than *justification*, so that *excusing* battered women's killing of their husbands under circumstances not fitting within the traditional requirements of self-defense would not be seen as *justifying* and therefore encouraging such self-help killing); Mitchell, *Does Wife Abuse Justify Homicide?*, 24 Wayne L. Rev. 1705 (1978) (advocating institutional rather than self-help solutions to wife abuse and citing case studies at the trial level where traditional defenses to homicide appeared stretched to accommodate poignant

facts, resulting in justifications of some killings which appeared to be motivated by revenge rather than protection from death or great bodily harm). It has even been suggested that the relaxed requirements of self-defense found in what is often called the "battered woman's defense" could be extended in principle to *any type of case* in which a defendant testified that he or she subjectively believed that killing was necessary and proportionate to any perceived threat. Rosen, *The Excuse of Self-Defense: Correcting A Historical Accident on Behalf of Battered Women Who Kill*, 36 Am. U.L. Rev. 11, 44 (1986).

In conclusion, we decline to expand our law of self-defense beyond the limits of immediacy and necessity which have heretofore provided an appropriately narrow but firm basis upon which homicide may be justified and, thus, lawful by reason of perfect self-defense or upon which a defendant's culpability may be reduced by reason of imperfect self-defense. As we have shown, the evidence in this case did not entitle the defendant to jury instructions on either perfect or imperfect self-defense.

For the foregoing reasons, we conclude that the defendant's conviction for voluntary manslaughter and the trial court's judgment sentencing her to a six-year term of imprisonment were without error. Therefore, we must reverse the decision of the Court of Appeals which awarded the defendant a new trial.

Reversed.

Justice MARTIN dissenting.

At the outset it is to be noted that the peril of fabricated evidence is not unique to the trials of battered wives who kill. The possibility of invented evidence arises in all cases in which a party is seeking the benefit of self-defense. Moreover, in this case there were a number of witnesses other than defendant who testified as to the actual presence of circumstances supporting a claim of self-defense. This record contains no reasonable basis to attack the credibility of evidence for the defendant.

Likewise, the difficulty of rebutting defendant's evidence because the only other witness to many of the events is deceased is not unique to this type of case. This situation is also commonplace in cases in which self-defense is raised, although, again,

in the case sub judice there was more than one surviving witness to such events. In considering the argument that the state is faced with a difficult burden in attempting to rebut evidence of which defendant is the only surviving witness, one must not overlook the law: the burden is always on the state to prove that the killing was intentional beyond a reasonable doubt. "Defendant may always rest ultimately on the weakness of the state's case and the state's failure to carry its burden of proof." *State v. Patterson*, 297 N.C. 247, 256, 254 S.E. 2d 604, 610 (1979).

At the heart of the majority's reasoning is its unsubstantiated concern that to find that the evidence presented by defendant would support an instruction on self-defense would "expand our law of self-defense beyond the limits of immediacy and necessity." Defendant does not seek to expand or relax the requirements of self-defense and thereby "legalize the opportune killing of allegedly abusive husbands by their wives," as the majority overstates. Rather, defendant contends that the evidence as gauged by the existing laws of self-defense is sufficient to require the submission of a self-defense instruction to the jury. The proper issue for this Court is to determine whether the evidence, viewed in the light most favorable to the defendant, was sufficient to require the trial court to instruct on the law of self-defense. I conclude that it was.

In every jury trial, it is the duty of the court to charge the jury on all substantial features of the case arising on the evidence, whether or not such instructions have been requested. *See State v. Dooley*, 285 N.C. 158, 203 S.E. 2d 815 (1974). All defenses presented by the defendant's evidence are substantial features of the case, even if that evidence contains discrepancies or is contradicted by evidence from the state. *Id.* This rule reflects the principle in our jurisprudence that it is the jury, not the judge, that weighs the evidence.

A defendant is entitled to an instruction on self-defense when there is evidence, viewed in the light most favorable to the defendant, that these four elements existed at the time of the killing:

> (1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and

(2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and

(3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and

(4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

State v. Gappins, 320 N.C. 64, 71, 357 S.E. 2d 654, 659 (1987). *See also State v. McCray*, 312 N.C. 519, 324 S.E. 2d 606 (1985) (to be entitled to an instruction on self-defense defendant must produce evidence tending to show he was free from fault and it was necessary or reasonably appeared to be necessary to kill in order to protect himself from great bodily harm or death). *See generally State v. Wallace*, 309 N.C. 141, 305 S.E. 2d 548 (1983); *State v. Bush*, 307 N.C. 152, 297 S.E. 2d 563 (1982); *State v. Wilson*, 304 N.C. 689, 285 S.E. 2d 804 (1982); *State v. Norris*, 303 N.C. 526, 279 S.E. 2d 570 (1981); *State v. Potter*, 295 N.C. 126, 244 S.E. 2d 397 (1978) (cases setting out these elements as requisites of proof of self-defense). The first element requires that there be evidence that the defendant believed it was necessary to kill in order to protect herself from serious bodily harm or death; the second requires that the circumstances as defendant perceived them were sufficient to create such a belief in the mind of a person of ordinary firmness. Both elements were supported by evidence at defendant's trial.

Evidence presented by defendant described a twenty-year history of beatings and other dehumanizing and degrading treatment by her husband. In his expert testimony a clinical psychologist concluded that defendant fit "and exceed[ed]" the profile of an abused or battered spouse, analogizing this treatment to the dehumanization process suffered by prisoners of war under the Nazis during the Second World War and the brainwashing techniques of the Korean War. The psychologist described the defendant as a woman incarcerated by abuse, by fear, and by her conviction that her husband was invincible and inescapable:

> Mrs. Norman didn't leave because she believed, fully believed that escape was totally impossible. There was no place to go. He, she had left before; he had come and gotten her. She had gone to the Department of Social Services. He had come and gotten her. The law, she believed the law could not protect her; no one could protect her, and I must admit, looking over the records, that there was nothing done that would contradict that belief. She fully believed that he was invulnerable to the law and to all social agencies that were available; that nobody could withstand his power. As a result, there was no such thing as escape.

When asked if he had an opinion whether it appeared reasonably necessary for Judy Norman to shoot her husband, this witness responded:

> Yes. . . . I believe that in examining the facts of this case and examining the psychological data, that Mrs. Norman believed herself to be doomed . . . to a life of the worst kind of torture and abuse, degradation that she had experienced over the years in a progressive way; that it would only get worse, and that death was inevitable; death of herself, which was not such, I don't think was such an issue for her, as she had attempted to commit suicide, and in her continuing conviction of J. T. Norman's power over her, and even failed at that form of escape. I believe she also came to the point of beginning to fear for family members and her children, that were she to commit suicide that the abuse and the treatment that was heaped on her would be transferred onto them.

This testimony describes defendant's perception of circumstances in which she was held hostage to her husband's abuse for two decades and which ultimately compelled her to kill him. This testimony alone is evidence amply indicating the first two elements required for entitlement to an instruction on self-defense.

In addition to the testimony of the clinical psychologist, defendant presented the testimony of witnesses who had actually seen defendant's husband abuse her. These witnesses described circumstances that caused not only defendant to believe escape was impossible, but that also convinced *them* of its impossibility. Defendant's isolation and helplessness were evident in testimony that her family was intimidated by her husband into acquiescing

in his torture of her. Witnesses also described defendant's experience with social service agencies and the law, which had contributed to her sense of futility and abandonment through the inefficacy of their protection and the strength of her husband's wrath when they failed. Where torture appears interminable and escape impossible, the belief that only the death of the oppressor can provide relief is reasonable in the mind of a person of ordinary firmness, let alone in the mind of the defendant, who, like a prisoner of war of some years, has been deprived of her humanity and is held hostage by fear.

In *State v. Mize*, 316 N.C. 48, 53, 340 S.E. 2d 439, 442 (1986), this Court noted that if the defendant was in "no imminent danger" at the time of the killing, then his belief that it was necessary to kill the man who had pursued him eight hours before was unreasonable. The second element of self-defense was therefore not satisfied. In the context of the doctrine of self-defense, the definition of "imminent" must be informed by the defendant's perceptions. It is not bounded merely by measurable time, but by all of the facts and circumstances. Its meaning depends upon the assessment of the facts by one of "ordinary firmness" with regard to whether the defendant's perception of impending death or injury was so pressing as to render reasonable her belief that it was necessary to kill.

Evidence presented in the case sub judice revealed no letup of tension or fear, no moment in which the defendant felt released from impending serious harm, even while the decedent slept. This, in fact, is a state of mind common to the battered spouse, and one that dramatically distinguishes Judy Norman's belief in the imminence of serious harm from that asserted by the defendant in *Mize*. Psychologists have observed and commentators have described a "constant state of fear" brought on by the cyclical nature of battering as well as the battered spouse's perception that her abuser is both "omnipotent and unstoppable." *See* Comment, *The Admissibility of Expert Testimony on the Battered Woman Syndrome in Support of a Claim of Self-Defense*, 15 Conn. L. Rev. 121, 131 (1982). Constant fear means a perpetual anticipation of the next blow, a perpetual expectation that the next blow will kill. "[T]he battered wife is constantly in a heightened state of terror because she is certain that one day her husband will kill her during the course of a beating. . . . Thus from the perspec-

tive of the battered wife, the danger is constantly 'immediate.' " Eber, *The Battered Wife's Dilemma: To Kill or To Be Killed*, 32 Hastings L.J. 895, 928-29 (1981). For the battered wife, if there is no escape, if there is no window of relief or momentary sense of safety, then the next attack, which could be the fatal one, is imminent. In the context of the doctrine of self-defense, "imminent" is a term the meaning of which must be grasped from the defendant's point of view. Properly stated, the second prong of the question is not whether the threat was *in fact* imminent, but whether defendant's belief in the impending nature of the threat, given the circumstances as she saw them, was reasonable in the mind of a person of ordinary firmness.[1]

Defendant's intense fear, based on her belief that her husband intended not only to maim or deface her, as he had in the past, but to kill her, was evident in the testimony of witnesses who recounted events of the last three days of the decedent's life. This testimony could have led a juror to conclude that defendant reasonably perceived a threat to her life as "imminent," even while her husband slept. Over these three days, her husband's anger was exhibited in an unprecedented crescendo of violence. The evidence showed defendant's fear and sense of hopelessness similarly intensifying, leading to an unsuccessful attempt to escape through suicide and culminating in her belief that escape would be possible only through her husband's death.

Defendant testified that on 10 June, two days before her husband's death, he had again forced her to go to a rest stop near Kings Mountain to make money by prostitution. Her daughter Phyllis and Phyllis's boyfriend Mark Navarra accompanied her on this occasion because, defendant said, whenever her husband took her there, he would beat her. Phyllis corroborated this account. She testified that her father had arrived some time later and had begun beating her mother, asking how much money she had. Defendant said they all then drove off. Shortly afterwards an officer arrested defendant's husband for driving under the influence. He

1. This interpretation of the meaning of "imminent" is reflected in the Comments to the Model Penal Code: "The actor must believe that his defensive action is immediately necessary and the unlawful force against which he defends must be force that he apprehends will be used on the present occasion, but he need not apprehend that it will be immediately used." Model Penal Code § 3.04 comment (ALI 1985).

spent the night in jail and was released the next morning on bond paid by defendant's mother.

Defendant testified that her husband was argumentative and abusive all through the next day, 11 June. Mark Navarra testified that at one point defendant's husband threw a sandwich that defendant had made for him on the floor. She made another; he threw it on the floor, as well, then insisted she prepare one without touching it. Defendant's husband had then taken the third sandwich, which defendant had wrapped in paper towels, and smeared it on her face. Both Navarra and Phyllis testified that they had later watched defendant's husband seize defendant's cigarette and put it out on her neck, the scars from which defendant displayed to the jury.

A police officer testified that he arrived at defendant's home at 8:00 that evening in response to a call reporting a domestic quarrel. Defendant, whose face was bruised, was crying, and she told the officer that her husband had beaten her all day long and that she could not take it any longer. The officer told her that he could do nothing for her unless she took out a warrant on her husband. She responded that if she did, her husband would kill her. The officer left but was soon radioed to return because defendant had taken an overdose of pills. The officer testified that defendant's husband was interfering with ambulance attendants, saying "Let the bitch die." When he refused to respond to the officer's warning that if he continued to hinder the attendants, he would be arrested, the officer was compelled to chase him into the house.

Defendant's mother testified that her son-in-law had reacted to the discovery that her daughter had taken the pills with cursing and obscenities and threats such as, "Now, you're going to pay for taking those pills," and "I'll kill you, your mother and your grandmother." His rage was such that defendant's mother feared he might kill the whole family, and knowing defendant's sister had a gun in her purse, she took the gun and placed it in her own.

Defendant was taken to the hospital, treated, and released at 2:30 a.m. She spent the remainder of the night at her grandmother's house. Defendant testified that the next day, 12 June, she felt dazed all day long. She went in the morning to the county mental

health center for guidance on domestic abuse. When she returned home, she tried to talk to her husband, telling him to "straighten up. Quit drinking. . . . I'm going to have you committed to help you." Her husband responded, "If you do, I'll see them coming and before they get here, I'll cut your throat."

Later, her husband made her drive him and his friend to Spartanburg to pick up the friend's paycheck. On the way, the friend testified, defendant's husband "started slapping on her" when she was following a truck too closely, and he periodically poured his beer into a glass, then reached over and poured it on defendant's head. At one point defendant's husband lay down on the front seat with his head on the arm rest, "like he was going to go to sleep," and kicked defendant, who was still driving, in the side of the head.

Mark Navarra testified that in the year and a half he had lived with the Normans, he had never seen defendant's husband madder than he was on 12 June, opining that it was the DUI arrest two days before that had ignited J. T.'s fury. Phyllis testified that her father had beaten her mother "all day long." She testified that this was the third day defendant's husband had forbidden her to eat any food. Phyllis said defendant's family tried to get her to eat, but defendant, fearing a beating, would not. Although Phyllis's grandmother had sent over a bag of groceries that day, defendant's husband had made defendant put them back in the bag and would not let anyone eat them.

Early in the evening of 12 June, defendant's husband told defendant, "Let's go to bed." Phyllis testified that although there were two beds in the room, her father had forbidden defendant from sleeping on either. Instead, he had made her lie down on the concrete floor between the two beds, saying, "Dogs don't lay in the bed. They lay in the floor." Shortly afterward, defendant testified, Phyllis came in and asked her father if defendant could take care of her baby while she went to the store. He assented and eventually went to sleep. Defendant was still on the floor, the baby on the small bed. The baby started to cry and defendant "snuck up and took him out there to [her] mother's [house]." She asked her mother to watch the baby, then asked if her mother had anything for headache, as her head was "busting." Her mother responded that she had some pain pills in her purse. De-

fendant went in to get the pills, "and the gun was in there, and I don't know, I just seen the gun, and I took it out, and I went back there and shot him."

From this evidence of the exacerbated nature of the last three days of twenty years of provocation, a juror could conclude that defendant believed that her husband's threats to her life were viable, that serious bodily harm was imminent, and that it was necessary to kill her husband to escape that harm. And from this evidence a juror could find defendant's belief in the necessity to kill her husband not merely reasonable but compelling.

The third element for entitlement to an instruction on self-defense requires that there be evidence that the defendant was not the aggressor in bringing on the affray. If the defendant was the aggressor and killed with murderous intent, that is, the intent to kill or inflict serious bodily harm, then she is not entitled to an instruction on self-defense. *State v. Mize*, 316 N.C. 48, 340 S.E. 2d 439. A hiatus between provocation by the decedent and the killing can mark the initiation of a new confrontation between the defendant and the decedent, such that the defendant's earlier perception of imminent danger no longer appears reasonable and the defendant becomes the aggressor. For example, in *Mize*, the defendant, who had been told the day before that the decedent was "out to get" him, went to the decedent's trailer with a shotgun, knocked on the front door, and hid under the steps when the decedent opened the door and asked who was there. Defendant then went to the back door, knocked again, and shot the decedent. When the defendant went with his shotgun to the decedent's trailer, this Court said, it was a new confrontation, and if the defendant still believed that it was necessary to kill the decedent to avoid his own imminent death, that belief was unreasonable.

Where the defendant is a battered wife, there is no analogue to the victim-turned-aggressor, who, as in *Mize*, turns the tables on the decedent in a fresh confrontation. Where the defendant is a battered wife, the affray out of which the killing arises can be a continuing assault. There was evidence before the jury that it had not been defendant but her husband who had initiated "the affray," which the jury could have regarded as lasting twenty years, three days, or any number of hours preceding his death. And there was evidence from which the jury could infer that in

defendant's mind the affray reached beyond the moment at which her husband fell asleep. Like the ongoing threats of death or great bodily harm, which she might reasonably have perceived as imminent, her husband continued to be the aggressor and she the victim.

Finally, the fourth element of self-defense poses the question of whether there was any evidence tending to show that the force used by defendant to repel her husband was not excessive, that is, more than reasonably appeared to be necessary under the circumstances. This question is answered in part by abundant testimony describing defendant's immobilization by fear caused by abuse by her husband. Three witnesses, including the decedent's best friend, all recounted incidents in which defendant passively accepted beating, kicks, commands, or humiliating affronts without striking back. From such evidence that she was paralyzed by her husband's presence, a jury could infer that it reasonably appeared to defendant to be necessary to kill her husband in order ultimately to protect herself from the death he had threatened and from severe bodily injury, a foretaste of which she had already experienced.

In *State v. Wingler*, 184 N.C. 747, 115 S.E. 59 (1922), in which the defendant was found guilty for the murder of his wife, Justice (later Chief Justice) Stacy recognized the pain and oppression under which a woman suffers at the hands of an abusive husband: "The supreme tragedy of life is the immolation of woman. With a heavy hand, nature exacts from her a high tax of blood and tears." *Id.* at 751, 115 S.E. at 61. By his barbaric conduct over the course of twenty years, J. T. Norman reduced the quality of the defendant's life to such an abysmal state that, given the opportunity to do so, the jury might well have found that she was justified in acting in self-defense for the preservation of her tragic life.

It is to be remembered that defendant does not have the burden of persuasion as to self-defense; the burden remains with the state to prove beyond a reasonable doubt that defendant intentionally killed decedent without excuse or justification. *See State v. Mash*, 323 N.C. 339, 346, 372 S.E. 2d 532, 537 (1988) (the state must satisfy the jury beyond a reasonable doubt that, despite evidence of intoxication, defendant did form a deliberate and

premeditated intent to kill). If the evidence in support of self-defense is sufficient to create a reasonable doubt in the mind of a rational juror whether the state has proved an intentional killing without justification or excuse, self-defense must be submitted to the jury. This is such a case.

THE STATE OF NORTH CAROLINA EX REL. LACY H. THORNBURG, ATTORNEY GENERAL v. CURRENCY IN THE AMOUNT OF $52,029.00 IN U.S. CURRENCY; ONE (1) 1976 FOUR DOOR CADILLAC SEVILLE AUTOMOBILE, VEHICLE IDENTIFICATION NUMBER 6S69R6Q498436; ONE (1) SMITH & WESSON 44 MAGNUM PISTOL, MODEL 29-3, SERIAL NUMBER LB5425; AND ONE (1) ACTION ARMS UZI TYPE ASSAULT GUN, SERIAL NUMBER SA40430

No. 7PA88

(Filed 5 April 1989)

1. **Narcotics § 6; Penalties § 1— forfeiture provisions of Controlled Substances Act—precedence over RICO Act**

The criminal forfeiture provisions of the Controlled Substances Act take precedence over the civil forfeiture provisions of the RICO Act where the possessor of the items seized and subject to forfeiture has been validly indicted and awaits criminal trial under the Controlled Substances Act. N.C.G.S. § 75D-5(a), (c) and (d); N.C.G.S. § 75D-10; N.C.G.S. § 90-112.

2. **Narcotics § 6; Penalties § 1— forfeiture in narcotics case—county school fund**

Any judgment of property forfeiture entered against a defendant as a result of convictions on criminal charges against him pursuant to the Controlled Substances Act will accrue to the State and thus to the appropriate county school fund. Art. IX, § 7 of the N. C. Constitution; N.C.G.S. § 90-112(1); N.C.G.S. § 115C-437.

3. **Appeal and Error § 36.2— service of case on appeal—ex parte extension of time**

The trial judge did not err in extending *ex parte* the time for the State to serve the record on appeal in an action involving a forfeiture where counsel for the State miscalculated the initial filing date, the State complied with Appellate Rule 27(c)(1) by giving oral and written notice of its motion to extend time to serve the proposed record on appeal, and the trial judge complied with the requirement of Rule 27(c)(1) that all other parties have an opportunity to be heard by considering motions filed by appellees to dismiss the appeal and letters of the appellees filed in response to the State's motion.

4. Appeal and Error § 36.1— belated service of case on appeal—good cause for denial of motion to dismiss

Good cause was shown for the trial court's denial of appellees' Rule 25 motion to dismiss the appeal for failure of appellant to serve the case on appeal within the time allowed where the record on appeal consisted of all the papers already on file with the clerk of court and the uncontested hearing transcript, no testimony was narrated and no exhibits were included in the proposed record on appeal, and the case presented no factual dispute and only two questions of law. Appellate Rule 25.

APPEAL by the State pursuant to N.C.G.S. § 7A-31 from a judgment entered by *Battle, J.*, at the 8 June 1987 Regular Civil Non-jury Session of ALAMANCE County Superior Court. Heard in the Supreme Court 14 September 1988.

Lacy H. Thornburg, Attorney General, by Jean A. Benoy, Senior Deputy Attorney General, and Charles M. Hensey, Special Deputy Attorney General, for the State-appellant.

Ridge & Associates, by Paul H. Ridge and David K. Holley, for intervenor-appellee Alamance County Board of Education; and Allen & Walker, by Louis C. Allen, Jr., for intervenor-appellee Burlington City Board of Education.

Lacy H. Thornburg, Attorney General, by Harold M. White, Jr., Assistant Attorney General, Office of Special Litigation, amicus curiae.

MEYER, Justice.

In this case, we consider whether the criminal forfeiture provisions of the Controlled Substances Act take precedence over the civil forfeiture provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO) where the possessor of the items seized and subject to forfeiture has been validly indicted and awaits criminal trial under the Controlled Substances Act. Limiting our decision to the specific fact situation presented here, we conclude that the forfeiture provisions of the Controlled Substances Act prevail. We also consider whether Judges Battle and Brewer respectively erred in extending the time for serving the proposed record on appeal *ex parte* and in denying the intervenors' motion to dismiss this appeal. We conclude that the trial judges did not err.

On 11 December 1986, the male occupant of a room at the Econo Lodge Motel in Graham, North Carolina, had failed to check out in timely manner. The motel manager, who had tried unsuccessfully to rouse the occupant by telephone, used his master key to gain access to the room. He observed the sleeping occupant on one bed and a handgun on the other bed. The manager called the Graham Police Department. As the three officers who responded to the call passed the window of the occupied room, one of them observed drug paraphernalia in plain view. The officers entered the room, awakened the occupant, arrested and handcuffed him and advised him of his constitutional rights. The officers then searched the room, discovering among other things, $52,029 in United States currency, a Smith and Wesson magnum .44-caliber pistol, an Action Arms "UZI" type assault machine gun, and 105 grams of cocaine. The occupant identified as his a Cadillac automobile with a Nevada license tag parked in the motel lot. He had a driver's license in the name of Michael Lawrence Short, but he was later identified as Larry Wendle Parham. Parham admitted owning the $52,029, which he described as the proceeds from a drug sale. He told the officers that he traveled between Florida and Graham, North Carolina, on a weekly basis, picking up cocaine in Florida and selling it in North Carolina. Parham was subsequently charged with one count of felony trafficking by possession of cocaine (level one), one count of felony trafficking by possession of cocaine (level three), and one count of maintaining a vehicle for transporting controlled substances.

On 23 December 1986, the State of North Carolina, on the relation of Lacy H. Thornburg, Attorney General, filed a document entitled "Complaint *In Rem* RICO Forfeiture Proceeding," pursuant to N.C.G.S. § 75D-5(a), which named as defendants the $52,029, the Cadillac automobile, the pistol and the assault gun. A copy of the complaint was served on Larry Parham the same day. Parham never filed answer or otherwise appeared. On 19 January 1987, an order of seizure was entered under the RICO Act directing the Sheriff of Alamance County to seize, attach and keep the currency, automobile and guns in a safe place. On 21 January 1987, 4 May 1987, and 6 May 1987, orders were entered respectively allowing the City of Graham, the Alamance County Board of Education and the Burlington City Board of Education (school boards) to intervene and file answer. In its answer, the City of

Graham asked that the proceeds of the seized property, when forfeited, be paid to its Police Department pursuant to the RICO Act. In their answers, the two school boards demanded the proceeds be paid to the school fund of Alamance County pursuant to article IX, section 7 of the North Carolina Constitution, which provides in part that the clear proceeds of all penalties and forfeitures collected for any breach of the penal laws shall be used for maintaining the public schools.

On 8 June 1987, the case was heard for entry of final judgment of forfeiture. Upon completion of the State's evidentiary showing, the trial judge considered trial briefs and oral argument presented by all parties. The trial judge made findings of fact and concluded as a matter of law

> (1) That the property described in the complaint is subject to forfeiture under Chapter 75D of the North Carolina General Statutes.
>
> (2) That it appears to the Court that the property . . . is subject to forfeiture under the North Carolina Controlled Substances Act, upon a final conviction of the said Larry Parham in the cases now pending in Alamance County Superior Court against said defendant.
>
> (3) That the amount of the forfeiture pursuant to Chapter 75D of the General Statutes cannot be determined in this action until the criminal actions pending against Larry Parham are completed and any forfeitures ordered under the Controlled Substances Act shall have taken place.
>
> (4) That the provisions of Chapter 75D of the General Statutes are secondary to the criminal forfeiture provision of the Controlled Substances Act, North Carolina General Statutes Section 90-112, which applies to these properties.
>
> (5) The Court concludes as a matter of law that any property received at the appropriate time by and forfeited to the State Treasurer under General Statutes Chapter 75D must thereafter be passed on by the State Treasurer to the treasurer or proper officer authorized to receive fines and forfeitures to be used for the school fund of Alamance County in accordance with the provisions of North Carolina Constitution Article IX, Section 7.

After the entry of an order pursuant to these findings, the Burlington City Board of Education filed a motion for forfeiture pursuant to the Controlled Substances Act in the three criminal cases pending against Larry Parham. The State and the City of Graham gave notice of appeal. On 9 March 1988, this Court allowed the State's petition for discretionary review prior to determination by the Court of Appeals.

I.

The Racketeer Influenced and Corrupt Organizations Act, codified at N.C.G.S. ch. 75D, became effective 1 October 1986 and will expire 1 October 1989. 1985 N.C. Sess. Laws ch. 999 § 3. "Racketeering activity" is defined in part as follows:

> [T]o commit, to attempt to commit, or to solicit, coerce, or intimidate another person to commit an act or acts which would be chargeable by indictment if such act or acts were accompanied by the necessary mens rea or criminal intent under the following laws of this State:
>
> a. Article 5 of Chapter 90 of the General Statutes of North Carolina relating to controlled substances and counterfeit controlled substances.

N.C.G.S. § 75D-3(c)(1) (1987). Under the section entitled "Prohibited activities":

> (a) No person shall:
>
> (1) engage in a pattern of racketeering activity or, through a pattern of racketeering activities or through proceeds derived therefrom, acquire or maintain, directly or indirectly, any interest in or control of any enterprise, real property, or personal property of any nature, including money; or
>
> (2) conduct or participate in, directly or indirectly, any enterprise through a pattern of racketeering activity whether indirectly, or employed by or associated with such enterprise; or
>
> (3) conspire with another or attempt to violate any of the provisions of subdivision (1) or (2) of this subsection.

N.C.G.S. § 75D-4(a) (1987).

A RICO forfeiture proceeding is a civil *in rem* proceeding against property, which is instituted by complaint and prosecuted only by the Attorney General of North Carolina or his designated representative. N.C.G.S. § 75D-5(c), (d) (1987). Section 75D-5(a) provides:

> All property of every kind used or intended for use in the course of, derived from, or realized through a racketeering activity or pattern of racketeering activity is subject to forfeiture *to the State*.

N.C.G.S. § 75D-5 (a) (1987) (emphasis added). The statute specifically provides:

> Civil remedies under this Chapter are *cumulative, supplemental and not exclusive*, and are *in addition* to the fines, penalties and forfeitures set forth in a final judgment of conviction of a violation of the criminal laws of this State as punishment for violation of the penal laws of this State.

N.C.G.S. § 75D-10 (1987) (emphasis added).

The Controlled Substances Act is codified in chapter 90, article 5 of the North Carolina General Statutes. Criminal violations of the Act and the penalties therefor are set out in section 90-95. N.C.G.S. § 90-95 (1985). Under section 90-112(a), the following property is subject to forfeiture:

> (1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of the provisions of this Article;
>
> (2) All money, raw material, products, and equipment of any kind which are acquired, used, or intended for use, in selling, purchasing, manufacturing, compounding, processing, delivering, importing, or exporting a controlled substance in violation of the provisions of this Article;
>
> (3) All property which is used, or intended for use, as a container for property described in subdivisions (1) and (2);
>
> (4) All conveyances, including vehicles, vessels, or aircraft, which are used or intended for use to unlawfully conceal, convey, or transport, or in any manner to facilitate the

> unlawful concealment, conveyance, or transportation of property described in (1) or (2) . . . ;
>
> . . . .
>
> (5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this Article.

N.C.G.S. § 90-112 (1985). Property taken or detained under this section is not repleviable, but is deemed to be in the custody of the law enforcement agency seizing it. N.C.G.S. § 90-112(c) (1985). Under subsection (d), the law enforcement agency is provided with several options in dealing with the forfeited property, depending on its nature. N.C.G.S. § 90-112(d)(1) to (4) (1985).

The State vigorously argues that the legislative intent behind passage of the RICO Act was to provide for a fast, effective *civil* method of separating persons engaged in racketeering from the instrumentalities used in such activities as well as any gains derived therefrom. Indeed, the RICO forfeiture provisions are preceded by a legislative statement that

> the purpose and intent of this Chapter is: to deter organized unlawful activity by imposing civil equitable sanctions against th[e] subversion of the economy by organized unlawful elements; to prevent the unjust enrichment of those engaged in organized unlawful activity; [and] to restore the general economy of the State . . . .

N.C.G.S. § 75D-2(b) (1987). The State contends that because forfeitures under the RICO Act are, in effect, restitution to law enforcement agencies, the property forfeited under the Act is not subject to article IX, section 7 of our Constitution. Section 7 provides in part that

> the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools.

N.C. Const. art. IX, § 7 (1984).

We express no opinion as to the State's contention that RICO forfeitures are in the nature of restitution or as to the constitutional validity of the RICO forfeiture provisions. However, we recently addressed the reach of article IX, section 7. *Mussallam v. Mussallam*, 321 N.C. 504, 364 S.E. 2d 364 (1988). There, the wife argued that the proceeds from a forfeited appearance bond from her husband, which guaranteed that their child would be produced for a custody hearing, belonged to her rather than to the county school fund, because the bond was civil in nature. We acknowledged that we were dealing with a civil case, but we declined to interpret article IX, section 7 to mean that the clear proceeds of penalties, forfeitures and fines go to the school fund only if they arise from criminal cases. *Id.* at 508, 364 S.E. 2d at 366. We stated:

> We interpret the provisions of section 7 relating to the clear proceeds from penalties, forfeitures and fines as identifying two distinct funds for the public schools. These are (1) the clear proceeds of all penalties and forfeitures in all cases, regardless of their nature, so long as they accrue to the state; and (2) the clear proceeds of all fines collected for any breach of the criminal laws. In the second category, it is quite apparent from the words of section 7 that the clear proceeds of all fines collected for the violation of the criminal laws are to be used for school purposes. . . . While its intent as to the first category is less obvious, the wording of the entire section 7 makes its meaning clear. The term "penal laws," as used in the context of article IX, section 7, means laws that impose a monetary payment for their violation. The payment is punitive rather than remedial in nature and is intended to penalize the wrongdoer rather than compensate a particular party. *See* D. Lawrence, *Fines, Penalties, and Forfeitures: An Historical and Comparative Analysis*, 65 N.C.L. Rev. 49, 82 (1986).

Id. at 508-09, 364 S.E. 2d at 366-67. In *Mussallam*, the appearance bond was penal in nature, even though it was designated as a civil bond. We held that it is the *nature* rather than the *form* of the instrument that governs, however it may be labeled.

Whatever the merits of the State's argument concerning the intent of the RICO Act, on which we do not pass, the specific lan-

guage in N.C.G.S. § 75D-10 and the particular circumstances of the case sub judice compel this Court to conclude that the forfeiture provisions of the Controlled Substances Act prevail over those of the RICO Act. The property discovered during the search of Larry Parham's motel room and the automobile were seized under authority of the Controlled Substances Act. N.C.G.S. ch. 90, art. 5 (1985). The criminal charges pending against Larry Parham at the time of this RICO forfeiture proceeding were also brought under authority of the Controlled Substances Act. The City of Graham Police Department and the Alamance County and Burlington City Boards of Education both lay claim to the property seized from Larry Parham. Resolution of these conflicting claims lies in the statutory language of both the Controlled Substances Act and the RICO Act.

[1] Chapter 90 provides for forfeiture of property involved in violations of the Controlled Substances Act. As outlined above, section 75D-10 provides that the civil remedies under RICO are *cumulative, supplemental and not exclusive*. The RICO forfeiture provisions are *in addition to* the fines, penalties and forfeitures set forth in a final *criminal* conviction. N.C.G.S. § 75D-10 (1987). "Cumulative" and "supplemental" both mean "additional." The Random House Dictionary of the English Language, 489, 1912 (2d ed. 1987). "Not exclusive" means "not limited to." *Id.* at 675. Statutory language should be given its plain meaning wherever possible. *Utilities Comm. v. Edmisten, Atty. General*, 291 N.C. 451, 232 S.E. 2d 184 (1977). Construing the two statutes *in pari materia*, *Shaw v. Baxley*, 270 N.C. 740, 155 S.E. 2d 256 (1967), we read the "in addition to" language in N.C.G.S. § 75D-10 to mean that the forfeiture provisions of the RICO Act do not prevent forfeiture under other applicable statutory forfeiture provisions. Therefore, where, as here, the owner of the forfeitable property has been indicted and is awaiting trial on *criminal* charges under the Controlled Substances Act, we hold that the forfeiture provisions of that Act take precedence over the RICO Act forfeiture provisions.

[2] Having decided that the forfeiture provisions of the Controlled Substances Act prevail here, we note that any judgment of property forfeiture which may be entered against Larry Parham as a result of convictions on the criminal charges against him pursuant to the Controlled Substances Act will accrue to the

State and thus to the appropriate county school fund. The statute specifically provides that:

> Notwithstanding the provisions of subsection (d), the law-enforcement agency having custody of money that is forfeited pursuant to this section *shall pay it to the treasurer or proper officer authorized to receive fines and forfeitures to be used for the school fund of the county in which the money was seized.*

N.C.G.S. § 90-112(d1) (1985) (emphasis added). Moreover, N.C.G.S. § 115C-437, which implements article IX, section 7 of our state Constitution, provides for allocation of revenues to the local school administrative unit by the county.

> The clear proceeds of all penalties and forfeitures and of all fines collected for any breach of the penal laws of the State, as referred to in Article IX, Sec. 7 of the Constitution, shall include the full amount of all penalties, forfeitures or fines collected under authority conferred by the State, diminished only by the actual costs of collection, not to exceed ten percent (10%) of the amount collected.

N.C.G.S. § 115C-437 (1987). In light of our conclusion that the forfeiture provisions of the Controlled Substances Act prevail over those of the RICO Act under the particular facts of this case, and in light of the constitutional mandate in article IX, section 7 and the statutory provisions of N.C.G.S. § 115C-437 and N.C.G.S. § 90-112(d1), we hold that the trial court did not err in entering its order pursuant to its findings that the amount of the forfeiture could not be determined until the criminal actions pending against Larry Parham were completed and any forfeitures under the Controlled Substances Act had taken place.

II.

[3] We now turn to the school boards' contention that Judge Battle committed reversible error in extending *ex parte* the time for the State to serve the record on appeal and that Judge Brewer erred in denying the school boards' motion to dismiss the appeal.

This case was heard on 8 June 1987. On the same day, the trial court announced its ruling in open court and the State and

the City of Graham gave notice of appeal. The judgment was signed on 23 June 1987. The appeal entries attached to the judgment allowed the appellants 90 days to serve the record on appeal, so that the due date was 7 September 1987. On 4 September 1987, the time allowed for serving the record on appeal was enlarged to 120 days by consent, so that the new due date was 7 October 1987.

Counsel for the State counted the number of days from the day the judgment was signed, 23 June 1987, rather than from the day the trial judge announced his decision, 8 June 1987. Counsel for the State served the proposed record on appeal on 22 October 1987, the 120th day from 23 June 1987. After speaking to opposing counsel on the telephone, he also served them with a copy of a written motion to extend time to serve the proposed record on appeal. Simultaneously, the school boards filed a written motion to dismiss the appeal.[1] Without counsel for the school boards present, Judge Battle considered all the papers filed and extended the time for serving the proposed record on appeal to 22 October 1987, the day of its actual filing. Judge Brewer later denied the school boards' motion to dismiss the appeal. The school boards now contend that Judge Battle's *ex parte* order was entered contrary to the provisions of Rule 27(c)(1) of the North Carolina Rules of Appellate Procedure. We disagree.

The proceedings from the time of giving notice of appeal to the filing of the settled record on appeal are governed by the North Carolina Rules of Appellate Procedure. Rule 11 sets out the times and procedures to be followed. N.C.R. App. P. 11. Rule 11(e) provides that the times for taking any action may be extended in accordance with the provisions of Rule 27(c). Rule 27(c)(1), "Motions for Extension of Time in the Trial Division," provides in pertinent part:

> Motions for extension of time . . . may be made orally or in writing and without notice to other parties . . . ; provided that motions to extend the time for serving the proposed record on appeal made after the expiration of any time previous-

1. The Burlington City Board of Education did not file its motion to dismiss the appeal until 5 November 1987 but therein adopted the reasons for dismissal presented by the Alamance County Board of Education.

> ly allowed for such service must be *in writing and with notice to all other parties and may be allowed only after all other parties have had opportunity to be heard.* Such motions may be determined ex parte, but the moving party shall promptly serve on all other parties to the appeal a copy of any order extending time.

N.C.R. App. P. 27(c)(1) (emphasis added). The State complied with the emphasized portion of Rule 27(c)(1) by giving oral and written notice of its motion to extend time to serve the proposed record on appeal. The trial judge complied with the emphasized portion of Rule 27(c)(1) by considering the motions filed by both parties and the letters of the school boards filed in response to the State's motion, prior to entering the order on 26 October 1987, extending time in which to serve the proposed record on appeal. Although counsel for the State erred in calculating the initial filing date, we conclude that Judge Battle properly entered his *ex parte* order extending the time for serving the proposed record on appeal.

We note that the State also complied with the time limits specified in Rule 12(a) of the Rules of Appellate Procedure. That rule provides:

> (a) *Time for Filing Record on Appeal.* Within 15 days after the record on appeal has been settled by any of the procedures provided in this Rule 11 or Rule 18, but no later than 150 days after giving notice of appeal, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken.

N.C.R. App. P. 12(a) (emphasis added). On 4 November 1987, counsel for the State made a motion to the Court of Appeals to extend time to file the record on appeal. Pursuant to Rule 27(c)(2) of the Rules of Appellate Procedure, an order issued from that court on 18 November 1987 extending the time for filing to 14 December 1987. On 3 December 1987, the settled record on appeal was served on the school boards. On 10 December the settled record on appeal was filed and docketed in the Court of Appeals. The State therefore complied with the initial fifteen-day time limit specified in Rule 12(a). Further, a simple calculation demonstrates that the State also complied with the outside time limit of 150 days in which to file the settled record on appeal from the time of

oral notice of appeal. The trial judge announced his decision in the RICO proceeding on 8 June 1987. One hundred fifty days from 8 June 1987 brings the time limit under Rule 12(a) to 5 November 1987. However, the State filed its motion to extend time to file the record on appeal with the Court of Appeals on 4 November 1987. As outlined above, the motion was granted and the time for filing the settled Record was extended to 14 December 1987. Since the State filed the settled record on appeal with the Court of Appeals on 10 December 1987, such filing complied with the 150-day time limit specified in Rule 12(a).

[4] The school boards further contend that Judge Brewer's order denying their motion to dismiss under Rule 25 was deficient because it did not disclose the basis for denial and did not purport to be based on a showing of good cause by the State. We disagree.

Rule 25 governs dismissal of an appeal for failure to comply with the Rules of Appellate Procedure. The rule provides in pertinent part:

> If after giving notice of appeal from any Court . . . the appellant shall fail within the times allowed by these rules or by order of court to take any action required to present the appeal for decision, the appeal may on motion of any other party be dismissed. . . . Motions to dismiss . . . shall be allowed . . . *unless the court for good cause shall permit the action to be taken out of time.*

N.C.R. App. P. 25 (emphasis added). In his order denying the school boards' motion to dismiss the appeal, Judge Brewer stated that he had heard the arguments of counsel and had considered the material in the file of the case.

The proposed record on appeal consisted of all the papers already on file with the Clerk of Superior Court, Alamance County, together with the hearing transcript, which transcript the school boards did not contest. No testimony was narrated, and no exhibits were included in the proposed record on appeal. The case presented no factual dispute and only two questions of law. Since all other documents in the case were filed and uncontested, we conclude that sufficient good cause was shown to allow this ap-

peal to proceed. Judge Brewer therefore properly denied the school boards' motion to dismiss the appeal.

In summary, we hold that under the particular fact situation presented in this case, the forfeiture provisions of the Controlled Substances Act prevail over the forfeiture provisions of the RICO Act. The State's motion to extend time to serve the proposed record on appeal was properly granted, and the school boards' motion to dismiss the appeal was properly denied.

Affirmed.

NANCY SILVERS, INDIVIDUALLY AND ADMINISTRATRIX OF THE ESTATE OF STUART MARTIN WILLIAMS, DECEASED v. HORACE MANN INSURANCE COMPANY, ROGER MATTHEWS, AS AGENT, AND INDIVIDUALLY, JAMES RICHARD BELL, AND ROBERT EARL BELL

No. 261PA88

(Filed 5 April 1989)

1. **Insurance § 69— underinsured motorist coverage—settlement with tortfeasors no bar to recovery**

Although the phrase "legally entitled to recover" in N.C.G.S. § 20-279.21 (1983) and in provisions of an automobile insurance policy regarding underinsured motorist (UIM) coverage means that the insurance carrier's UIM liability is derivative, plaintiff insured's entry of a consent judgment releasing the tortfeasors and their insurance carrier does not bar her as a matter of law from recovering under the UIM coverage of her policy where conflicting provisions in the statute and in the policy appear to require the insured both to preserve the cause of action against the tortfeasor and to settle the cause before seeking UIM benefits.

2. **Insurance § 69— underinsured motorist coverage—settlement with tortfeasor without insurer's consent—necessity for showing prejudice**

An insured plaintiff's entry into a consent judgment with tortfeasors and their liability insurance carrier without notice to or the consent of the insured's UIM coverage carrier, in violation of the terms of the UIM policy, does not bar plaintiff from recovering UIM benefits under that policy unless the insurance carrier was materially prejudiced by plaintiff's failure to notify it and to procure its consent to the settlement. The insurance carrier bears the burden of proving such prejudice.

Justice WEBB dissenting.

Justice MEYER joins in this dissenting opinion.

ON discretionary review of a decision of the Court of Appeals, reported at 90 N.C. App. 1, 367 S.E. 2d 372 (1988), affirming in part and reversing in part judgments entered by *Barnette, J.*, at the 1 September 1986 Civil Session of Superior Court, HARNETT County. Heard in the Supreme Court 14 February 1989.

Anderson, Cox, Collier & Ennis, by Henry L. Anderson, Jr. and Clay A. Collier, for plaintiff-appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Grady S. Patterson, Jr. and Theodore B. Smyth, for defendant-appellees Horace Mann Insurance Company and Roger Matthews.

WHICHARD, Justice.

Defendants Horace Mann Insurance Company (Horace Mann) and Roger Matthews (Matthews) seek reversal of a decision of the Court of Appeals reversing the trial court's entry of summary judgment in their favor. The issue is whether an insured plaintiff who has entered into a consent judgment with a tort-feasor and the tort-feasor's liability insurance carrier, without notice to[1] or the consent of the insured's underinsured motorist (UIM) coverage carrier, in violation of the terms of the UIM policy, may nevertheless recover UIM benefits under that policy. We answer in the affirmative, and we thus affirm the Court of Appeals except as its opinion is modified herein.

On 14 March 1984 plaintiff's son was riding in a car driven by James Bell and owned by Robert Bell when the car was involved in a single-vehicle accident. Plaintiff's son died approximately a week later from injuries sustained in the accident. At the time of the accident plaintiff was covered by a Horace Mann insurance policy providing UIM coverage of at least $25,000 per person and $50,000 per accident.[2] On 4 May 1984 plaintiff filed a wrongful

1. Plaintiff argues in her brief that defendants Horace Mann and Matthews must have received actual notice of her claims because they denied the existence of underinsured motorist coverage in their answer to her complaint. However, these defendants complain of lack of notice of the claim filed in May 1984 against the Bell defendants, which culminated in a consent judgment, not lack of notice of the later claims.

2. Plaintiff alleges she had requested that Matthews, Horace Mann's agent, increase her UIM coverage prior to the accident, and that Matthews assured her that

death action against James and Robert Bell. On 16 May 1984 the following consent judgment was entered in that action:

> THIS CAUSE, coming on to be heard and being heard before the undersigned Judge upon statement of counsel for Plaintiff and Defendants that this cause has been settled and adjusted between the parties by agreement under the terms of which the Plaintiff shall have and recover judgment in the amount of Twenty-Five Thousand Dollars ($25,000); AND IT FURTHER APPEARING TO THE COURT from the face of the Complaint that this is an action for recovery for wrongful death of Plaintiff's intestate for which damages far exceed the liability coverage of the Defendants' insurance carrier, Indiana Lumbermans Mutual Insurance Co.; AND IT FURTHER APPEARING TO THE COURT, upon statement of counsel, that the liability of Indiana Lumbermans Mutual Insurance Company, which is the insurance carrier for the Defendant, is limited to Twenty-Five Thousand Dollars ($25,000) per person for bodily injury; AND IT FURTHER APPEARING TO THE COURT that the primary carrier, Indiana Lumbermans Mutual Insurance Co., wishes to pay the policy limits in order to avoid unnecessary litigation costs as liability on the part of the Defendants is clear and the damages of the Plaintiff's intestate far exceed the policy limits covered by the primary liability carrier, Indiana Lumbermans Mutual;
>
> AND IT FURTHER APPEARING TO THE COURT that the Plaintiff's intestate was covered by underinsured motorist coverage through The Horace Mann Company and that this consent judgment is not to be construed in any way to adversely affect the rights of Plaintiff or her intestate concerning any such underinsured coverage;

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the coverage had been increased or, on other occasions, that "he would take care of it." She filed actions against defendants Horace Mann and Matthews for breach of contract, negligence, bad faith, fraud, and unfair trade practices in March 1985. These claims, if proven, save plaintiff from coming within the purview of N.C.G.S. § 20-279.21(b)(4), which provides that insurance policies shall "provide UIM coverage, to be used *only* with policies that are written at limits that exceed those prescribed by subdivision (2) of this section . . . ." (Emphasis added.) Subdivision (2) provides for minimum liability limits of $25,000 for bodily injury per person and $50,000 per accident. N.C.G.S. § 20-279.21(b)(2) (1983).

NOW, THEREFORE, IT IS BY CONSENT ORDERED AND ADJUDGED that the Plaintiff's intestate have and recover of and from the Defendants, by and through their primary liability insurance carrier, Indiana Lumbermans Mutual Insurance Company, the sum of Twenty-Five Thousand Dollars ($25,000) and that the same shall be a full and final release of Indiana Lumbermans Mutual Insurance Company and the Defendants. It is hereby further ordered that this consent judgment shall not release nor relinquish any rights that the Plaintiff's intestate has or might have against Horace Mann Company under any underinsured liability coverage.

On 27 March 1985 plaintiff instituted this action against the Bells, Matthews, and Horace Mann to establish the total damages suffered due to the wrongful death of her son and to recover from Horace Mann under her UIM coverage. Plaintiff's complaint also included claims against Horace Mann and Matthews for breach of contract, negligence, bad faith, fraud, and unfair trade practices. All defendants moved to dismiss, relying on the consent judgment in the wrongful death action against the Bells as a bar to further liability. In addition, Matthews and Horace Mann alleged that plaintiff's violations of various policy provisions released them from further liability. The trial court considered matters outside the pleadings and thus treated the motions to dismiss as motions for summary judgment. It entered orders granting summary judgment for all defendants.

On appeal, the Court of Appeals affirmed the summary judgment entered in favor of the Bell defendants. Plaintiff did not seek discretionary review; thus, the propriety of the summary judgment entered in favor of the Bell defendants is not before us. The Court of Appeals reversed the summary judgment in favor of defendants Horace Mann and Matthews (hereinafter defendants) and remanded the cause to the trial court for further proceedings on the claims against those defendants. Those defendants petitioned for discretionary review, and on 7 September 1988 we allowed their petition.

[1] Defendants first argue that defendant-insurer's liability under the UIM coverage derives from the tortfeasors' liability. Because plaintiff has released the tortfeasors—the Bells—from any further liability, defendants argue that plaintiff is no longer

legally entitled to recover from the tortfeasors and thus no longer entitled to recover from defendants.

Both the insurance policy and the relevant statute[3] predicate UIM coverage on the insured's entitlement to recover from the tort-feasor. The policy states under Part C—Uninsured Motorist Coverage: "We will pay damages which a covered person is *legally entitled to recover* from the owner or operator of an uninsured motor vehicle because of:

1. Bodily injury sustained by a covered person and caused by an accident; and

2. Property damage caused by an accident."

(Emphasis added.) The policy includes underinsured motor vehicles within the definition of uninsured motorist (UM) coverage; therefore, Part C and its terms apply to UIM coverage. The phrase "legally entitled to recover" tracks the language of N.C.G.S. § 20-279.21(b)(3), which mandates that motor vehicle liability insurance be available "for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles . . . ."

In *Brown v. Casualty Co.*, 285 N.C. 313, 204 S.E. 2d 829 (1974), this Court construed the phrase "legally entitled to recover" in the context of an insured seeking recovery under his UM coverage when his claim against the tort-feasor was barred by the statute of limitations. Justice (later Chief Justice) Sharp wrote for the Court:

> In our view it would indeed constitute "antics with semantics" to say that a litigant with a stale tort claim, one against which the applicable statute of limitations has been specifically pleaded, remains "legally entitled to recover" when his remedy has been taken away! To be "legally entitled to recover damages" a plaintiff must not only have a

3. The version of the statute in effect at the time the policy was issued and at the time of the accident was N.C.G.S. § 20-279.21 (1983). The statute was amended in 1985 to provide for different procedures in claims for underinsurance benefits. *See* 1985 N.C. Sess. Laws ch. 666, § 74. Our discussion of the relevant statutory provisions concerns only the 1983 versions.

> cause of action but a remedy by which he can reduce his right to damage to judgment.

Id. at 319, 204 S.E. 2d at 833. *See also Buchanan v. Buchanan*, 83 N.C. App. 428, 350 S.E. 2d 175 (1986), *disc. rev. denied*, 319 N.C. 224, 353 S.E. 2d 406 (1987) (release of tort-feasor without consent of UIM insurer also discharged UIM insurer as a matter of law because of derivative nature of insurer's liability).

The words "legally entitled to recover" are subject to other interpretations. For example, in *Karlson v. City of Oklahoma City*, 711 P. 2d 72 (Okla. 1985), the Oklahoma Supreme Court interpreted the phrase as follows: "The words, 'legally entitled to recover[,]' simply mean that the insured must be able to establish fault on the part of the uninsured motorist which gives rise to damages and prove the extent of those damages." *Id.* at 74-75 (quoting *Uptegraft v. Home Ins. Co.*, 662 P. 2d 681, 685 (Okla. 1983)). Given our interpretation of the phrase in *Brown*, however, we agree with defendants that "legally entitled to recover" should be construed to mean that the carrier's UIM liability is derivative in nature.

The analysis does not end here, however. As the Court of Appeals noted, both the policy and the statute contain an exhaustion clause. The policy contains a section entitled "Underinsured Motorists Coverage—North Carolina" which amended Part C, the UM section, to include the following paragraph:

> We will pay under this coverage only after the limits of liability under any applicable liability bonds or policies have been exhausted by payment of judgments or settlements.

Similarly, the 1983 version of the statute provided:

> The insurer shall not be obligated to make any payment . . . to which underinsured motorist insurance coverage applies . . . until after the limits of liability under all bodily injury liability bonds or insurance policies applicable at the time of the accident have been exhausted by payment of judgments or settlements . . . .

1983 N.C. Sess. Laws ch. 777, § 1. Thus, both the policy and the statute contain internally conflicting provisions. While a release of the tort-feasor acts to release the UIM insurance carrier of its

derivative liability, the statute and the policy terms regarding UIM coverage appear to require the insured to exhaust all liability policies by judgment or settlement before the insurer is obligated to pay under the UIM coverage. The insured reasonably could have read the exhaustion clause to require her to approach her UIM carrier with judgment or settlement in hand when seeking to recover under the UIM provisions of her policy.

The Court of Appeals aptly reasoned:

> The exhaustion clause of the policy and the similar wording of Section 20-279.21(b)(4) obligate the insurer to pay *only after* the applicable liability bonds or policies have been exhausted by payment of a judgment or settlement. In entering the consent judgment with the Bells and their insurer, plaintiff established her legal entitlement to damages as to those parties. However, once the applicable liability policy was exhausted in compliance with the provision, plaintiff was no longer legally entitled to recover additional damages from the tortfeasors.

Silvers v. Horace Mann Ins. Co., 90 N.C. App. 1, 8, 367 S.E. 2d 372, 376 (1988) (emphasis in original).

Like all contracts, insurance contracts must be construed against the drafter, which had the best opportunity to protect its interests. *Chavis v. Southern Life Ins. Co.*, 318 N.C. 259, 262, 347 S.E. 2d 425, 427 (1986). "If any ambiguity exists in the insurance contract, . . . the fault lies with the insurance company and not with the insured." *Mazza v. Medical Mut. Ins. Co.*, 311 N.C. 621, 630, 319 S.E. 2d 217, 223 (1984). This Court has stated:

> The various terms of the policy are to be harmoniously construed, and if possible, every word and every provision is to be given effect. If, however, the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations, the doubts will be resolved against the insurance company and in favor of the policyholder.

Woods v. Insurance Co., 295 N.C. 500, 506, 246 S.E. 2d 773, 777 (1978). A reasonable reading of the policy here appears to require the insured both to preserve the cause of action against the tortfeasor and to settle the cause before seeking UIM benefits. This conflict must be resolved in favor of the insured. *See Proctor v.*

N.C. Farm Bureau Mutual Ins. Co., 324 N.C. 221, 376 S.E. 2d 761 (1989) (Court declined to resolve ambiguity created by insurer in its favor).

When statutory provisions cannot be reconciled, courts must look to the purpose of the statute as their guide in divining the intent of the legislature. *See McLean v. McLean*, 323 N.C. 543, 548-89, 374 S.E. 2d 376, 380 (1988). The Court of Appeals correctly noted regarding the Motor Vehicle Safety and Financial Responsibility Act: "The statute is remedial in nature and is to be liberally construed to effectuate its purpose of providing coverage for damages to injured parties caused by insured motorists with liability coverage not sufficient to provide complete compensation for the damages." 90 N.C. App. at 5, 367 S.E. 2d at 375. We have recently stated: "The purpose of this State's compulsory motor vehicle insurance laws, of which the underinsured motorist provisions are a part, was and is the protection of innocent victims who may be injured by financially irresponsible motorists." *Proctor*, 324 N.C. at ---, 376 S.E. 2d at --- (1989). Construing the statutory provision in question here in light of the remedial purpose of the Act, we conclude that it was not the intent of the General Assembly that plaintiff be prohibited from recovering UIM benefits from Horace Mann.

Thus, viewing the policy in question in light of well-established principles of contract interpretation, and viewing the statutory provision in question in light of well-established principles of statutory construction, plaintiff's entry of a consent judgment with the tortfeasors and their carrier does not bar her as a matter of law from recovering under the UIM coverage of her policy with Horace Mann.[4]

4. The Court of Appeals appears to have attached some significance to plaintiff's reservation of her right to UIM benefits against Horace Mann in the consent judgment. *See* 90 N.C. App. at 6, 367 S.E. 2d at 375. We do not consider this reservation of rights significant. Horace Mann was not a party to the consent judgment; therefore, the terms of the judgment cannot bind it. "A consent judgment is the contract of the parties entered upon the records with the approval and sanction of a court of competent jurisdiction . . . ." *Layton v. Layton*, 263 N.C. 453, 456, 139 S.E. 2d 732, 735 (1965) (quoting 3 Strong's N.C. Index *Judgments* § 10, at 16 (1960)). "The power of the court to sign a consent judgment depends upon the unqualified consent of the parties thereto . . . ." *Owens v. Voncannon*, 251 N.C. 351, 354, 111 S.E. 2d 700, 702 (1959) (quoting *King v. King*, 225 N.C. 639, 641, 35 S.E. 2d 893, 895 (1945)). "[I]n order to bind a third person contractually, an expression of

[2] Defendants also argue that plaintiff violated provisions in the policy requiring notice to the insurer and the insurer's consent before settlement. The policy provides:

> Any judgment for damages arising out of a suit is not binding on us unless we have been served with a copy of the summons, complaint or other process against the uninsured motorist.

In Part C, under the heading "Exclusions," the policy states:

> We do not provide Uninsured Motorists Coverage for property damage or bodily injury sustained by any person:
>
> . . .
>
> 2. If that person or the legal representative settles the bodily injury or property damage without our written consent.

"[E]xclusions from, conditions upon and limitations of undertakings by the company, otherwise contained in the policy, are to be construed strictly so as to provide the coverage, which would otherwise be afforded by the policy." *Trust Co. v. Insurance Co.*, 276 N.C. 348, 355, 172 S.E. 2d 518, 522-23 (1970). In *Insurance Co. v. Construction Co.*, 303 N.C. 387, 279 S.E. 2d 769 (1981), this Court considered a condition precedent in an insurance policy requiring the insured to give the insurer notice of an accident "as soon as practicable." We held that failure to comply with the notification requirement did not relieve the insurer of its contractual obligations unless it suffered material prejudice in its investigation and defense under the policy. *Id.* at 396, 279 S.E. 2d at 774. The Court stated:

> The rule we adopt today places the notice requirement in its proper context. No condition of timely notice will be given a greater scope than required to fulfill its purpose. Simply put, the scope of the condition precedent which will relieve an insurer of its obligations under an insurance contract, is only as broad as its purpose: to protect the ability of

assent by such person is necessary." 17 Am. Jur. 2d *Contracts* § 294 (1964). Here, Horace Mann did not assent to the reservation of rights against it. Therefore, if the consent judgment had operated to release Horace Mann by operation of law, plaintiff's recitation that she reserved her rights against Horace Mann, when Horace Mann was not a party to the consent judgment, would have been ineffective.

> the insurer to defend by preserving its ability fully to investigate the accident.

Id. at 396, 279 S.E. 2d at 774-75. The Court of Appeals used a similar analysis in the present case, holding that the consent-to-settlement clause should be construed in light of its purpose. 90 N.C. App. at 11, 367 S.E. 2d at 378. That purpose was to protect the insurer's right of subrogation. *Id.*

The court then held that Horace Mann had waived its right to subrogation by the following term in the policy:

> A. If we make a payment under this policy and the person to or for whom payment was made has a right to recover damages from another we shall be subrogated to that right. That person shall do:
>
> 1. Whatever is necessary to enable us to exercise our rights; and
>
> 2. Nothing after loss to prejudice them. However, our rights in this paragraph do not apply under:
>
> 1. Parts B and C . . . .

Part c describes UM and UIM coverage.

The Court concluded:

> From this language, it is clear that Horace Mann does not have a right to subrogation under the terms of its policy. Furthermore, assuming Horace Mann had a right of subrogation in equity or by statute, we hold it waived the right under this section of the policy. . . .
>
> Therefore, since Horace Mann has waived its right to subrogation, the clause serves no valid purpose. . . . We hold that plaintiff's failure to obtain Horace Mann's consent before entering into the consent judgment does not bar its recovery against Horace Mann as a matter of law.

Id. at 12-13, 367 S.E. 2d at 379 (citations omitted).

We agree that Horace Mann, by the terms of its policy, waived any right of subrogation otherwise accorded it. We also agree that protecting the insurer's subrogation right appears to

be the primary purpose of the consent-to-settlement clause of the policy. *See* Thomas, *No-Consent-to-Settlement Clauses and Uninsured Motorist Coverage*, 35 Fed'n Ins. Couns. Q. 71, 74 (1984); Note, *Underinsured Motorist Coverage: Legislative Solutions to Settlement Difficulties*, 64 N.C.L. Rev. 1408, 1411 (1986) ("To protect their subrogation rights, insurers often include a 'consent-to-settlement' clause in their insurance policies."). Defendants argue, however, that protecting the insurer's subrogation right is not the sole reason for the notice and consent-to-settlement clauses. The clauses also serve to protect the UIM carrier against collusion between the tortfeasor and the insured and noncooperation on the part of the tortfeasor after his or her release by the insured. We agree that the insurance company should have an opportunity to establish any prejudice that may have been caused by plaintiff's failure to notify it and to obtain consent to settlement as required by the policy. As we noted previously in a similar context, this approach to interpretation of the consent-to-settlement requirement has the advantage "of providing coverage whenever in the reasonable expectations of the parties it should exist and of protecting the insurer whenever failure strictly to comply with a condition has resulted in material prejudice." *Insurance Co.*, 303 N.C. at 396, 279 S.E. 2d at 775.

Accordingly, we remand the case to the Court of Appeals for further remand to the trial court to determine whether Horace Mann was materially prejudiced by plaintiff's failure to notify it and to procure its consent to settlement. *See Parrish v. Grain Dealers Mut. Ins. Co.*, 90 N.C. App. 646, 649-50, 369 S.E. 2d 644, 645-56 (Greene, J., concurring), *disc. rev. allowed*, 323 N.C. 366, 373 S.E. 2d 547 (1988). As established in *Insurance Co.*, the insurer will bear the burden of proving that it has been materially prejudiced by the insured's failure to notify it and to obtain its consent to settlement. *Insurance Co.*, 303 N.C. at 398, 279 S.E. 2d at 775-76. "[T]he burden of showing prejudice should be on the insurer because it is seeking to escape its obligation . . ., the very thing which it is paid to do." *Id.* at 397, 279 S.E. 2d at 775. Further, the insurer is in a much better position than the insured to know what factors are relevant to its posture regarding settlement and to recognize prejudice. *Id.* at 398, 279 S.E. 2d at 776. "An insured would be in a far less enviable position if he had the

burden of showing an absence of prejudice. Indeed, the insured would be forced to prove a negative." *Id.*

The decision of the Court of Appeals, as modified herein, is affirmed. The case is remanded to the Court of Appeals with instructions to remand to the Superior Court, Harnett County, for further proceedings consistent with this opinion.

Modified and affirmed.

Justice WEBB dissenting.

I dissent from the majority opinion. The provisions of the policy and N.C.G.S. § 20-279.21(b)(3) provide that a covered policyholder may recover damages the covered person is legally entitled to recover from the third party tort-feasor after the underinsured tort-feasor's coverage is exhausted. In this case the plaintiff is not entitled to recover from the Bells. Under the policy she is not entitled to recover from Horace Mann.

The majority says there are conflicting provisions in the policy and the statute. They say the provision that Horace Mann will pay "only after the limits of liability under any applicable liability bonds or policies have been exhausted by payment of judgments or settlements" "appears to require the insured both to preserve the cause of action against the tort-feasor and to settle the cause before seeking UIM benefits." I believe the policy and the statute can and should be read to mean that before the policyholder may proceed against his own insurer on the underinsured motorist provision of his policy he must first proceed against the underinsured motorist. If he procures a judgment which is larger than the underinsured's liability coverage he may collect on his underinsured coverage after the underinsured tort-feasor's liability insurance has been paid. If the policyholder settles his claim for an amount *larger* than the coverage of the tort-feasor he may collect on his underinsured motorist coverage after the tort-feasor's policy has been exhausted. If the policy is read in this manner we can give effect to all its provisions. It is a rule of construction, which we are required to follow, that every part of a contract must be given effect if that can be done by any fair or reasonable interpretation. *Refining Co. v. Construction Co.*,

153 N.C. 277, 72 S.E. 1003 (1911). I believe it is error for the Court to ignore this rule.

I also believe the plaintiff is barred by her failure to give notice to Horace Mann and her settlement of the case without Horace Mann's consent. The policy provides that she must do these things in order for Horace Mann to be liable. I believe these provisions should be enforced. The majority has required Horace Mann to prove it has been prejudiced before it may take advantage of these exclusions. It appears to me that the prejudice is evident. Horace Mann must now defend a claim which the defendant has no interest in defending. I believe this shows prejudice enough.

I vote to reverse the Court of Appeals.

Justice MEYER joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. EUGENE FRANKLIN VAUGHN

No. 83A88

(Filed 5 April 1989)

1. Homicide § 18.1— murder—premeditation and deliberation—evidence sufficient

The evidence was sufficient in a noncapital prosecution for first degree murder to show premeditation and deliberation where the evidence showed that, after a confrontation between defendant and the victim, defendant went to his trailer and got his gun; defendant told the woman who lived with him, Nellie Cayton, that the victim had beaten him and that if he beat him any more, he would shoot him; Cayton then called Barbara Lewis and said that defendant had a gun and had said that he was going to shoot the victim, Fritz Lewis; as the victim and two others approached Barbara Lewis's trailer, defendant backed into an adjacent driveway and motioned for Lewis to come over; when Lewis, who was unarmed, got within three to five feet of defendant's truck, defendant stuck his gun out of the window and shot Lewis; defendant told Lewis to get up after he fell; defendant pointed the gun at one of the others and told her that he would shoot her too; defendant gave a bystander two live shells and asked him to do something with them; defendant did not attempt to help the victim, but rather sat in his truck and looked at him; defendant told an emergency medical technician that the victim would not breathe because he had taken a gun and blown his brains out; there was testimony

that it was necessary before firing the gun to load it, close it, and cock it before pulling the trigger; and there was evidence that defendant reloaded the gun after shooting the victim.

2. **Homicide § 8.1— murder—premeditation and deliberation—intoxication**

No inference of the absence of premeditation and deliberation arises from intoxication, as a matter of law.

3. **Homicide § 8.1— murder—intoxication—erroneous instruction—no prejudice**

The trial court erred in a prosecution for first degree murder by instructing the jury on voluntary intoxication that "the evidence must show that at the time of the killing the defendant's mind and reason was so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill." The error was not prejudicial because the evidence was insufficient to require an instruction on voluntary intoxication.

4. **Homicide § 30.2— murder—failure to instruct on manslaughter—no error**

There was no prejudicial error in a first degree murder prosecution from the court's denial of defendant's request to instruct the jury on voluntary manslaughter where the jury was properly instructed on first degree murder and second degree murder and the jury returned a verdict of guilty of first degree murder.

5. **Homicide § 15— murder—testimony as to defendant's behavior when angry—not prejudicial**

There was no prejudice in a prosecution for first degree murder from the State's questioning of a woman with whom defendant lived regarding his behavior when angry because, assuming error, the testimony tended to show that defendant had no special propensity toward violence and that the woman had provoked defendant's anger toward her. N.C.G.S. § 15A-1443(a).

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) (Cum. Supp. 1988) from the imposition of a sentence of life imprisonment upon his conviction of first degree murder before *Lewis, John B., Jr., J.*, at the 16 November 1987 Criminal Session of Superior Court, BEAUFORT County. Heard in the Supreme Court 14 February 1989.

Lacy H. Thornburg, Attorney General, by Doris J. Holton, Assistant Attorney General, for the State.

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

WHICHARD, Justice.

In a non-capital trial, defendant was convicted of the first degree murder of Fritz Lewis and sentenced to life imprisonment. We find no error.

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

On 25 August 1987, defendant gave Fritz Lewis, Joann Clark and Carey White a ride in his truck to the home of Wendy Clark, Joann Clark's sister. Defendant drank from a liquor bottle as he drove; the three passengers drank beer. Defendant stopped the truck at a dumpster for Joann Clark and White to urinate. When they returned to the truck, defendant and Lewis were arguing and cursing at each other. Lewis told White and Clark that defendant said he had seen Clark naked twice. Clark was Lewis' girlfriend. She told Lewis that defendant's statement was not true. Lewis said to defendant, "We ought to fight." Clark took over the driving, and defendant and Lewis calmed down. After defendant and his passengers got to Wendy Clark's house, defendant left. Wendy Clark drove Lewis, White and Joann Clark back to Lewis Grocery. On their way they passed defendant in his truck. When they arrived at the grocery store, they sat outside and drank beer. Wendy Clark left.

While Lewis, White and Joann Clark were outside the store, defendant drove by in his truck and turned down the road heading toward his house. Lewis asked Joann Clark, "It ain't so, is it baby?" She replied, "You know it ain't." Lewis ran from the store through the woods toward defendant's house. He returned about five minutes later, out of breath. White asked Lewis, "Did you take care of it?" Lewis responded, "Taken care of."

Defendant returned to his trailer. He went to the bedroom and asked Nellie Cayton, who lived with him, "Where is it at?" He then came out of the bedroom with his shotgun. Defendant told Cayton that Fritz Lewis "beat the hell out of [me]." Cayton testified that defendant's eye was swollen and bruised and his cheekbone was blue. Defendant told Cayton that if Lewis beat him anymore he would shoot him. Defendant then left his home, driving "real slow." Cayton testified that defendant was drunk, was not walking very well, and had trouble getting to the door.

Cayton called Barbara Lewis at Lewis Grocery and told her that defendant had a gun and that he said he was going to shoot Fritz Lewis. Cayton advised her to get Lewis, White and Clark away before defendant arrived.

Barbara Lewis went outside and told White to get Lewis away because defendant was on his way to the store to shoot him. White suggested that they go back to the house. Lewis, White and Clark left the store and returned through the woods to Lewis and Clark's trailer. As they got near the trailer, they saw defendant in his truck. Defendant looked at them, stopped the truck, and backed it into the driveway of Greg Scaggs, who lived next to Lewis and Clark. Defendant motioned for Lewis to come over. Lewis, who was unarmed, began walking toward defendant's truck, telling Clark, "Well, I'm going to go see what he's got to say now." When Lewis got within three to five feet of the truck, defendant stuck the barrel of his shotgun out the window. Lewis threw his arm up and defendant shot him. After Lewis fell, defendant said, "Now, get up." Clark ran toward Lewis. Defendant pointed the gun at her and told her that he would shoot her head off too. Defendant pointed the gun back and forth at Clark and Lewis and would not let Clark go near Lewis.

Scaggs walked around the truck and saw Lewis lying on the ground, bleeding from his head. He went to the passenger's side of the truck and got the shotgun from defendant. He took the gun into his house, wiped fingerprints from it, then went back to the truck and put the gun inside. Defendant handed Scaggs two live shells and told him to do something with them. Scaggs threw them in the woods.

Mary Ann Lewis, Clark's grandmother, arrived on the scene. She went up to the truck and asked defendant why he did it. He said, "Ma, I ain't taking a beating from no damn body." She saw blood on defendant's cheeks and thought he was drunk. She asked him if he was sorry and he said he was. Lewis was still breathing. Defendant stayed in his truck, smoking cigarettes and looking at Lewis.

When an emergency medical technician arrived and began administering CPR to Lewis, defendant said, "Baby, he ain't going to breathe because I took a gun and I blowed his f--ing brains out." Lewis died on the way to the hospital.

Several hours after the shooting, Deputy Sheriff Ray Manning commented to defendant, "That's a nasty looking mouse under your eye." Defendant responded, "Yeah, that's why that gun went off." Manning testified that the wound under defendant's eye was red and dark. Manning gave his opinion that defendant was intoxicated but not drunk. Manning testified that he removed an unfired slug from defendant's gun.

Lewis died of a gunshot wound to his head. Dr. Page Hudson, the pathologist who performed the autopsy, estimated that the end of the gun was approximately four feet, give or take a foot, from Lewis' head when it was fired. Special Agent Eugene Bishop, a firearms expert with the SBI, testified that the gun had to be loaded, closed, and cocked before being fired.

Defendant offered no evidence.

[1] Defendant first contends that the trial court erred in failing to grant his motion to dismiss the first degree murder charge. He argues that the State's evidence was insufficient to show premeditation and deliberation.

Premeditation and deliberation are necessary elements of first degree murder based on premeditation and deliberation (as opposed to other bases for first degree murder set forth in N.C.G.S. § 14-17 (1986)). *State v. Jackson*, 317 N.C. 1, 23, 343 S.E. 2d 814, 827 (1986), *vacated on other grounds*, 479 U.S. 1077, 94 L.Ed. 2d 133 (1987). Premeditation means that the defendant thought out the act beforehand for some length of time, however short. *Id.* "Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation." *Id.* The State may prove the elements of premeditation and deliberation by circumstantial evidence as well as by direct evidence. *Id.* Among the circumstances to be considered in determining whether a defendant acted after premeditation and deliberation are the want of provocation by the victim, the defendant's conduct and statements before and after the killing, and threats and declarations by the defendant before and during the course of the occurrence giving rise to the death of the victim. *Id.*

The evidence in this case shows that after a confrontation between defendant and Lewis, defendant went to his trailer and got his gun. He told Nellie Cayton that Lewis had beaten him and that if he beat him anymore he would shoot him. After defendant left, Cayton called Barbara Lewis and said that defendant had a gun and had said he was going to shoot Lewis. As Lewis, Clark, and White approached Lewis and Clark's trailer, defendant backed into an adjacent driveway and motioned for Lewis to come over. When Lewis, who was unarmed, got within three to five feet of defendant's truck, defendant stuck his gun out of the window and shot Lewis. After Lewis fell, defendant told him to "get up." Defendant pointed the gun at Clark and told her that he would shoot her too. Defendant gave Scaggs two live shells and asked him to do something with them. Defendant did not attempt to help Lewis; rather, he sat in his truck and looked at him. He told an emergency medical technician that Lewis would not breathe because he had taken a gun and blown his brains out. There was testimony that to fire the gun, it was necessary to load it, close it, and cock it before pulling the trigger. There is evidence that defendant reloaded the gun after shooting Lewis. The foregoing evidence is sufficient to support a jury finding of premeditation and deliberation.

[2] Defendant argues that the uncontroverted evidence shows that he was intoxicated and that he therefore could not have deliberated. This contention is unavailing because "[n]o inference of the absence of deliberation and premeditation arises from intoxication, as a matter of law." *State v. Mash*, 323 N.C. 339, 347, 372 S.E. 2d 532, 537 (1988) (quoting *State v. Murphy*, 157 N.C. 614, 619, 72 S.E. 1075, 1077 (1911)).

[3] Defendant next contends that the trial court erred in failing to give the pattern jury instruction on voluntary intoxication. Rather, it gave the following instruction, in pertinent part:

> Voluntary drunkenness is not a legal excuse for crime. The evidence must show that at the time of the killing the *[d]efendant's mind and reason was so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill.* Intoxicated and drunk have similar if not the same meaning in the law. According to the dictionaries, they are sometimes referred

one to the other. Do not attempt to make any distinction between drunk and intoxicated insofar as this case is concerned.

A person may be under the influence as referred to in the Motor Vehicle Law, or referred to as intoxicated, and be quite capable of carrying out a specific intent to kill. The breathalyzer readings and so forth that are done in motor vehicle cases have no application here insofar as this evidence is concerned.

The influence of intoxication under question of existence of premeditation depends upon its degree and its effect upon the mind and passion. *For it to constitute a defense it must appear that the [d]efendant is not able by reason of drunkenness to think out beforehand what he intended to do, and to weigh it and understand the nature and consequences of his act.*

(Emphasis added.) Defendant argues that the italicized portions of the instruction improperly relieved the State of its burden of proof, citing *State v. Mash*, 323 N.C. 339, 372 S.E. 2d 532.

In *Mash*, we held that the following modification to the pattern jury instruction, *see* N.C.P.I.—Crim. 305.11, was improper:

[T]he intoxication must be so great that his mind and reason were so completely overthrown so as to render him utterly incapable to form a deliberate and premedi[t]ated purpose to kill. Mere intoxication cannot serve as an excuse for the defendant. It must be intoxication to the extent that the defendant's mental processes were so overcome by the excessive use of liquor or other intoxicants that he had temporarily, at least, lost the capacity to think and plan.

Id. at 345, 372 S.E. 2d at 536. This instruction was erroneous because "[f]or the jury, evidence of defendant's intoxication need only raise a reasonable doubt as to whether defendant formed the requisite intent to kill required for conviction of first degree murder in order for defendant to prevail on this issue." *Id.* at 346, 372 S.E. 2d at 537. Likewise, in this case, the court's instruction on voluntary intoxication states, also erroneously, that "[t]he evidence must show that at the time of the killing the [d]efendant's mind and reason was so completely intoxicated and over-

thrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill."

This error was not prejudicial, however, because the evidence was insufficient to require an instruction on voluntary intoxication. *State v. McQueen*, 324 N.C. 118, 141, 377 S.E. 2d 38, 51 (1989). To be entitled to an instruction on voluntary intoxication, a defendant "must produce substantial evidence which would support a conclusion by the judge that he was so intoxicated that he could not form a deliberate and premeditated intent to kill." *Mash*, 323 N.C. at 346, 372 S.E. 2d at 536. The defendant must show "that at the time of the killing the defendant's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill." *Id.* "Evidence of mere intoxication . . . is not enough to meet defendant's burden of production." *Id.* "[A] person may be excited, intoxicated and emotionally upset, and still have the capability to formulate the necessary plan, design, or intention to commit murder in the first degree." *Id.* at 347, 372 S.E. 2d at 537.

Several witnesses testified as to whether defendant appeared to be intoxicated. Clark testified that defendant had been drinking but was not drunk, that he was aware of what was going on around him, and that his statements were serious, coherent and rational. White testified that defendant was intoxicated, but that most of his statements made sense, that he was responsive, and that he appeared to know what was going on around him. Scaggs testified that defendant was slightly intoxicated and that he smelled of alcohol. Deputy Sheriff Joe Bell, who arrested defendant, testified that defendant was responsive, behaved appropriately, and walked unassisted. He testified that he did not detect alcohol on defendant. Mary Ann Lewis testified that defendant was drunk, but was no drunker than usual. Cayton testified that defendant was drunk, was not walking very well, and had trouble getting to the door. However, she said that his questions were "appropriate and responsive," that he knew what was going on around him, and that he walked unassisted to his truck. Deputy Sheriff Ray Manning testified that defendant "was intoxicated," but "was not drunk."

In deciding whether the evidence was sufficiently substantial to entitle defendant to an instruction on voluntary intoxication, we must consider the evidence of intoxication in the light most favorable to defendant. *Id.* In the light most favorable to defendant, the evidence shows that he was intoxicated and had some trouble walking. However, there is no testimony that he behaved inappropriately, that his statements were irrational or incoherent, or that he was unaware of what was going on around him. The evidence thus was insufficient to require any instruction on voluntary intoxication, and we thus cannot find prejudicial error from the instruction given.

[4] Defendant next contends that the trial court erred in denying his request to instruct the jury on voluntary manslaughter. Assuming arguendo that the evidence supported such an instruction, the trial court's failure to give it was harmless. This Court has held that where a jury is properly instructed on first degree murder and second degree murder, and the jury returns a verdict of guilty of first degree murder, the failure to instruct on voluntary manslaughter is harmless error. *State v. Tidwell*, 323 N.C. 668, 674-75, 374 S.E. 2d 577, 581 (1989); *State v. Judge*, 308 N.C. 658, 664-65, 303 S.E. 2d 817, 821-22 (1983).

[5] Finally, defendant contends that the court erred in overruling his objections to part of the State's direct examination of Nellie Cayton. The State questioned Cayton as follows about defendant's behavior when he went to his trailer and got his gun:

> Q. Was he mad? Have you seen him when he was mad?
>
> A. He didn't say nothing ill nor hateful to me, and he didn't cuss at me, so I don't know whether he was mad or not.
>
> Q. Has he ever cussed at you or been ill or mad at you before?
>
> A. Well, if you live with me, I have an idea the next one will get mad with me at times.
>
> [Defense Counsel:] OBJECTION, MOVE TO STRIKE THE STATEMENT.
>
> THE COURT: OVERRULED.

Q. Has he?

A. Has he what?

Q. Gotten mad and upset with you?

[Defense Counsel:] OBJECTION.

OVERRULED.

A. Yes.

Q. Has he ever got [the murder weapon] out after you before?

[Defense Counsel:] OBJECTION.

OVERRULED.

A. No sir.

Defendant argues that this testimony was irrelevant and that it was prejudicial because it sought to have the jury convict him on the basis of his bad character. Assuming error, we conclude that the testimony failed to prejudice defendant because it tended to show that defendant had no special propensity toward violence and that Cayton had provoked defendant's anger toward her. N.C.G.S. § 15A-1443(a) (1988).

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

No error.

STATE OF NORTH CAROLINA v. ROBERT DANIEL RHINEHART

No. 456A88

(Filed 5 April 1989)

1. Homicide § 18.1— murder—premeditation and deliberation—evidence sufficient

There was sufficient evidence of premeditation and deliberation in a prosecution for first degree murder where defendant bought a gun and took the day off from work; defendant told his wife that he had some of her clothes with him in order to persuade his wife's boyfriend to drive into a nearby parking lot; although defendant had an ample opportunity to shoot the boyfriend at

the intersection, he waited until he could approach his victim on foot; defendant told his wife after the killing that he had intended the victim to die and that had he had another bullet, he would also have shot her; defendant told a law enforcement officer that he just couldn't take it any more because his wife had left him and the children; defendant had visited the victim's mobile home two days prior to the killing and was only persuaded to leave when the victim picked up a pistol; defendant stated that that visit would not be the last; defendant testified that the victim did nothing to provoke him on the day of the shooting; and, having twice shot the victim in the head, defendant ran alongside the car as it accelerated and shot the victim again when the car came to rest against an embankment.

2. Criminal Law § 119— homicide—request for instructions on sudden provocation and heat of passion—pattern jury instructions given—no error

The trial court did not err in a first degree murder prosecution by refusing to use defendant's proffered instructions on sudden provocation and heat of passion where the court instructed the jury according to the pattern jury instructions on adequate provocation and heat of passion.

APPEAL as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a life sentence entered by *Burroughs, J.*, at the 24 May 1988 Session of Superior Court, HAYWOOD County, upon defendant's conviction by a jury of one count of first-degree murder. Heard in the Supreme Court 15 March 1989.

Lacy H. Thornburg, Attorney General, by G. Lawrence Reeves, Jr., Assistant Attorney General, for the State.

John I. Jay for defendant-appellant.

MEYER, Justice.

Defendant was indicted on one count of murder in the first degree for the shooting death of Michael Trantham, the man with whom defendant's wife had been staying for several days. The State did not seek the death penalty, but tried the case on a theory of premeditation and deliberation.

The State's evidence tended to show the following. Defendant's wife, Betty Rhinehart, met Michael Trantham while they were both working at a dairy farm. On 14 December 1987, she left her family and moved in with Trantham and his four children, who lived in a mobile home on the farm. Defendant visited the farm that night, apparently looking for Trantham, but upon refus-

ing to name the person for whom he was looking, defendant was asked to leave.

On 15 December 1987, defendant returned to the dairy farm and found Trantham. Accompanied by Trantham, defendant went to the mobile home in order to talk to his wife. After some conversation between defendant and Trantham, defendant's wife began to cry and locked herself into the bedroom. Defendant tried unsuccessfully to talk her into coming out. Trantham eventually picked up a pistol and told defendant to leave. Defendant agreed to do so, but stated that this visit would not be his last.

On 16 December 1987, defendant again visited Trantham's mobile home to pick up his post office key from his wife. Defendant told his wife that he was going to talk to a lawyer and that if she would sign some papers, he would leave her alone.

On 17 December 1987, defendant's wife went with Trantham to do some Christmas shopping. On the way into town, they stopped at an intersection. There, they saw defendant in his car. Defendant drove his car beside theirs, so that the two drivers' doors were side by side. Defendant told his wife that he had some of her clothes to give to her and asked Trantham to pull over. Defendant drove into a nearby parking lot, and Trantham parked his car so that the drivers' doors were again side by side. Defendant left his car, walked over to the Trantham car, put his arm inside the car and shot Trantham twice in the head. As Trantham's body fell over, the car accelerated. Defendant ran beside it until it came to rest on an embankment. Defendant put the gun inside the car and shot Trantham again. He then threw the gun against the car. Shortly after the shooting, defendant told his wife that if he had had another bullet, he would have shot her too. He stated that he had intended Trantham to die.

Defendant presented evidence which tended to show the following. Defendant was "all tore up" about his wife leaving him, although they had separated for a day or two on prior occasions. Defendant testified that on 17 December 1987, he bought the gun with which he shot Trantham. He took the day off work and "was just out riding around." When he saw his wife and Trantham at the intersection, defendant told them he had some of her clothes in order to get them to stop and meet with him. Defendant did not actually have any of his wife's clothes in his car.

Defendant testified that he did not see Trantham with a gun on the morning of the shooting. Trantham did not say a word to defendant, nor did he make any move towards him. Defendant further testified that he did not plan to shoot either his wife or Trantham.

Defendant was present when Deputy Sheriff Bobby Lamb and Lt. John Jordan arrived at the parking lot. He told Deputy Lamb, "Go ahead and arrest me. I done it." To Lt. Jordan, he said, "John, I just couldn't take it anymore. She left me and the kids." The officers observed that although defendant was nervous, he was also calm and quiet. Defendant made a statement at the Sheriff's office, in which he said that he "got out of [his] car and walked up to the window on the driver's side of Mike Trantham's car and fired four or five times."

The trial court instructed the jury on first-degree murder, second-degree murder and voluntary manslaughter. The jury convicted defendant of first-degree murder, for which the trial court imposed the mandatory sentence of life imprisonment.

[1] Defendant presents two questions for review. First, he argues that the trial court should have granted his motion to dismiss the charge of first-degree murder because no evidence of premeditation and deliberation was presented at trial. We disagree.

This Court has defined premeditation and deliberation as follows:

> Premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation. 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. The phrase "cool state of blood" means that the defendant's anger or emotion must not have been such as to overcome his reason.

State v. Jackson, 317 N.C. 1, 23, 343 S.E. 2d 814, 827 (1986) (citations omitted), *judgment vacated*, 479 U.S. 1077, 94 L.Ed. 2d 133 (1987). Premeditation and deliberation must generally be proved

by circumstantial evidence. *State v. Gladden*, 315 N.C. 398, 340 S.E. 2d 673, *cert. denied*, 479 U.S. 871, 93 L.Ed. 2d 166 (1986). Factors which the jury may consider in determining whether a killing was carried out with premeditation and deliberation include

> (1) want of provocation on the part of the deceased; (2) the conduct and statements of the defendant before and after the killing; (3) threats and declarations of the defendant before and during the course of the occurrence giving rise to the death of the deceased; (4) ill-will or previous difficulty between the parties; (5) the dealing of lethal blows after the deceased has been felled and rendered helpless; and (6) evidence that the killing was done in a brutal manner.

State v. Jackson, 317 N.C. 1, 23, 343 S.E. 2d 814, 827.

Further, in ruling on a motion to dismiss in a case where the defendant has elected to introduce evidence, the trial court may consider any such evidence that is favorable to the State. *State v. Price*, 280 N.C. 154, 184 S.E. 2d 866 (1971). A defendant's motion to dismiss a charge should be denied whenever substantial evidence of every element of that charge has been introduced at trial. *State v. Forrest*, 321 N.C. 186, 362 S.E. 2d 252 (1987). " 'Substantial evidence' is that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Cox*, 303 N.C. 75, 87, 277 S.E. 2d 376, 384 (1981). In deciding whether the evidence is substantial, the trial court must evaluate it in the light most favorable to the State, drawing all reasonable inferences in the State's favor. *State v. Simpson*, 303 N.C. 439, 279 S.E. 2d 542 (1981). The test of the sufficiency of the evidence to withstand dismissal is the same whether the State's evidence is direct, circumstantial, or a combination of the two. *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967).

With these principles in mind, a review of the transcript compels the conclusion that substantial evidence of premeditation and deliberation was presented in this case. On 17 December 1987 defendant bought a gun and took the day off work. He told his wife that he had some of her clothes with him in order to persuade Trantham to drive into a nearby parking lot. Although, as defendant himself points out, he had ample opportunity to shoot Trantham at the intersection, he waited until he could approach

his victim on foot. These actions tend to demonstrate planning and intent. *State v. Gladden*, 315 N.C. 398, 340 S.E. 2d 673.

Defendant's statements after the killing are also indicative of premeditation and deliberation. He told his wife that he had intended Trantham to die and that had he had another bullet, he would also have shot her. Defendant told a law enforcement officer that he "just couldn't take it anymore," because his wife had left him and the children. This evidence tends to show that defendant thought beforehand about killing Trantham and did so intentionally and in a cool state of blood. *State v. Jackson*, 317 N.C. 1, 343 S.E. 2d 814. Furthermore, defendant's testimony that he had visited Trantham's mobile home two days prior to the killing and was only persuaded to leave when Trantham picked up a pistol shows that ill-will existed between them. There is also testimony that defendant stated that this visit would not be the last. Defendant himself testified that on 17 December 1987, Trantham did nothing to provoke him. Finally, the transcript shows that having twice shot Trantham in the head, defendant ran alongside the car as it accelerated and shot Trantham again when the car came to rest against the embankment. In short, the transcript reveals testimony in support of several factors which the jury could consider in determining whether the killing was done with premeditation and deliberation. *State v. Jackson*, 317 N.C. 1, 343 S.E. 2d 814. Evaluating this evidence in the light most favorable to the State, *State v. Simpson*, 303 N.C. 439, 279 S.E. 2d 542, we conclude that substantial evidence of premeditation and deliberation was presented, *State v. Cox*, 303 N.C. 75, 277 S.E. 2d 376. The trial court did not err in denying defendant's motion to dismiss the charge of first-degree murder.

[2] Second, defendant argues that, with regard to the jury instructions on voluntary manslaughter, the trial court erred in refusing to use defendant's proposed instructions on "sudden provocation" and "heat of passion." This argument is without merit. The well-established rule is that when a request is made for a specific instruction " 'which is correct in itself and supported by evidence, the trial judge, while not required to parrot the instructions . . . must charge the jury in substantial conformity to the prayer.' " *State v. Davis*, 291 N.C. 1, 14, 229 S.E. 2d 285, 294 (1976) (quoting *State v. Bailey*, 254 N.C. 380, 386, 119 S.E. 2d 165, 170 (1961)). Here, the trial judge instructed the jury on voluntary

manslaughter according to the pattern jury instructions on adequate provocation and heat of passion. N.C.P.I.—Crim. 206.10. Defendant has failed to show that these jury instructions were in any way deficient. This assignment of error is overruled.

In defendant's trial, we find

No error.

REGINA SMITH v. MARTHA S. QUINN

No. 422PA88

(Filed 5 April 1989)

1. **Rules of Civil Procedure § 4— failure to deliver summons for service—violation of Rule 4(a)—bad faith or delay—dismissal of action**

The failure of plaintiff's counsel to deliver the endorsed summons or two subsequent alias or pluries summonses to some proper person for service constituted a violation of Rule 4(a) which may serve as the basis for dismissal of plaintiff's action under Rule 41(b) if the violation was done in bad faith or for the purpose of delay or taking unfair advantage of defendant. N.C.G.S. § 1A-1, Rules 4(a) and 41(b).

2. **Rules of Civil Procedure §§ 4, 41— failure to deliver summons for service—bad faith or delay—dismissal of action**

The trial court properly dismissed plaintiff's action pursuant to Rule 41(b) based upon plaintiff's violation of Rule 4(a) for the purpose of delay and to gain an unfair advantage over defendant where plaintiff's counsel filed the suit only to toll the statute of limitations and intentionally failed to deliver the summons to the sheriff for service for some eight months so that defendant and her insurer would not be notified of the suit until counsel had the opportunity to interview five or six witnesses.

ON defendant's petition for discretionary review of the decision of the Court of Appeals, 91 N.C. App. 112, 370 S.E. 2d 438 (1988), reversing judgment dismissing plaintiff's action by *Gardner, J.*, filed 26 June 1987 in Superior Court, HENDERSON County. Heard in the Supreme Court 15 February 1989.

Prince, Youngblood, Massagee & Jackson, by Sharon B. Ellis and B. B. Massagee III, for plaintiff-appellee.

Roberts Stevens & Cogburn, P.A., by Landon Roberts and Glenn S. Gentry, for defendant-appellant.

MARTIN, Justice.

On 7 March 1986, within a week of the expiration of the applicable statute of limitations, plaintiff filed a complaint alleging that she had been injured when she slipped and fell on premises leased from defendant. Plaintiff timely caused summons to issue, but waited until 7 April 1986 to deliver it to the sheriff. The same day the summons was returned unserved. Plaintiff secured the endorsement of the summons by the clerk, extending the period for service an additional thirty days, but did not subsequently deliver the summons to the sheriff for service. On 7 May 1986, 1 August 1986, and 28 October 1986, alias or pluries summonses were issued, but plaintiff delivered only the last of these to the sheriff, who served this summons and complaint upon defendant on 29 October 1986.

Defendant filed a motion to dismiss the action pursuant to Rules 4(a), 11(a), and 41(b) of the North Carolina Rules of Civil Procedure. At the hearing on the motion, the trial court made findings of fact and concluded that plaintiff had willfully and intentionally violated Rule 4(a) of the North Carolina Rules of Civil Procedure "for the purpose of delay and in order to gain an unfair advantage over the defendant." The court then dismissed plaintiff's action with prejudice pursuant to Rule 41(b), which provides that a defendant may move for dismissal of an action against him for failure of the plaintiff to prosecute or to comply with the Rules of Civil Procedure.

The Court of Appeals reversed, holding that "since [plaintiff had] obtained an alias and pluries summons each time before the previous summons expired," Rule 4(a) had not been violated. *Smith v. Quinn*, 91 N.C. App. 112, 114, 370 S.E. 2d 438, 439 (1988). The Court of Appeals erroneously relied upon *Smith v. Starnes*, 317 N.C. 613, 346 S.E. 2d 424 (1986). In *Starnes* this Court held that where there was no evidence that the complaint and summons had been filed and issued in bad faith or that they had been interposed for the purpose of delay or were otherwise subject to dismissal as a sham and false pleading, the mere fact that the summons had not been delivered to the sheriff for service within thirty days after it was issued did not invalidate the summons from serving as a basis for the issuance of alias or pluries summons. *Starnes* is inapposite to this case. Here, the validity of the

summons is not at issue; we are concerned with whether plaintiff violated Rule 4(a) by failing to deliver the summons to a proper person for service and whether this was done in bad faith and with the intent to delay and gain unfair advantage over the defendant.

[1] The evidence is uncontradicted that plaintiff did not deliver either the endorsed summons of 7 April 1986 or the summonses issued on 7 May 1986 and 1 August 1986 to "some proper person for service" as required by Rule 4(a). They were retained in the possession of plaintiff's counsel. This is a violation of Rule 4(a). The violation may serve as the basis for dismissal of plaintiff's action under Rule 41(b) if the violation was done in bad faith or for the purpose of delay or taking unfair advantage of defendant.

After finding facts as to the issuance of the various summonses, the trial judge found:

> Plaintiff's counsel, at the hearing, stated in open Court, that suit was filed in order not to be barred by the three-year statute of limitations; that he did not at any time intend to have summons served until such time as he could talk to five or six witnesses; that he purposely took action to avoid any service of process so the defendant would not be notified of the lawsuit. Plaintiff's attorney stated in open Court that from his past experience dealing with insurance companies he knew that as soon as the Complaint was served on the defendant, the defendant would notify her insurance carrier and the insurance company's lawyer would get in touch with these witnesses who he needed to talk to and stake them out and that thereafter the witnesses would not tell plaintiff's attorney the truth about what had occurred.

[2] The trial judge concluded that the plaintiff had willfully and intentionally violated Rule 4(a) of the Rules of Civil Procedure and that she had done so for the purpose of delay and in order to gain an unfair advantage over the defendant. No exceptions were made by plaintiff to any of the findings of fact, and they are binding upon this Court. *Schloss v. Jamison*, 258 N.C. 271, 128 S.E. 2d 590 (1962). The trial judge's conclusion and dismissal of plaintiff's case are amply supported by the findings of fact. By his own statements to the court, counsel for plaintiff has furnished the basis for the trial judge's conclusion and the dismissal of plaintiff's action. Where the Rules of Civil Procedure are violated

for the purpose of delay or gaining an unfair advantage, dismissal of the action is an appropriate remedy. *See Estrada v. Burnham*, 316 N.C. 318, 341 S.E. 2d 538 (1986) (dismissal under N.C.R. Civ. P. 11(a)); *Veazey v. Young's Yacht Sale & Service, Inc.*, 644 F. 2d 475 (5th Cir. 1981) (a lesser sanction would not better serve the interests of justice); 5 J. Moore, J. Lucas & J. Wicker, *Moore's Federal Practice* ¶ 41.11(2) (2d ed. 1988).

By failing to attempt to serve defendant pursuant to Rule 4(a), plaintiff prevented defendant from knowledge of the claim against her from 7 March 1986 to 29 October 1986, a period of almost eight months. Remembering that the alleged claim arose in March 1983, this unconscionable delay was most critical to defendant. There was no contention that defendant was unavailable for service.

Counsel must realize that this Court will not condone violations of the letter or spirit of the rules for the purpose of delay or obtaining an unfair advantage. *Estrada*, 316 N.C. 318, 341 S.E. 2d 538. In the words of the mountain people where this lawsuit arose, plaintiff's conduct "won't do."

> [W]e cannot agree that such "procedural gymnastics" as were employed in this case were contemplated by the drafters of the Rules of Civil Procedure. "[T]he fundamental premise of the . . . rules [of Civil Procedure] is that a trial is an orderly search for the truth in the interest of justice rather than a contest between two legal gladiators with surprise and technicalities as their chief weapons . . . ." A. Vanderbilt, Cases and Other Materials on Modern Procedure and Judicial Administration 10 (1952).

Estrada, 316 N.C. at 327, 341 S.E. 2d at 544.

The trial judge properly dismissed plaintiff's action pursuant to Rule 41(b) based upon plaintiff's violation of Rule 4(a) for the purposes of delay and in order to gain an unfair advantage over the defendant.

The decision of the Court of Appeals is reversed and the case remanded to the Court of Appeals for further remand to the Superior Court, Henderson County, for reinstatement of the judgment of dismissal filed 26 June 1987.

Reversed and remanded.

IN RE: INQUIRY CONCERNING A JUDGE, NO. 104 STAFFORD GOVERNOR BULLOCK, RESPONDENT

No. 84A88

(Filed 5 April 1989)

Judges § 7— judge's conduct toward witness—discipline not warranted

A district court judge's outbursts toward an arresting officer in a case tried by the judge, which occurred in the privacy of the judge's office, were not so egregious so as to amount to conduct prejudicial to the administration of justice that brings the judicial office into disrepute within the meaning of N.C.G.S. § 7A-376.

THIS matter is before the Court upon a recommendation by the Judicial Standards Commission (Commission), filed with the Court on 29 February 1988, that Judge Stafford G. Bullock, a Judge of the General Court of Justice, District Court Division, Tenth Judicial District of the State of North Carolina, be censured for conduct prejudicial to the administration of justice that brings the judicial office into disrepute, in violation of Canons 2A and 3A(3) of the North Carolina Code of Judicial Conduct. Heard in the Supreme Court on 12 September 1988.

James J. Coman, Senior Deputy Attorney General, Special Counsel for the Judicial Standards Commission.

Womble, Carlyle, Sandridge & Rice, by G. Eugene Boyce; Bass, Powell & Bryant, by Gerald L. Bass, for respondent.

ORDER REJECTING CENSURE.

After reviewing the evidence adduced at the hearing before the Commission, this Court concludes that respondent's conduct in question in these proceedings may be described as follows:

During the trial of a driving-while-intoxicated case on 24 June 1986, respondent, who was presiding, and the arresting officer, Jeffrey A. Karpovich, differed concerning the officer's responsibility in connection with having a blood test administered to the defendant. Ultimately Karpovich, realizing, according to his testimony before the Commission, that "I was not getting anywhere, and to me it was a moot point . . . finally just said [to respondent], 'I'm sorry, I must have misunderstood you,' just to get

over with that issue." Thereafter respondent recessed court for lunch.

While respondent and others, including Karpovich, were preparing to leave the courtroom, Karpovich was engaged in conversation by a fellow officer, G. R. Passley, who had heard the colloquy which had earlier taken place between the respondent and Karpovich. Passley expressed his agreement with Karpovich's position on the question of an arresting officer's responsibility to accord an arrestee a blood test. The evidence differs somewhat as to Karpovich's precise response to Passley; but according to Passley, who testified for the Commission, Karpovich said in a voice "loud enough for people in the courtroom to hear" and which "got everybody's attention" the following: "I know that. What do you want me to do, go over there and slap him?" [Karpovich testified that his remark to Passley was, "I know it's not our responsibility. But what did you want me to do, slap him?"] Respondent overheard Karpovich say to Passley, "Do you want me to slap him" or "do you want me to slap him up side his head."

Passley, realizing that respondent had overheard Karpovich's comment, started for the door because, as he testified, "a statement like that, being in law enforcement fourteen years, it was just sort of smart to leave. The less I heard, the less I get involved."

Respondent approached Passley in the lobby outside the courtroom to ask what Karpovich had said and to whom Karpovich was referring when he said it. Passley testified that respondent "asked me was Karpovich talking about him or what statement did Karpovich make and it was in relation to Karpovich saying he wanted to slap him. And then I told him, 'yes he did say it but he was talking to me.' That's the best I can remember."

Respondent then located Karpovich, who was in a corridor walking toward the elevators, and directed him to come to respondent's chambers. Respondent's chambers being occupied, he and Karpovich remained in the anteroom adjacent to respondent's chambers, where some privacy was available. After closing the door respondent said to Karpovich, "If you want to slap me, there's no better time to do it than right now." Karpovich responded, "I didn't say I wanted to slap you." Karpovich tried to

explain to respondent what, in fact, he had said. Respondent, believing that he, himself, had heard what Karpovich had said and having had his belief confirmed by Passley, refused to listen to Karpovich's explanation, which appeared to respondent to be contrary to what respondent overheard.

Respondent asked Karpovich to leave the office. He three times [according to Karpovich's testimony] or four or five times [according to respondent's testimony] asked Karpovich to leave. Karpovich continued to try to explain his position to respondent. Respondent physically took hold of Karpovich by his upper arm or shoulder and escorted him out of the office, shutting the door behind him, after Karpovich, at respondent's request, removed his foot from the doorsill.

After careful consideration, we conclude respondent's conduct, while not the most propitious and even if characterized as intemperate, is, nevertheless, not so egregious as to amount to conduct prejudicial to the administration of justice that brings the judicial office into disrepute within the meaning of N.C.G.S. § 7A-376. Not every intemperate outburst of a judge, especially when it is an isolated, single event, occurring in the privacy of the judge's office and brought on by what the judge might reasonably have perceived to be some provocation, amounts to conduct deserving of discipline. To rule otherwise would be asking judges to be more than they can be; it would be asking them to be more than human. We think respondent's outbursts toward Karpovich fall in the category of those not deserving of discipline. The Court, accordingly, rejects the recommendation of the Commission that respondent be censured.

Now, therefore, it is, pursuant to N.C.G.S. § 7A-376, -377 and Rule 3 of the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission, ordered that the recommendation of the Commission that Judge Stafford G. Bullock be censured be and it is hereby rejected.

Done by the Court in conference this the 5th day of April 1989.

WHICHARD, J.
For the Court

DONNA B. PARRISH v. GRAIN DEALERS MUTUAL INSURANCE COMPANY

No. 363PA88

(Filed 5 April 1989)

Insurance § 69— underinsured motorist coverage—settlement with tort-feasor without insurer's consent

An insured plaintiff's entry into a settlement with a tort-feasor without the consent of plaintiff's underinsured motorist coverage carrier does not bar her claim for underinsured motorist benefits as a matter of law.

Justice WEBB dissenting.

Justice MEYER joins in this dissenting opinion.

ON defendant's petition for discretionary review of a decision of the Court of Appeals, 90 N.C. App. 646, 369 S.E. 2d 644 (1988), vacating summary judgment in favor of defendant by *Hight, J.*, at the 2 April 1987 session of Superior Court, WAKE County. Heard in the Supreme Court 14 February 1989.

Johnny S. Gaskins for plaintiff-appellee.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Patricia L. Holland and Theodore B. Smyth, for defendant-appellant.

MARTIN, Justice.

The issues in this case are virtually identical to those in *Silvers v. Horace Mann Ins. Co.*, 324 N.C. 289, 378 S.E. 2d 21 (1989), filed contemporaneously with this opinion. Factually, this case differs only in that the insurance policy at issue preserved, rather than waived, the right of subrogation. This difference is not material to our disposition of this appeal.

For the reasons fully and aptly stated in *Silvers*, we hold that plaintiff's entry into a settlement with the tort-feasor without defendant's consent does not bar her claim for underinsured motorist benefits as a matter of law.

The decision of the Court of Appeals is affirmed. However, the case must be remanded to the Court of Appeals for further remand to the trial court to determine whether defendant was

prejudiced by plaintiff's failure to procure its consent to the settlement.

Modified and Affirmed.

Justice WEBB dissenting.

I dissent for the reasons stated in the dissenting opinion in *Silvers v. Horace Mann Ins. Co.*, 324 N.C. 289, 378 S.E. 2d 21 (1989).

Justice MEYER joins in this dissenting opinion.

IN RE: INQUIRY CONCERNING A JUDGE, NO. 117 LACY S. HAIR, RESPONDENT

No. 504A88

(Filed 5 April 1989)

Judges § 7— censure of judge for misconduct

A district court judge, now retired, is censured by the Supreme Court for conduct prejudicial to the administration of justice that brings the judicial office into disrepute on the basis of the following actions: (a) attempting an assignation with a woman, convicted of prostitution and on probation, and giving the impression that he could assist her with her legal problems; (2) changing verdicts in motor vehicle violation cases upon *ex parte* communications from defendants without providing the State an opportunity to be heard; (3) making an inappropriate advance toward a woman detective; (4) making improper remarks to a victim in a criminal proceeding; and (5) making implied threats to attorneys who were representing clients in cases heard by respondent or pending before his court.

THIS matter is before the Court upon a recommendation by the Judicial Standards Commission (Commission), filed with the Court on 31 October 1988, that Judge Lacy S. Hair, now retired, formerly a Judge of the General Court of Justice, District Court Division, Twelfth Judicial District of the State of North Carolina, be censured for conduct prejudicial to the administration of justice that brings the judicial office into disrepute, in violation of Canons 2A, 2B, 3A(2), 3A(3), and 3A(4) of the North Carolina Code of Judicial Conduct.

No counsel for respondent.

ORDER OF CENSURE.

The conduct of the respondent in this proceeding, which formed the basis of the Commission's recommendation that he be censured, involved: (1) attempting an assignation with a woman, convicted of prostitution and on probation, and giving the impression that he could assist her with her legal problems; (2) changing verdicts in motor vehicle violation cases upon *ex parte* communications from defendants without providing the state an opportunity to be heard; (3) making an inappropriate advance toward a woman detective employed by the Fayetteville Police Department; (4) making improper and potentially embarrassing and humiliating remarks to the victim in a criminal proceeding before the court and the victim's girlfriend; and (5) making what could be construed as implied threats to attorneys who were representing clients in cases heard by the respondent or pending before his court.

Respondent in his answer to the complaint against him "acknowledges that his conduct . . . could be interpreted as conduct prejudicial to the administration of justice, thus bringing the judicial office into disrepute." Respondent also waived formal hearing before the Commission and agreed "to accept and abide by any rulings and sanctions imposed by the Commission." Respondent retired effective 1 November 1988 and has made no application to sit as an emergency district court judge.

The Court concludes that respondent's conduct does amount to conduct prejudicial to the administration of justice that brings the judicial office into disrepute within the meaning of N.C.G.S. § 7A-376. The Court approves the recommendation of the Commission that respondent be censured.

Now, therefore, it is, pursuant to N.C.G.S. §§ 7A-376, -377 and Rule 3 of the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission, ordered that Judge Lacy S. Hair, retired, be, and he is hereby, censured for conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

Done by the Court in Conference this the 5th day of April 1989.

WHICHARD, J.
For the Court

BROOKS DISTRIBUTING COMPANY, INC., PLAINTIFF v. JEFFREY PUGH, DEFENDANT

BROOKS DISTRIBUTING COMPANY, INC., PLAINTIFF v. HOWARD HELTON, DEFENDANT

No. 560A88

(Filed 5 April 1989)

APPEAL by plaintiff from a divided panel of the Court of Appeals, 91 N.C. App. 715, 373 S.E. 2d 300 (1988), which affirmed in part and reversed in part a judgment of superior court entered 22 September 1988. Heard in the Supreme Court 14 March 1989.

Maxwell, Martin, Freeman and Beason, by James B. Maxwell and John C. Martin, for plaintiff appellant.

Haywood, Denny, Miller, Johnson, Sessoms and Patrick, by George W. Miller, Jr. and E. Elizabeth Lefler, for defendant appellees.

PER CURIAM.

For the reasons stated in the dissenting opinion of Cozort, J., the decision of the Court of Appeals as to the defendant Helton is reversed. The case is remanded to the Court of Appeals for further remand to the Superior Court of Durham County.

Reversed and remanded.

IREDELL DIGESTIVE DISEASE CLINIC, P.A., A NORTH CAROLINA PROFESSIONAL ASSOCIATION v. JOSEPH A. PETROZZA, M.D.

No. 573A88

(Filed 5 April 1989)

APPEAL by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 92 N.C. App. 21, 373 S.E. 2d 449 (1988), affirming an order entered by *Walker (R.G.), J.*, on 1 October 1987, in Superior Court, IREDELL County, denying plaintiff's motion for a preliminary injunction. Heard in the Supreme Court 13 March 1989.

Pope, McMillan, Gourley, Kutteh & Parker, by William P. Pope and Constantine H. Kutteh, II; and Hall and Brooks, by John E. Hall, for plaintiff-appellant.

Vannoy, Moore, Colvard, Triplett & Freeman, by Anthony R. Triplett and James H. Early, Jr., for defendant-appellee.

PER CURIAM.

Affirmed.

BRENDA S. McLAIN, ADMINISTRATRIX OF THE ESTATE OF L. J. MACK, DECEASED v. ALICE M. WILSON AND HOME FEDERAL SAVINGS & LOAN ASSOCIATION

No. 471PA88

(Filed 5 April 1989)

ON discretionary review of a unanimous opinion of the Court of Appeals reported at 91 N.C. App. 275, 371 S.E. 2d 151 (1988), reversing the entry of declaratory judgment in favor of plaintiff by *Gardner, J.*, on 29 October 1987 in Superior Court, CLEVELAND County, and remanding the case for further proceedings. We allowed plaintiff-appellant's petition for discretionary review on 8 December 1988. Heard in the Supreme Court 13 March 1989.

Brenda S. McLain for plaintiff-appellant.

Frank Patton Cooke, by Malcolm B. McSpadden, for defendant-appellee Wilson.

PER CURIAM.

We conclude that plaintiff-appellant's petition for discretionary review was improvidently allowed.

Discretionary review improvidently allowed.

STATE OF NORTH CAROLINA v. JOHN JASPER GREEN, JR.

No. 411PA88

(Filed 5 April 1989)

ON discretionary review of the decision of the Court of Appeals, 91 N.C. App. 127, 370 S.E. 2d 604 (1988), vacating the judgment entered against the defendant by *Farmer, J.*, in Superior Court, WAKE County, and remanding this case for a new trial. Heard in the Supreme Court 13 March 1989.

Lacy H. Thornburg, Attorney General, by Robin W. Smith, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Constance H. Everhart, Assistant Appellate Defender, for the defendant-appellee.

PER CURIAM.

Discretionary review improvidently allowed.

STATE OF NORTH CAROLINA v. HARVEY PAUL BYRD, JR. AND RONALD WAYNE SUMMERS

No. 410A88

(Filed 5 April 1989)

APPEAL by defendants pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, reported without a published opinion, 91 N.C. App. 170, 371 S.E. 2d 313 (1988), finding no error in defendants' trial by *Phillips, J.*, at the 12 January 1987 Criminal Session of Superior Court, NORTHAMPTON County. Heard in the Supreme Court 15 March 1989.

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

Glover and Petersen, by James R. Glover, for defendant-appellants.

PER CURIAM.

Affirmed.

ANNIE B. TAYLOR v. JACK R. FOY AND CITY ELECTRIC COMPANY OF CHARLOTTE, INC.

No. 423A88

(Filed 5 April 1989)

APPEAL by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 91 N.C. App. 82, 370 S.E. 2d 442 (1988), vacating the judgment against the corporate defendant by *Brown (L. Stanley), J.*, at the 20 July 1987 session of District Court, MECKLENBURG County. Heard in the Supreme Court 13 March 1989.

Ferguson, Stein, Watt, Wallas & Adkins, P.A., by Melvin L. Watt, for plaintiff-appellant.

No counsel contra.

PER CURIAM.

Affirmed.

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
HARVEY LEE GREEN, JR.	)	

No. 385A84

(Filed 20 March 1989)

UPON review of the record and briefs in this matter, this Court issued an opinion, the effect of which was to remand the case to the Superior Court, PITT County, for a hearing on the *Batson* issue. The opinion indicates that the finding of facts and conclusions of law of the superior court are to be certified back to this Court promptly after the hearing, at which time this Court shall determine the remaining assignments of error, if necessary.

Accordingly, inasmuch as this Court's 2 March 1989 opinion in this case does not finally dispose of the issues before us, and inasmuch as this Court intends to retain its jurisdiction over the subject matter of the appeal, it is hereby ordered that no mandate or judgment shall be issued on the 2 March 1989 opinion in this case.

By order of the Court in conference, this the 20th day of March 1989.

EXUM, C.J.
For the Court

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

BARTLETT v. INGLES MARKETS, INC.

No. 95P89.

Case below: 92 N.C. App. 598.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 April 1989.

BATTEN v. N.C. DEPT. OF CORRECTION

No. 76PA89.

Case below: 92 N.C. App. 595.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 5 April 1989.

BOTTOMLEY v. BOTTOMLEY

No. 536P88.

Case below: 91 N.C. App. 586.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 April 1989.

BUMGARNER v. TOMBLIN

No. 94P89.

Case below: 92 N.C. App. 571.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 April 1989.

BURNS v. BURNS

No. 66P89.

Case below: 92 N.C. App. 114.

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 5 April 1989.

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

CARDWELL v. SMITH

No. 65P89.

Case below: 92 N.C. App. 505.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 5 April 1989.

CHANDLER v. MAYNOR

No. 67P89.

Case below: 92 N.C. App. 595.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 April 1989.

FRIEDMAN v. CLARKE

No. 47P89.

Case below: 92 N.C. App. 382.

Motion by defendant to dismiss appeal for lack of substantial constitutional question allowed 5 April 1989. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 April 1989.

GOSS v. HUDSON

No. 34P89.

Case below: 92 N.C. App. 382.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 April 1989.

HATCHER v. HATCHER

No. 32P89.

Case below: 92 N.C. App. 595.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 dismissed 5 April 1989.

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

HINNANT v. HOLLAND

No. 7P89.

Case below: 92 N.C. App. 142.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 5 April 1989.

HUDSPETH v. HUDSPETH

No. 13P89.

Case below: 92 N.C. App. 244.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 April 1989.

JOHNSON v. SPRINKLE

No. 97P89.

Case below: 92 N.C. App. 598.

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 5 April 1989.

LAWYERS TITLE INS. CORP. v. LANGDON

No. 123P89.

Case below: 91 N.C. App. 382.

Petition by defendant (Ben I. Langdon) for writ of certiorari to the North Carolina Court of Appeals denied 5 April 1989.

LAXTON CONSTRUCTION v. MOEHRING INVESTMENTS

No. 62P89.

Case below: 92 N.C. App. 595.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 April 1989.

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

LOCKLEAR v. LOCKLEAR

No. 40PA89.

Case below: 92 N.C. App. 299.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 5 April 1989.

LOWDER v. ALL STAR MILLS

No. 42P89.

Case below: 92 N.C. App. 382.

Petition by several defendants for discretionary review pursuant to G.S. 7A-31 denied 5 April 1989.

NELSON v. FOOD LION, INC.

No. 122P89.

Case below: 92 N.C. App. 592.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 April 1989.

NORTHAMPTON COUNTY DRAINAGE DISTRICT NUMBER ONE v. BAILEY

No. 576A88.

Case below: 92 N.C. App. 68; 323 N.C. 705.

Ex mero motu, the Court hereby withdraws its order of 4 January 1989, 323 N.C. 705, insofar as it dismissed the defendants' appeal based upon the existence of a substantial constitutional question, as provided by G.S. 7A-30.

Accordingly, the Defendants' new brief, limited in scope to the issue which was the basis of the dissenting opinion in the Court of Appeals, the constitutional question presented in the notice of appeal, filed in this Court on 14 December 1988, and the issue relating to attorney fees, presented in the petition for discretionary review and as specified in this Court's order of 4 January 1989, shall be filed with this Court not more than 30 days from the date of certification of this order.

By order of the Court in conference, this the 5th day of April 1989.

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

NORTHAMPTON COUNTY DRAINAGE DISTRICT NUMBER ONE v. BAILEY

No. 576A88.

Case below: 92 N.C. App. 68; 323 N.C. 705.

Petition by defendants for reconsideration of the order dismissing appeal in this matter is dismissed as moot 5 April 1989.

POLK v. BILES

No. 557P88.

Case below: 92 N.C. App. 86.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 5 April 1989.

R. R. & E., INC. v. CABARRUS CONSTRUCTION

No. 63P89.

Case below: 92 N.C. App. 595.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 April 1989.

RICHARDS v. TOWN OF VALDESE

No. 10P89.

Case below: 92 N.C. App. 222.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 April 1989.

RUFFIN WOODY AND ASSOCIATES v. PERSON COUNTY

No. 14P89.

Case below: 92 N.C. App. 129.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 April 1989.

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

STATE v. CHAMBERS

No. 6P89.

Case below: 92 N.C. App. 230.

Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 5 April 1989. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 April 1989.

STATE v. CHARLES

No. 72P89.

Case below: 92 N.C. App. 430.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 April 1989.

STATE v. DAVIS

No. 100A89.

Case below: 92 N.C. App. 627.

Petition by the State for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues allowed 5 April 1989. Petition by the State for writ of supersedeas to stay the judgment of the Court of Appeals allowed 5 April 1989.

STATE v. FRYAR

No. 523P88.

Case below: 91 N.C. App. 474.

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 5 April 1989.

STATE v. GARRETT

No. 143P89.

Case below: 93 N.C. App. 79.

Petition by Attorney General for writ of supersedeas and temporary stay allowed 28 March 1989. Stay dissolved, supersedeas denied 5 April 1989. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 5 April 1989.

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

STATE v. GILLIAM

No. 49P89.

Case below: 92 N.C. App. 383.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 April 1989.

STATE v. GOODSON

No. 140P89.

Case below: 92 N.C. App. 756.

Petition by defendants (Goodson and Ferguson) for discretionary review pursuant to G.S. 7A-31 denied 5 April 1989.

STATE v. HARRELSON

No. 30P89.

Case below: 92 N.C. App. 115.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 April 1989.

STATE v. JOSEY

No. 117A89.

Case below: 92 N.C. App. 757.

Petition by Attorney General for writ of supersedeas and temporary stay allowed 16 March 1989.

STATE v. MAXFIELD

No. 77P89.

Case below: 92 N.C. App. 596.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 April 1989.

STATE v. MAYNOR

No. 60P89.

Case below: 92 N.C. App. 596.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 April 1989.

STATE v. PARSONS

No. 5P89.

Case below: 92 N.C. App. 175.

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 5 April 1989.

STATE v. PATTERSON

No. 31P89.

Case below: 92 N.C. App. 384.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 April 1989.

STATE v. SMITH

No. 74P89.

Case below: 92 N.C. App. 500.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 April 1989.

STATE v. SPECKMAN

No. 50PA89.

Case below: 92 N.C. App. 265.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 5 April 1989.

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

STATE v. STIGALL

No. 39P89.

Case below: 92 N.C. App. 245.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 5 April 1989.

STATE v. SUMMERS

No. 57P89.

Case below: 92 N.C. App. 453.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 April 1989.

STATE v. VANDIVER

No. 101PA89.

Case below: 92 N.C. App. 695.

Petition by the State for discretionary review pursuant to G.S. 7A-31 allowed 5 April 1989. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 5 April 1989. Petition by the State for writ of supersedeas to stay the judgment of the Court of Appeals allowed 5 April 1989.

STATE v. WILLIS

No. 73P89.

Case below: 92 N.C. App. 494.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 April 1989.

STATE EX REL. UTILITIES COMM. v.
NANTAHALA POWER AND LIGHT CO.

No. 93PA89.

Case below: 91 N.C. App. 545.

Petition by plaintiff Utilities Commission for discretionary review pursuant to G.S. 7A-31 allowed 5 April 1989. Petition by plaintiff Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 5 April 1989.

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

W & J RIVES, INC. v. KEMPER INSURANCE GROUP

No. 48P89.

Case below: 92 N.C. App. 313.

Petition by defendant (Aetna Casualty) for discretionary review pursuant to G.S. 7A-31 denied 5 April 1989.

WATKINS v. GENTRY

No. 54P89.

Case below: 92 N.C. App. 597.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 5 April 1989.

WELLS v. WELLS

No. 8P89.

Case below: 92 N.C. App. 226.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 April 1989.

WHICHARD v. BD. OF ADJUSTMENTS

No. 56P89.

Case below: 92 N.C. App. 597.

Motion by defendants to dismiss appeal for lack of substantial constitutional question allowed 5 April 1989. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 5 April 1989.

WILSON v. STATE FARM MUT. AUTO. INS. CO.

No. 45PA89.

Case below: 92 N.C. App. 320.

Motion by plaintiff and defendant State Farm to dismiss appeal by defendant Farm Bureau Mutual for lack of substantial constitutional question denied 5 April 1989. Petition by defendant Farm Bureau Mutual for discretionary review pursuant to G.S. 7A-31 allowed 5 April 1989.

STATE OF NORTH CAROLINA v. DARRYL EUGENE HUNT

No. 507A85

(Filed 4 May 1989)

1. **Criminal Law § 89.4— prior inconsistent statements—erroneously admitted**

The trial court erred in a prosecution for felony murder by admitting the prior inconsistent statements of a fourteen-year-old retarded prostitute which, if true, strongly contradicted defendant's evidence as to his whereabouts the night of the crime. Once the court determined that the witness was hostile or unwilling, it properly permitted the State to subject her to cross-examination; however, the trial court erred by permitting an officer to testify as to the substance of the prior statements denied by the witness. The proper use of the prior statements to corroborate the officer's testimony would have been only to demonstrate the fact that the witness made statements to him on a particular date, not to prove the facts those statements purported to relate. The likelihood that the jury would confuse the substance of the statements with their use for purposes of impeachment was compounded by the nature of the trial court's limiting instructions.

2. **Criminal Law § 66.5— lineup identification—right to counsel denied—no prejudice**

There was no prejudicial error in a prosecution for felony murder in admitting the results of a lineup identification where the lineup took place in the lobby of one of the floors of the jail; the witness rode an elevator to that floor and observed the lineup through the elevator door window; neither of defendant's counsel was allowed in the elevator with the witness and an officer; and defendant did not object when the witness identified him before the jury as the man he had picked out of the lineup. Failure to object when identification is made before the jury is a waiver of the right to have the propriety of that identification considered by the appellate court.

Justice MITCHELL dissenting.

Justice MEYER joins in the dissenting opinion.

APPEAL by defendant from judgment sentencing him to life imprisonment for conviction of murder in the first degree, said judgment imposed by *Cornelius, J.*, at the 28 May 1985 session of Superior Court, FORSYTH County. Heard in the Supreme Court 14 March 1989.

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

Adam Stein for defendant.

MARTIN, Justice.

Defendant was convicted of murder in the first degree based upon the felony murder doctrine and sentenced to life imprisonment. Although defendant raises several assignments of error, we find it necessary to discuss only one: The state's introduction of hearsay evidence for impeachment, corroborative, and substantive purposes was improper, and the prejudicial effect of that evidence entitles the defendant to a new trial.

Evidence presented by the state tended to show that the victim was raped and stabbed to death at approximately 6:45 a.m. on 10 August 1984 in Winston-Salem. Three witnesses for the state identified defendant as the man they had seen in inculpatory circumstances shortly before, during, and after the assault on the victim. The first witness had driven past a black man and a white woman walking closely together near the field where the victim's body was later found. The witness identified defendant less than one month later from both photographic and in-person lineups. A second witness walking by the same field at around 6:40 a.m. actually observed the assault and called to report it. The witness testified that he had gotten a good look at the face of the assailant, whom he identified in court as defendant. This witness had also identified defendant in photographic and in-person lineups. The state's third witness was employed by a hotel in downtown Winston-Salem. At approximately 6:45 a.m. he had seen a black male enter the hotel lobby and go directly to the men's room. The witness testified that he had seen this man on at least three other occasions when the man had asked to use the restroom. Because on this occasion the man remained so long in the restroom, the employee asked a security guard to tell him to leave. The employee entered the restroom about a half-hour later and saw red-tinted water in the sink and bloody paper towels. Although this witness did not make a connection between the man he had seen and defendant until he saw the latter's picture in the paper almost a year after the murder, he positively identified defendant as the man who had used the restroom.

Defendant testified that he and his friend Sammy Mitchell had spent the night of 9 August at the McKee household, arriving around 6 p.m. and coming and going until around 11 or 11:30, when he fell asleep in a living room chair. Defendant testified

that he had wakened around 7:30 the next morning and had left with Sammy around 8:30, taking the bus downtown, stopping for breakfast, then going on to the courthouse where Mitchell had to make an appearance. Sammy Mitchell attested to essentially the same whereabouts, times, and activities involving defendant and himself the 9th and 10th of August. The testimony of three residents of the McKee household similarly corroborated defendant's account of spending the night of 9 August in that house and not leaving until sometime after 7 a.m.

Marie Crawford, a fourteen-year-old prostitute, was called by the state to testify. After preliminary questions eliciting her acknowledgment of her occupation and her close friendship with defendant, the prosecutor asked her directly whether she had ever come to his office and given him a statement. She admitted that she had come to his office but first denied, then stated she could not recall, having given him or the police detective a statement. Defendant objected to the state's offer to refresh the witness's memory as to the statements, and a voir dire followed.

During the voir dire, Marie Crawford was reminded of two statements she had made to police officers, and signed transcriptions of those statements were shown to her. Marie repeatedly denied knowledge or memory of these, admitting that it was her signature subscribed on the statements, but denying any memory of uttering the transcribed words or of signing the paper upon which they had been written. The statements as read to the witness on voir dire, if believed, strongly contradicted defendant's evidence as to his whereabouts the night of 9-10 August:

> [O]n August 10th Mr. Darryl Hunt and Sammy Mitchell were at Motel 6 and Darryl Hunt and Sammy Mitchell left the room at about 6:00 a.m. and that they were both wearing black shirts and black pants and Darryl told me he was going to call a cab. The next time I saw Darryl was about 9:30 a.m. and he was nervous when he came back to the motel room and he said he needed a drink. Darryl had mud or grass stains on his pants knees[.]
>
> [A]bout two weeks ago me and Darryl were at Motel 6 and Darryl was saying some stuff about the white lady that got killed downtown and Darryl said that Sammy did it when we were watching the Crimestoppers on the news and the televi-

sion and I said to Darryl I wish I knew who killed that lady because I could use the money and Darryl said Sammy did it and he fucked her too.

At the conclusion of Marie's voir dire testimony, defendant argued that the state should not be permitted to impeach its witness with the prior inconsistent statements, reasoning that the probative value of such would be overwhelmed by its tendency to prejudice defendant. The trial court denied defendant's motion to suppress the statements, concluding that the witness may have been hostile or unwilling, that it was permissible for the state to cross-examine her respecting the alleged statements, and that the relevance and probative value of her testimony would substantially outweigh any danger of unfair prejudice or confusion.

Before the jury, Marie Crawford again denied that she had made the prior statements. Despite the fact that her signature was inscribed beneath both statements and despite her admission that she remembered signing a piece of paper, she persistently denied having made the statements themselves and, to the extent of her knowledge, their truth.

Q. Now, on August 30th, 1984, did you have a conversation with Officer Daulton while you were being detained in this courthouse and being tried for soliciting for prostitution and prostitution?

A. I don't remember.

Q. And do you remember the statement you made to him on that day?

A. No, sir, I don't.

Q. Do you remember that you told him that on the nights of August 9th, 1984 and August 10th, 1984, that you spent the night with Darryl Hunt and Sammy Mitchell and that they were with you at Motel 6 on Patterson Avenue?

A. No, sir, I did not.

Q. Are you saying that you did not make that statement or you don't remember making that statement?

A. I did not make that statement.

Q. And on September the 11th, 1984, did you make a statement to Officer Daulton?

A. No, sir.

Q. Referring to what is marked State's Exhibit No. 38, would you look at Exhibit 38 and I'll ask you if that is a statement that you made?

A. I do not remember making this statement.

Q. Is that your signature on that statement?

A. Yes, sir.

Q. And did you make the following statement to Officer—

At this point defendant objected, but the trial court, inquiring whether Officer Daulton would later be testifying, overruled defendant's objection "for [the] purpose of corroborating the testimony of a later witness" and instructed the jury accordingly. The two statements were then read to the jury.

These statements were reintroduced through the testimony of the police detective to whom they had been made. The officer testified that Marie had recounted the substance of the first statement to him in an interview on 30 August 1984, and that this and the second statement were both transcribed on 11 September. He testified that he had read the transcriptions to her and had allowed her to read them before she signed them. When the state offered the statements themselves into evidence, defendant objected again, reminding the court that, as he had understood the court's prior ruling, the admission of the statements was not to be as substantive evidence but only for the purpose of challenging credibility. The court overruled defendant's objection and allowed the introduction of both statements into evidence without a limiting instruction.

In its final charge to the jury, the trial court instructed the jury that it had heard evidence that Marie Crawford had made prior statements that conflicted with her testimony at trial, but that the jury must not consider the earlier statements as evidence of the truth of what was said at that earlier time; however, such evidence could be considered by the jury in determining the

credibility of the witness. Nevertheless, in recapitulating the testimony of Officer Daulton, the court reiterated the substance of both statements.

A.

[1] Analyzing whether these statements were properly used at defendant's trial is complicated in this case by the fact that they appear to have been admitted for both credibility and substantive purposes under the authorization of more than one of the North Carolina Rules of Evidence. In order to determine whether these statements were properly admitted for any one purpose, it is necessary to examine not only the defendant's stated grounds for objection and the trial court's reason for admitting the statements on each occasion, but also the purposes for which they were actually used.

After voir dire of Marie Crawford, the trial court ruled the statements admissible for the purpose of impeaching the credibility of that witness, a practice that North Carolina's Evidence Code expressly permits: "The credibility of a witness may be attacked by any party, including the party calling him." N.C.G.S. § 8C-1, Rule 607 (1988). It is a logical corollary to this rule that the cross-examination of a party's own witness be governed by the same rules that govern the cross-examination of witnesses called by the opposing party. These include the rule that extrinsic evidence of prior inconsistent statements may not be used to impeach a witness where the questions concern matters collateral to the issues. *E.g., State v. Greene*, 296 N.C. 183, 250 S.E. 2d 197 (1978). Such collateral matters have been held to include testimony contradicting a witness's denial that he made a prior statement when that testimony purports to reiterate the substance of the statement. *See, e.g., State v. Williams*, 322 N.C. 452, 368 S.E. 2d 624 (1988); *State v. Cutshall*, 278 N.C. 334, 180 S.E. 2d 745 (1971); *State v. Moore*, 275 N.C. 198, 166 S.E. 2d 652 (1969).

The same principles govern the admissibility of Marie Crawford's prior statements for purposes of impeachment in this case. Once the trial court determined that Marie was a hostile or unwilling witness, it properly permitted the state to subject her to cross-examination. However, the trial court erred in permitting Officer Daulton to testify as to the substance of the prior statements denied by Marie. Officer Daulton could properly have been

called to contradict the fact, denied by Marie, that she had made the statement to him on the specified date. But, as this Court made clear in *Williams*, "it was improper to impeach [her concerning what she had or had not told Officer Daulton] by offering the testimony of [Officer Daulton]." 322 N.C. at 456, 368 S.E. 2d at 626.

B.

The trial court applied Rule 403 to balance the impeachment value of the statements against their tendency to prejudice defendant unfairly or to confuse the jury. Although unsworn prior statements are not hearsay when not offered for their truth, the difficulty with which a jury distinguishes between impeachment and substantive evidence and the danger of confusion that results has been widely recognized. *E.g.*, *United States v. Webster*, 734 F. 2d 1191 (7th Cir. 1984); *United States v. Morlang*, 531 F. 2d 183 (4th Cir. 1975). *See also* 3 D. Louisell & C. Mueller, *Federal Evidence* § 299 (1979). For this reason, the "overwhelming weight of [federal] authority" with regard to the use of the identical Fed. R. Evid. 607 has long been "that impeachment by prior inconsistent statement may not be permitted where employed as a *mere subterfuge* to get before the jury evidence not otherwise admissible." *United States v. Morlang*, 531 F. 2d 183, 190. *See also United States v. Hogan*, 763 F. 2d 697, *withdrawn in part on other grounds*, 771 F. 2d 82 (5th Cir. 1985) (a party may not introduce prior inconsistent statements "under the guise of impeachment for the *primary* purpose of placing before the jury substantive evidence which is not otherwise admissible." 763 F. 2d at 702 (quoting *United States v. Miller*, 664 F. 2d 94, 97 (5th Cir. 1981), *cert. denied*, 459 U.S. 854, 74 L.Ed. 2d 106 (1982)). As Judge Posner noted in *Webster*, it is taking advantage of the jury's likely confusion regarding the limited purpose of impeachment evidence that has moved federal appellate courts to scrutinize the use of hearsay evidence for the impeachment of a party's own witness.

> [I]t would be an abuse of [Rule 607], in a criminal case, for the prosecution to call a witness that it knew would not give it useful evidence, just so it could introduce hearsay evidence against the defendant in the hope that the jury would miss

> the subtle distinction between impeachment and substantive evidence—or, if it didn't miss it, would ignore it.

United States v. Webster, 734 F. 2d 1191, 1192, *quoted in United States v. Peterman*, 841 F. 2d 1474, 1479 (10th Cir. 1988), *cert. denied*, --- U.S. ---, 102 L.Ed. 2d 774 (1989).

It is the rare case in which a federal court has found that the introduction of hearsay statements by the state to impeach its own witness was not motivated primarily (or solely) by a desire to put the substance of that statement before the jury. Circumstances indicating good faith and the absence of subterfuge in these exceptional cases have included the facts that the witness's testimony was extensive and vital to the government's case, *United States v. DeLillo*, 620 F. 2d 939 (2d Cir.), *cert. denied*, 449 U.S. 835, 66 L.Ed. 2d 41 (1980); that the party calling the witness was genuinely surprised by his reversal, *United States v. Webster*, 734 F. 2d 1191; or that the trial court followed the introduction of the statement with an effective limiting instruction, *DeLillo*, 620 F. 2d 939; *United States v. Long Soldier*, 562 F. 2d 601 (8th Cir. 1977).

Although this Court is not bound by the federal courts' interpretation of Rule 607, we are wise to be guided by it, and the unanimous recognition by the federal circuit courts of the unfairness and potential prejudice of permitting hearsay evidence to be considered substantively under the guise of impeachment evidence is impressive. *See United States v. Peterman*, 841 F. 2d 1474; *United States v. Frappier*, 807 F. 2d 257 (1st Cir. 1986), *cert. denied*, 481 U.S. 1006, 95 L.Ed. 2d 203 (1987); *United States v. Johnson*, 802 F. 2d 1459 (D.C. Cir. 1986); *Balogh's of Coral Gables, Inc. v. Getz*, 798 F. 2d 1356 (11th Cir. 1986) (en banc); *United States v. Sebetich*, 776 F. 2d 412 (3d Cir. 1985), *reh'g denied*, 828 F. 2d 1020 (1987), *cert. denied*, --- U.S. ---, 98 L.Ed. 2d 673 (1988); *United States v. Hogan*, 763 F. 2d 697; *United States v. Webster*, 734 F. 2d 1191; *United States v. Crouch*, 731 F. 2d 621 (9th Cir. 1984), *cert. denied*, 469 U.S. 1105, 83 L.Ed. 2d 773 (1985); *United States v. Fay*, 668 F. 2d 375 (8th Cir. 1981); *United States v. DeLillo*, 620 F. 2d 939; *United States v. Morlang*, 531 F. 2d 183; *United States v. Dye*, 508 F. 2d 1226 (6th Cir. 1974), *cert. denied*, 420 U.S. 974, 43 L.Ed. 2d 653 (1975). It is also persuasive that the North Carolina Court of Appeals in *State v. Bell*, 87 N.C. App.

626, 362 S.E. 2d 288 (1987), has disapproved the tactic of masking impermissible hearsay as impeachment in order to get its substance before the jury. *See also State v. Hyleman*, 89 N.C. App. 424, 366 S.E. 2d 530 (1988), *rev'd on other grounds*, 324 N.C. 506, 379 S.E. 2d 830 (1989).

Under the facts of this case, circumstances accompanying the introduction of Marie's prior unsworn statement provide no assurance either that Marie's testimony was critical to the state's case or that it was introduced altogether in good faith and followed by effective limiting instructions. Except for brief testimony about the color of her bicycle, which another of the state's witnesses thought he had seen defendant riding, Marie's testimony consisted entirely of responding to challenges to her credibility and bias. Unlike the extensive testimony of the government's witness in *DeLillo* and the relatively insignificant portion of his testimony that was impeached, there was little if anything of value to the state in Marie's testimony. Moreover, the state appeared to know before Marie was called to the stand that she would not cooperate by reiterating her prior statements. The prosecutor knew that defendant's counsel had visited Marie while she was in jail in Atlanta in 1985. The prosecutor suggested this visit had resulted in convincing Marie she need neither talk to officers nor testify, although Marie denied on voir dire that she had been urged not to talk and said it had been her own decision not to do so. The prosecutor's subsequent question whether Marie had not told officers accompanying her back to North Carolina that she was not going to testify made evident the fact that the state was on notice before the trial began that their witness would not reiterate the unsworn statements it wished the jury to hear.

C.

In this case the likelihood that the jury would confuse the substance of the statements with their use for purposes of impeachment was compounded by the nature of the trial court's limiting instructions. Although the trial court initially indicated that the jury was to consider Marie's prior unsworn statements for the limited purpose of later determining the officer's credibility, the court failed to include a subsequent similar warning either when the statements were read to and denied by Marie or when they were reiterated during the direct examination of the officer.

Instructions regarding the statements during the final charge were no less ambiguous.

Moreover, by the time the statements were actually introduced as exhibits, they were before the jury as substantive evidence, and all earlier apparent efforts to restrict their use to impeachment of Marie or corroboration of the officer's testimony were mooted by their substantive use. "If . . . testimony . . . is not competent as substantive evidence, it is not rendered competent because it tends to corroborate some other witness." *State v. Lassiter*, 191 N.C. 210, 216, 131 S.E. 577, 579 (1926). Defendant realized this and objected; his objection was erroneously overruled. Unless exempted by the rules of evidence or by statute, hearsay is not admissible. N.C.G.S. § 8C-1, Rule 802 (1988). Marie's unsworn statements are not exempt from this rule by virtue of any exception listed in Rules 801, 803, or 804, or under any other evidentiary exception. Furthermore, to offer statements that the declarant has disavowed in corroboration of the testimony of one witness does not strengthen the witness's credibility. "In no aspect of the law of evidence can contradictory evidence be used as corroborating, strengthening, or confirming evidence." *Lassiter*, 191 N.C. at 213, 131 S.E. at 579.

D.

The state's contention that the challenged testimony was competent as corroboration of Officer Daulton is without merit. The proper use of Marie's prior statements to corroborate the testimony of Officer Daulton would have been only to demonstrate the fact that Marie had made statements to him on a particular date, not to prove the facts those statements purported to relate. Of those Officer Daulton had no personal knowledge. *See* N.C.G.S. § 8C-1, Rule 602 (1988). The written statements signed by Marie were not prior consistent corroborating statements by the officer, but were hearsay statements by Marie. *See State v. McAdoo*, 35 N.C. App. 364, 241 S.E. 2d 336, *cert. denied*, 295 N.C. 93, 244 S.E. 2d 262 (1978). "The rationale justifying admission of prior consistent statements does not justify admission of extrajudicial declarations of someone other than the witness purportedly being corroborated." 1 Brandis on North Carolina Evidence § 52, at 243 (3d ed. 1988).

E.

Finally, the challenged written statements, had they been otherwise admissible, also fail the test of N.C.R. Evid. 403: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." The Commentary to Rule 607 speaks directly to the danger of impeachment evidence and to the use of this rule as a check on the improper use of such evidence: "The impeaching proof must be relevant within the meaning of Rule 401 and Rule 403 and must in fact be impeaching." There can be no question that prejudice resulted from the testimony that defendant had returned to Marie's motel room three hours after the murder occurred with "mud or grass" stains on the knees of his pants, and that he was "very nervous and upset" and wanted to "get drunk" and did so. The prejudicial effect of this testimony far outweighed the need to show Marie to be less than credible (especially where the remainder of her testimony included little of value to the state's case) or the need to bolster Officer Daulton's credibility.

Even if Marie's testimony on the subject of the prior statements had not been collateral and the purposes of their introduction had not been suspect as subterfuge, the application of the safeguard test of Rule 403 would properly have excluded them. The trial court's discretion to exclude or admit evidence under Rule 403 is broad, and this Court has observed that the trial court's ruling should be reversed for abuse of discretion only when it can be shown to have been "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). However, the inculpatory substance of the statement and the doubt surrounding other inculpatory evidence compels the conclusion that the trial court failed to apply Rule 403 correctly. Moreover, the prejudicial effect of the statements, which were not admissible for either corroborative or substantive purposes, indicates the magnitude of the error. Although there were three witnesses who identified defendant as the one they had seen with the victim the morning of her murder, the record reflects doubt about the testimony of each, including the limited opportunity for observation of the witness who drove by, certain discrepancies in the description of the witness who reported the assault, and the belated identifica-

tion of defendant by the third witness. In addition, the record reflects that Marie admitted to having had problems with telling the truth in the past and that she had been told by police officers that she could be placed at the scene of the crime. Her youth, her habit of prevaricating, the fact that she was being held at the time for violating the law, and her fear of being implicated are all facts supporting the possibility that the unsworn statements themselves might have been less than reliable.

For the foregoing reasons, we conclude 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." N.C.G.S. § 15A-1443(a) (1988). Defendant is entitled to a new trial.

[2] We turn now to defendant's contention that the results of the lineup identification by the hotel employee were erroneously introduced to the jury because the circumstances surrounding that identification violated defendant's sixth amendment right to the effective assistance of counsel. Although not necessary to the disposition of this appeal, we discuss this issue for the guidance of counsel and the court in further proceedings in this case.

The voir dire record shows that defendant's two counsel were notified prior to the lineup as to when it would occur, and both were present at the jail. The lineup was to take place in the lobby of one of the floors of the jail. The witness was to ride in an elevator to that floor and observe the lineup through the elevator door window. One of defendant's counsel asked to accompany the witness and officer in the elevator, but he was told by the officer in charge of the lineup that although he could remain in the lobby with the men participating in the lineup, neither of defendant's counsel would be permitted in the elevator. One of defendant's counsel consequently observed the lineup from the lobby but was unable to observe the elevator occupants. The witness testified that the officer in the elevator had neither spoken of nor otherwise indicated any one person in the lineup and that the witness had simply observed the five men and had written down the number corresponding to defendant's position in the line. This was corroborated in the testimony of the officer who accompanied him.

Defendant's right to have counsel present at a post-indictment lineup in which the accused is exhibited to an identifying

witness to a crime is assured by the sixth amendment. *Gilbert v. California*, 388 U.S. 263, 18 L.Ed. 2d 1178 (1967); *United States v. Wade*, 388 U.S. 218, 18 L.Ed. 2d 1149 (1967); *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). A defendant is entitled to the presence of counsel in such circumstances in order to prevent or remedy "dangers and variable factors which might seriously, even crucially, derogate from a fair trial." *Wade*, 388 U.S. at 228, 18 L.Ed. 2d at 1158. In *Wade* the Supreme Court recognized that such factors could exist on either the defendant's or the witness's side of the lineup, citing not only suggestive "physical conditions . . . surrounding the conduct of the line-up" itself, 388 U.S. at 230 n.13, 18 L.Ed. 2d at 1159 n.13, but the use of devices obscuring "what is said on the witness's side," *id.*, or the more blatant fingering of the suspect to the witness. *Id.* at 233, 18 L.Ed. 2d at 1161.

Assuming arguendo that defendant's constitutional right of assistance of counsel at the lineup was violated, defendant waived that error by failing to object when the witness later identified him before the jury as the man he had picked out of the lineup. N.C.G.S. § 15A-1446(b) (1988). In *State v. Hammond*, 307 N.C. 662, 300 S.E. 2d 361 (1983), the defendant similarly objected prior to an in-court identification, and a voir dire was held. After the voir dire, however, the defendant failed to object once the identification was actually made in the presence of the jury. This Court held that defendant's failure to object to the witness's identification during trial waived defendant's right to have the propriety of the in-court identification considered on appeal.

The same principle applies here to the introduction of the witness's subsequent testimony that defendant was the man he had previously selected as the man he had seen in the hotel lobby the morning of the murder. Failure to object when identification is made before the jury is a waiver of the right to have the propriety of that identification considered by the appellate court. "An assertion in this Court by the appellant that evidence, to the introduction of which he interposed no objection, was obtained in violation of his rights under the Constitution of the United States, or under the Constitution of this state, does not prevent the operation of this rule." *State v. Foddrell*, 291 N.C. 546, 557, 231 S.E. 2d 618, 626 (1977).

On 19 February 1986, defendant filed with this Court a motion for appropriate relief. This Court, on 15 October 1986, entered an order directing that the motion would be determined after the direct appeal was argued. On 14 November 1988, defendant filed with this Court a supplemental motion for appropriate relief. Having determined that defendant is entitled to a new trial upon his direct appeal, defendant's motions for appropriate relief are now moot, and the same are hereby dismissed.

New trial.

Justice MITCHELL dissenting.

I agree that the trial court erred in allowing the State to impeach the testimony of its witness Marie Crawford by evidence of her prior unsworn statements concerning the whereabouts of the defendant on the morning of the murder in this case. Like the majority, I believe that the "circumstances accompanying the introduction of Marie's prior unsworn statement provided no assurance . . . that Marie's testimony was critical to the state's case . . . ." The State should not have been allowed to impeach Crawford by evidence of those prior unsworn statements.

The majority's conclusion that the defendant has carried *his burden* on appeal of showing that the error was prejudicial, however, is unsupported by the record in this case. Instead, it is clear to me that the trial court's error in allowing the State to impeach its witness by evidence of her prior statements did not affect the outcome at trial. Therefore, I dissent from the holding of the majority awarding the defendant a new trial.

The record on appeal reveals that the State's case against the defendant was overwhelming. A brief review of just some of the State's evidence readily reveals that the evidence erroneously admitted to impeach Crawford was harmless. The State's evidence tended to show that Deborah Sykes was a twenty-six-year-old copy editor for the *Winston-Salem Journal-Sentinel.* She was raped and stabbed to death at approximately 6:45 a.m. on 10 August 1984 in a field off West End Boulevard a few blocks from the offices of that newspaper. She died as a result of sixteen major stab wounds, at least one of which pierced her heart. Abrasions and tearing in the areas of the victim's anus and vagina and the

presence of sperm in both her anus and vagina indicated that the victim had been sexually assaulted and raped.

Thomas Murphy testified that he was forty-five years old and was employed at Hanes Dye and Finishing Company in Winston-Salem. On 10 August 1984, he left home at approximately 6:15 a.m. to drive to work. While at a traffic light at West End Boulevard, he observed the victim and the defendant, Darryl Eugene Hunt, standing on the sidewalk. He thought they were drunk because they appeared to be leaning on each other. He saw the defendant's right arm around the neck of the victim and observed that the defendant was holding the victim's hand with his right hand. Murphy positively identified the two people he saw on that occasion as the victim, Deborah Sykes, and the defendant, Darryl Eugene Hunt. Murphy said that there was no doubt that the defendant was the man he had observed.

Johnny Gray testified that he was walking to a friend's house at approximately 6:40 a.m. on 10 August 1984. While taking a shortcut near the Crystal Towers, he heard a woman scream. He looked over a fence and saw the defendant on top of a woman beating her. He observed the assault for approximately fifteen seconds, during which time the defendant was sitting on the woman's stomach as he hit her in the face and chest. Gray could not tell whether the defendant had a knife in his hand. Although the woman struggled to free herself, she could not do so. The defendant had her arms pinned to the ground with his legs, and she could only kick her legs. At that time, the woman did not have any clothing on below her waist. As Gray walked away from the scene, he turned back and saw the defendant running across Cherry Street. As the defendant ran, he tucked his shirt inside his pants. Gray observed that the zipper to the defendant's pants was down. Gray testified there was no doubt that the defendant was the man he saw.

Gray decided that the best thing he could do was call the police, because he believed the woman was hurt. He went to a telephone booth outside a lounge on Thurman Street where he called the police and told them what he had seen. He used a false name on that occasion, because he did not want to become involved, but later correctly identified himself to the police. He gave the location of the attack on the woman as a field near the Crystal

Towers behind the downtown fire station. The police dispatcher who received the call testified that she erroneously dispatched a police car to the area of another downtown fire station where nothing was discovered.

Roger Weaver testified that on 10 August 1984 he was on duty as an auditor employed by the Hyatt House, a hotel in downtown Winston-Salem. At approximately 6:45 a.m., Weaver observed the defendant enter the hotel and go directly into the restroom. He had observed the defendant in the hotel on at least three prior occasions when the defendant had asked permission to use the restroom. Although the defendant had asked permission to use the restroom on all prior occasions, he did not request permission on the morning of 10 August 1984. When the defendant did not leave the restroom after what seemed a normal period of time, Weaver had a security guard enter the restroom to ask the defendant to leave. Shortly after the defendant left, Weaver entered the restroom and noticed a reddish-pink substance in the sink. He found bloody paper towels in the trash dispenser in the restroom. Weaver testified that he was positive the defendant was the man he had seen enter the restroom on the morning of 10 August 1984.

In light of the positive and unequivocal identification of the defendant by three disinterested eyewitnesses, it strains all credulity to assert that the jury gave any significant weight to evidence concerning unsworn pretrial statements by Marie Crawford, a retarded fourteen-year-old who had been a prostitute since she was eleven and who had spent a good part of her life institutionalized in mental health and juvenile detention facilities. Specifically, there is no realistic possibility that, in rejecting the defendant's alibi evidence, the jury gave any significant weight to the State's "impeachment" evidence that this retarded child prostitute had said she spent the night of 9-10 August 1984 with the defendant at Motel 6 and that he left in the early morning hours and returned with dirt on his pants and appearing nervous.

It must be borne in mind that where, as here, the error asserted arises other than under the Constitution of the United States, *the defendant has the burden* of showing that the error was prejudicial and must do so by establishing "a reasonable possibility that, had the error in question not been committed, a

different result would have been reached at the trial . . . ." N.C.G.S. § 15A-1443(a) (1988). *See also State v. Spruill*, 320 N.C. 688, 360 S.E. 2d 667 (1987); *State v. DeLeonardo*, 315 N.C. 762, 340 S.E. 2d 350 (1986). The majority holds that the defendant has carried this burden. It bases this holding upon its conclusion that, had evidence of the statements by a witness the jury knew was a retarded child prostitute who admitted lying in the past not been introduced, there is a reasonable possibility the jury would have reached a different result. The majority is able to reach this conclusion only by baldly asserting that "the record reflects doubt about the testimony" of each of the disinterested eyewitnesses who testified that they saw the defendant and the victim together at about the time of the murder and, in the case of one eyewitness, while the murder was being committed.

In my view, a fair reading of the record reflects no such "doubt" concerning the testimony of the eyewitnesses. All of the eyewitnesses testified positively and unequivocally during both direct and cross-examination that the defendant was the man they saw at the times in question. Further, the record does not show that the eyewitnesses had any reason to be untruthful. It seems obvious that the jury—as any reasonable person would have—based its rejection of the defendant's alibi evidence upon the testimony of the disinterested eyewitnesses who observed the defendant and the victim together during the killing or near the time of its commission and not upon the State's "impeachment" evidence concerning the statements of the retarded child prostitute. The record does not support the conclusion that the jury would have reached a different result at trial, had the evidence of her prior statements not been admitted. Instead, it is clear to me on the record before us that any such conclusion is contrary to reason and common sense. Therefore, I dissent from the holding of the majority awarding this defendant a new trial.

Justice MEYER joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. RICKY GROVES

No. 553A87

(Filed 4 May 1989)

1. **Constitutional Law § 53— delay caused by defendant—no denial of speedy trial**

Defendant was not denied his Sixth Amendment right to a speedy trial by a delay of two years and two months between the issuance of a warrant for defendant's arrest for the murder of the victim and his trial on a first degree murder charge where most of the delay was caused by the granting of thirteen motions for continuances made by defendant, motions for discovery and other motions made by defendant, and problems in securing counsel for defendant; defendant failed to assert his right to a speedy trial until three days before the trial was scheduled to begin, and defendant's actions were inconsistent with a desire for a speedy trial; and defendant made only nonspecific assertions that he was prejudiced by the delay.

2. **Criminal Law § 34.7— threat to kill victim—admissibility**

Evidence that defendant threatened to kill the victim, or to kill a group of which he was a member, approximately two weeks before he killed the victim was relevant and admissible as evidence tending to show premeditation and deliberation and to negate self-defense. N.C.G.S. § 8C-1, Rule 404(b).

3. **Criminal Law § 34.2— other crimes and wrongs—admission as harmless error**

Assuming arguendo that the admission of evidence that defendant set a fire, possessed a knife and made threats to others while in jail awaiting trial for first degree murder violated N.C.G.S. § 8C-1, Rule 404(b), defendant failed to carry his burden under N.C.G.S. § 15A-1443(a) to establish any resulting prejudice by showing a reasonable possibility that a different result would have been reached at trial had the error not been committed.

4. **Homicide § 18.1— first degree murder—premeditation and deliberation—sufficiency of evidence**

Evidence that defendant threatened to kill the victim approximately two weeks before actually killing him, taken together with evidence of the number and nature of wounds the defendant inflicted and the defendant's own statement that he had killed the victim because the victim had stolen marijuana, was substantial evidence of premeditation and deliberation which supported defendant's conviction of first degree murder.

APPEAL by the defendant from judgment and sentence of life imprisonment entered by *Read, J.*, on 9 June 1987, in Superior Court, CUMBERLAND County. The defendant was brought to trial upon a proper bill of indictment charging him with murder and entered a plea of not guilty. The jury having found the defendant guilty of murder in the first degree, a sentencing proceeding was held pursuant to N.C.G.S. § 15A-2000. The jury recommended

that the defendant be sentenced to imprisonment for life, and the trial court entered judgment and sentence in accord with that recommendation. The defendant appealed to the Supreme Court as a matter of right under N.C.G.S. § 7A-27(a). Heard in the Supreme Court on 10 October 1988.

Lacy H. Thornburg, Attorney General, by G. Patrick Murphy, Assistant Attorney General, for the State.

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

MITCHELL, Justice.

The defendant first contends on appeal that he was denied his right to a speedy trial guaranteed by the Sixth Amendment to the Constitution of the United States. He also contends that the trial court committed reversible error in certain of its evidentiary rulings and by denying his motion to dismiss the charge against him. Finally, the defendant contends that the trial court erred in its instructions to the jury.

Evidence for the State tended to show that in April of 1985, the victim, Danny "Peanut" Williams, lived in a small house on his parents' property in Cumberland County. Ricky Faircloth lived in a house nearby. The victim and Faircloth had entered into an agreement with the defendant, Ricky Groves, whereby the three men were to purchase a pound of marijuana and then sell it for profit.

Faircloth testified that he went to the victim's house at approximately 9:00 p.m. on 8 April 1985. The victim and the defendant were in the victim's house with a man named Dusty and Archie Lee "Oggie" Chavis. The defendant and the victim left to buy a pound of marijuana, and Faircloth returned to his home where he remained until 11:00 p.m. At that time, the victim, Peanut Williams, came to Faircloth's home, and the two of them went to the victim's house. They left the defendant and Oggie in the victim's house at approximately 11:30 p.m. and returned at approximately 2:00 a.m. on the morning of 9 April 1985. When Faircloth and Peanut returned to Peanut's house, the defendant and Oggie were asleep. Peanut said the marijuana was missing. They

woke the defendant and Oggie and searched the house but could not find the marijuana. The victim, the defendant and Faircloth then went to Faircloth's house, where Faircloth gave the victim $450.00 to help pay for the missing pound of marijuana. Thereafter, the defendant and the victim left Faircloth's home together. Faircloth testified that he never again saw the victim alive after that occasion.

Archie Lee "Oggie" Chavis testified that he was in the home of the victim, Peanut Williams, on the evening of 8 April 1985 when Faircloth, Peanut and the defendant left the house saying that they were going to get a pound of marijuana. Oggie remained in the house until the others returned, at which time they all smoked some marijuana. Peanut and Faircloth then left, and Oggie and the defendant went to sleep in Peanut's house.

Oggie testified that he was awakened by the defendant who grabbed him and asked if he knew where the pound of marijuana was. Peanut and Faircloth had returned by that time, and the four men searched the house but failed to locate the marijuana. Faircloth then left the house, and Oggie went back to sleep. Oggie was awakened later when he heard Peanut's voice pleading, "Please don't kill me; don't kill me; don't kill me." Oggie jumped up and observed the defendant coming out of the bedroom with blood dripping from his clothes. The defendant said to Oggie: "Where are you going? You're not going nowhere. I ought to kill you. I don't leave no witnesses around when I do something like this. I ought to go around and kill that Ricky Faircloth boy." While the defendant made these statements, he was holding a knife in one hand and a pistol which he had pulled from his belt in the other hand. He was holding the barrel of the pistol between Oggie's eyes.

Oggie went into the bedroom and saw the victim, Peanut Williams on the floor with his throat cut. The defendant, Ricky Groves, said: "He got me. He got me for my pot." The defendant also said that he had gone to sleep with the marijuana on his stomach and awakened to find Peanut patting him on the stomach. The defendant told Oggie that he had killed the victim because the victim had gotten the marijuana.

Thereafter, the defendant began rummaging through the bedroom and asked Oggie if he "knew where Peanut kept the pot."

Oggie told the defendant that he did not. At that point, the victim "made a grunt" and the defendant kicked him in the head and said, "Shut up, you son of a bitch."

Oggie testified that the defendant later told him that, if anyone asked what had happened, he should say that some black people had killed Peanut. The two then left Peanut's residence. They proceeded to the home of Ronald Lowery, also known as Ronald Hunt, where the defendant gave Oggie a garbage bag and told him to throw it in a dumpster. The two men went to a barn behind Hunt's house where the defendant emptied his pockets, took off his bloody clothes and put them in a garbage bag. The defendant left to take the bag to the nearby dumpster. Oggie testified that the defendant returned and said, "I killed Peanut for nothing." The defendant then "started laughing like it was a joke."

On 9 April 1985, law enforcement officers searched the dumpster and found garbage bags containing clothes and other items. One item bore a fingerprint belonging to the victim, and blood found on some of the items matched the blood type of the victim.

Ronald Lowery, also known as Ronald Hunt, testified that he was asleep on the morning of 9 April 1985, when the defendant came to his house and awakened him by beating on the door. The defendant told Lowery that he had killed the victim, Peanut Williams. Lowery told the defendant to leave his house, and the defendant did so.

Dr. John Butts, a pathologist and the acting Chief Medical Examiner for the State of North Carolina, testified that he performed an autopsy upon the body of the victim, Danny "Peanut" Williams. Dr. Butts testified that the victim died from multiple stab wounds and a cutting or slash wound to the neck. The wound to the neck severed the jugular vein and a branch of the carotid artery, the large artery that supplied blood to the brain. The victim also suffered a cutting injury of the scalp above the right ear. The stab wounds included one wound at the base of the front of the neck and two wounds to the upper right portion of the chest. Additionally, there were nine stab wounds to the victim's back—three on the neck, three more on the right side of the back, two near the center of the back and one in the small of the back. As a

result of the stab wounds, both of the victim's lungs had collapsed and his chest cavity had filled with blood.

Anthony Crosby testified that he shared a cell with the defendant in the Cumberland County Jail while the defendant was awaiting trial on the charge of murdering Peanut Williams. The defendant told Crosby that he was in jail on a murder charge and that he had "butchered" someone named Peanut. The defendant also stated that someone had walked in while Peanut was lying on the floor. Crosby testified that the defendant said that Peanut had made "some kind of noise and he kicked him in the head and told him, said, You son-of-a-bitch, shut up."

Additional evidence was introduced by the State. Some of it is discussed at appropriate points in this opinion where helpful to an understanding of the issues presented.

The defendant testified at trial and stated that he and Peanut Williams were good friends. On 8 April 1985, Peanut Williams, Ricky Faircloth and the defendant discussed buying a pound of marijuana for $900.00 from Ronald Lowery and selling it for $1,200.00 to a buyer known to Peanut and Faircloth. The defendant testified that the men got the marijuana from Ronald Lowery after telling him they would bring him his money in a couple of hours. The men returned to Peanut's house, where the defendant kept the marijuana while Peanut and Faircloth went to locate their buyer.

The defendant testified that while Peanut and Faircloth were gone, he fell asleep with the pound of marijuana lying on his stomach. He awoke to find Peanut feeling around under him and the marijuana gone. The three men went to Faircloth's residence to discuss what they would do about the missing marijuana. While using some cocaine, they decided that Faircloth and Peanut would provide half of the money to pay Ronald Lowery, and the defendant would pay the rest.

The defendant testified that he and Peanut then went back to Peanut's house where they used some more cocaine. The defendant told Peanut that they needed to explain the missing pound of marijuana to Ronald Lowery, and this seemed to make Peanut nervous. Peanut asked the defendant if he thought that

Peanut had gotten the marijuana. The defendant responded that he did not know.

The defendant testified that Peanut then grabbed the handle of the .357 Magnum pistol which the defendant was carrying in the waist of his trousers. He said that as they struggled, he pulled his knife to keep Peanut from getting the gun and cut Peanut across the neck. Peanut's blood ran all over the defendant's face, and the defendant had blood in his eyes. The defendant "got back up on" Peanut and continued to stab him with the knife. The defendant testified: "When I got hold of the pistol, he weren't on me no more; I stopped."

The defendant testified that he left Peanut's house and went to Ronald Lowery's. He told Lowery that the marijuana had been stolen and what had happened to Peanut. Lowery then told the defendant that the marijuana had not been stolen. Lowery said that when Peanut, Faircloth and the defendant had been gone so long the night before, Lowery went to Peanut's house. Discovering the defendant and Oggie asleep, Lowery took the marijuana and left.

[1] The defendant first contends that he was denied his right to a speedy trial as guaranteed by the Sixth Amendment to the Constitution of the United States. The primary factors to be considered in determining whether this constitutional right has been violated are (1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) prejudice to the defendant resulting from the delay. *Barker v. Wingo*, 407 U.S. 514, 33 L.Ed. 2d 101 (1972); *State v. Lyszaj*, 314 N.C. 256, 333 S.E. 2d 288 (1985). None of these four factors, however, should be viewed as "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant." *Barker v. Wingo*, 407 U.S. at 533, 33 L.Ed. 2d at 118.

Considering the first factor, length of delay, we note that a period of approximately two years and two months passed between 9 April 1985, when a warrant was issued for the defendant's arrest for the murder of the victim, and the defendant's trial in this case. We previously have stated that "a delay of twenty-two months is not of great significance but is merely the 'trigger-

ing mechanism' that precipitates the [constitutional] speedy trial issue." *State v. Jones*, 310 N.C. 716, 721, 314 S.E. 2d 529, 533 (1984), *citing State v. Hill*, 287 N.C. 207, 214 S.E. 2d 67 (1975). Although the period of delay in the present case was considerable, mere length of delay, standing alone, does not establish that the delay was unreasonable or prejudicial under the Sixth Amendment. *See State v. Kivett*, 321 N.C. 404, 364 S.E. 2d 404 (1988) (427 day delay); *State v. Lyszaj*, 314 N.C. 256, 333 S.E. 2d 288 (three and one-half year delay).

As to the second factor, the reason for the delay, it is apparent that most of the delay in the present case resulted from the granting of motions for continuances made by the defendant. It is in all probability true, as the defendant argues, that some part of the delay in bringing him to trial occurred because the original murder indictment indicating that he would be tried for second-degree murder was dismissed on 27 January 1986, and a new murder indictment indicating that he would be tried for murder in the first degree was returned on the same day. It is also probable that the defendant is correct that the delay in bringing him to trial was occasioned in part by the difficulty in obtaining counsel who could or would represent him and the fact that he was represented by five different attorneys at various times during the period in question.

However, the record reveals that the defendant moved for and was granted thirteen continuances during the period of delay. Additionally, during most of that period, the defendant had numerous motions for discovery and other motions pending before the court. The defendant continued to file pretrial motions in this case as late as the day before the commencement of trial and the day of trial itself. Such facts fully support the trial court's finding in its order denying the defendant's motion to dismiss for denial of his Sixth Amendment right to a speedy trial that: "Most of the delay herein is attributable to the many continuance motions and pre-trial motions filed by defense, as well as the problems stated herein securing counsel for Defendant, his hospitalization, and the discovery process . . . ." As a result, we find no error in the conclusion of the trial court that there "has been no unjustifiable prosecutorial delay" in the present case.

The third factor, the defendant's assertion or failure to assert his right to a speedy trial, must be deemed to weigh against the defendant and in favor of the State. The defendant never indicated in any manner that he wished a speedy trial on the charge against him. To the contrary, the defendant sought and received numerous continuances and filed numerous pretrial motions upon which the trial court was required to rule before trial could commence. Until he filed his motion to dismiss for lack of a speedy trial on 8 May 1987—three days before trial was scheduled to commence on 11 May 1987—the defendant's actions appear to have been inconsistent with a desire for a speedy trial.

As to the fourth factor, prejudice to the defendant from the delay, the defendant presented the trial court with nothing but an affidavit which the trial court deemed "conclusory, self-serving and nonspecific." In denying the defendant's motion to dismiss for lack of a speedy trial, the trial court stated:

> Defendant does not specify how being incarcerated and losing contact with friends and family members and not seeing his children and common law wife has prejudiced him in the trial of this matter or its preparation. He does not specify who he has been unable to talk to and how they could assist him in his defense. The Defendant was given an opportunity to testify at the hearing on this matter, with assurances by the Court to his attorney that the State would be restricted on cross-examination questions and the Defendant declined to do so.

On appeal to this Court, the defendant has made similar nonspecific assertions that he has been prejudiced by delay. He additionally argues that the delay allowed the State to procure four additional witnesses to testify to his statements and actions while incarcerated and awaiting trial.

We do not find the defendant's contentions in this regard persuasive. In summary, we detect no basis for concluding that the defendant was deprived of his right to a speedy trial under the Sixth and Fourteenth Amendments to the Constitution of the United States.

The defendant next contends that the trial court erred in allowing evidence of his other crimes, wrongs, or acts. The defend-

ant argues that the admission of such evidence violated Rule 404(b) of the North Carolina Rules of Evidence.

[2] The defendant first argues in this regard that the testimony of Fonda Whaley violated Rule 404(b). Whaley testified that the defendant was in her home during March of 1985, approximately two weeks before Peanut Williams was killed. Whaley testified that she and her husband came home to discover their daughter Sherry there with Lee Wayne Hunt, Debbie Williford and the defendant, Ricky Groves. They were "doing drugs" and drinking and were not in condition to drive, so the Whaleys allowed them to spend the night. During the evening, they discussed having a cookout the following day. When Lee Wayne Hunt and the defendant awoke the next morning, they left the house. Thereafter, Peanut Williams and Kenny Locklear called and invited Sherry and Debbie to go to the beach with them. The two young women left shortly thereafter with Peanut and Locklear.

Whaley testified that the defendant, Ricky Groves, returned to her house later that afternoon. She further testified as follows:

> Ricky was still—Ricky was—to my opinion, he was still on drugs. He was still doing his drugs or whatever, and he came in with the bag of charcoal and he asked me where Sherry and Debbie were because they were going to cook out, and I told him that Sherry had gone to the beach with Peanut, Danny, and little Kenny Locklear. Ricky got real mad. He had a five pound bag of charcoal and he slung it up on the table, and I told him, I said, Ricky, this shit ain't going to work. I don't have to put up with your shit. Because he was acting real out of control. And I asked him to leave. And he—he had a .357 Magnum in his back pocket. He pulled out that .357 Magnum and told me, standing there, that he would blow their brains out.
>
> . . .
>
> He said he would blow their f—ing brains out.
>
> . . .
>
> MR. AMMONS: Ma'am, just tell me who y'all had been talking about prior to him making that statement.

THE WITNESS: Peanut and Kenny.

The defendant argues that the admission of Whaley's testimony violated Rule 404(b) because it had no relevance for any purpose other than to prove the character of the defendant in order to show that he acted in conformity therewith at the time he killed Peanut Williams. We do not agree.

As Dean Brandis has pointed out:

> In homicide cases, threats by the accused have always been freely admitted either to identify him as the killer or to disprove accident or justification, or to show premeditation and deliberation. The threats may have been directed specifically toward the deceased, or toward a class of persons of which deceased was a member, or, if there is other evidence tending to connect them with the victim, they may have been of a general nature, and they are not inadmissible merely because they were made a considerable time before the killing or because they were coupled with a condition.

1 Brandis on North Carolina Evidence § 162a (3d ed. 1988) (footnotes omitted). However, evidence of a defendant's threats is insufficient, standing alone, to justify conviction. *State v. Needham*, 235 N.C. 555, 71 S.E. 2d 29 (1952); *State v. Jarrell*, 233 N.C. 741, 65 S.E. 2d 304 (1951).

The enactment of Rule 404 has not changed such rules concerning the admissibility of prior threats against the victim by the defendant. The pertinent part of Rule 404 is as follows:

> (b) *Other crimes, wrongs, or acts.*—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C.G.S. § 8C-1, Rule 404(b) (1988).

Since the adoption of the North Carolina Rules of Evidence, Rule 404(b) has been given extensive consideration by this Court. Recently, we pointed out that:

> The list of permissible purposes for which such evidence [of other crimes, wrongs, or acts] may be introduced as set forth in the statute *is not exclusive*, and "the fact that evidence cannot be brought within a [listed] category does not necessarily mean that it is inadmissible." *State v. DeLeonardo*, 315 N.C. 762, 770, 340 S.E. 2d 350, 356 (1986). "In fact, as a careful reading of Rule 404(b) clearly shows, evidence of other offenses *is admissible* so long as it is *relevant to any fact or issue* other than the character of the accused." *State v. Weaver*, 318 N.C. 400, 403, 348 S.E. 2d 791, 793 (1986) (quoting 1 *Brandis on North Carolina Evidence* § 91 (2d rev. ed. 1982)) (emphasis added). " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1986). Thus, even though evidence may tend to show other crimes, wrongs, or acts by the defendant and his propensity to commit them, it is admissible under Rule 404(b) so long as it also "is relevant for some purpose *other than* to show that defendant has the propensity for the type of conduct for which he is being tried." *State v. Morgan*, 315 N.C. 626, 637, 340 S.E. 2d 84, 91 (1986) (emphasis in original).

State v. Bagley, 321 N.C. 201, 206-207, 362 S.E. 2d 244, 247 (1987).

Evidence that approximately two weeks before he killed Peanut Williams the defendant threatened to kill him, or to kill a group of which he was a member, was relevant and admissible as evidence tending to show premeditation and deliberation and to negate self-defense. *See* 1 Brandis on North Carolina Evidence § 162a (3d ed. 1988) and cases cited therein. Therefore, in addition to its tendency to show the defendant's propensity to commit the crime charged, this evidence was *also* relevant for a proper purpose. As a result, it was not excludable under Rule 404(b). *State v. Bagley*, 321 N.C. at 206, 362 S.E. 2d at 247; *State v. Weaver*, 318 N.C. at 403, 348 S.E. 2d at 793; *State v. DeLeonardo*, 315 N.C. at 770, 340 S.E. 2d at 356; *State v. Morgan*, 315 N.C. at 637, 340 S.E. 2d at 91. The trial court did not err in admitting Whaley's testimony in this regard.

[3] The defendant also argues that the trial court violated Rule 404(b) by allowing the introduction of evidence tending to show that he started a fire in jail while he was incarcerated awaiting trial on the charge of murder and that a "shank" or homemade knife similar to an ice pick with a blade approximately four inches in length was found among his belongings in the jail. The defendant additionally argues that the trial court erred in allowing testimony that he had threatened a guard in the jail and said that he had killed one person and would kill another. The State argues, on the other hand, that such evidence was relevant to explain why the witness Anthony Crosby waited for two weeks to tell the authorities that, while the two men were incarcerated together, the defendant told Crosby he had "butchered" Peanut Williams and explained some of the details.

It is true that during the cross-examination of Crosby, the defendant attempted to discredit him by casting doubt upon his reasons for bringing such information to the attention of authorities. However, we find it unnecessary to decide whether evidence of the knife, the fire in the jail or the defendant's threats to others while incarcerated violated Rule 404(b). Assuming *arguendo* that such evidence was improperly admitted in the present case, we conclude that the defendant has failed to carry his burden under N.C.G.S. § 15A-1443(a) to establish any resulting prejudice by showing a reasonable possibility that a different result would have been reached at trial had the error not been committed.

The evidence the State offered in attempting to prove the defendant's threats to kill others was in the form of Crosby's testimony to such events. In light of the fact that Crosby had already testified that the defendant had admitted "butchering" Peanut Williams it is doubtful that such testimony concerning later threats was given much weight at all by the jury.

The evidence concerning the defendant's alleged setting of the fire in the jail also consisted of testimony by Crosby to that effect. The defendant rebutted this evidence by the testimony of Phillip Locklear, another inmate who testified that Crosby himself set the fire. The defendant also introduced the testimony of James R. Nance, Jr., Locklear's attorney, who testified that he represented both Locklear and the defendant in the fire incident and that Locklear had told him that Crosby started the fire.

The evidence that the defendant had a knife in jail consisted of the testimony of Crosby to that effect and the testimony of Chief Jailer Daniel Ford concerning "field notes" made by jail personnel indicating that a knife was found among the defendant's belongings. Further, a knife purported to be the one found was displayed to the jury. However, nothing in the evidence tended to indicate that, if the defendant in fact possessed the knife, he ever used it or attempted to use it in any improper or unlawful way.

Even assuming *arguendo* that the foregoing evidence was improperly admitted in violation of Rule 404(b), the defendant has failed to show that it affected the jury's verdict in light of the evidence properly admitted. The State had already introduced evidence that the defendant cut the victim's throat and stabbed him more than a dozen times causing both of his lungs to collapse and his chest cavity to fill with blood. The defendant conceded these facts during his own testimony at trial. Additionally, the State introduced evidence of the defendant's own statement to Archie Lee "Oggie" Chavis shortly after the killing that the defendant had killed the victim because the victim had gotten the marijuana. In light of such evidence for the State, we conclude that the defendant has failed to show a reasonable possibility that, but for the admission of evidence that he set a fire and possessed a knife in jail and made threats while in jail, a different result would have been reached at trial. The defendant has failed to carry his burden of showing prejudice resulting from any possible violation of Rule 404(b).

[4] The defendant next contends that the trial court erred by denying his motion to dismiss the first-degree murder charge against him at the close of all evidence. The defendant argues that there was no substantial evidence tending to show that he killed Peanut Williams with premeditation and deliberation.

The rules for testing the sufficiency of the evidence to overcome a motion to dismiss in a criminal case have been stated in detail in numerous decisions of this Court. *E.g., State v. Mercer*, 317 N.C. 87, 343 S.E. 2d 885 (1986); *State v. Lowery*, 309 N.C. 763, 309 S.E. 2d 232 (1983); *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). It would serve no useful purpose to recite those rules again in

detail here. Instead, it suffices for purposes of this case to point out that in considering a motion to dismiss the evidence must be considered in the light most favorable to the State with every reasonable intendment and inference drawn in favor of the State. *Id.* Here, the evidence that the defendant threatened to kill the victim approximately two weeks before actually killing him, taken together with the evidence of the number and nature of wounds the defendant inflicted and the defendant's own statement that he had killed the victim because the victim had gotten the marijuana, was substantial evidence of premeditation and deliberation. It was more than sufficient to withstand the defendant's motion to dismiss.

Finally, the defendant contends that the trial court erred in failing to give an instruction he purportedly requested. We conclude that the instructions given by the trial court included the substance of the purportedly requested instruction and were without error. The defendant was entitled to no more, since a trial court is not required to give requested instructions verbatim, even when they are correct statements of law. *State v. Allen,* 322 N.C. 176, 367 S.E. 2d 626 (1988).

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

No error.

IN THE MATTER OF: THE APPEAL FROM THE CIVIL PENALTY ASSESSED FOR VIOLATIONS OF THE SEDIMENTATION POLLUTION CONTROL ACT ADMINISTERED BY THE DEPARTMENT OF NATURAL RESOURCES AND COMMUNITY DEVELOPMENT BY DENNIS W. HARRIS AND WIFE, NATALIE G. HARRIS AND ROY J. HALL

No. 543A88

(Filed 4 May 1989)

1. Administrative Law § 3; Constitutional Law § 10.3— administrative agency—power to assess civil penalties—constitutionality

Art. IV, § 3 of the N. C. Constitution does not prohibit the legislature from conferring the power on an administrative agency to assess civil penalties when necessary to accomplish the agency's purposes. The civil penal-

ty power is reasonably necessary to the purpose for which the Department of Natural Resources and Community Development was established.

2. **Administrative Law § 3; Constitutional Law § 10.3— administrative agency—discretion in determining civil penalties—constitutionality**

Art. IV, § 3 of the N. C. Constitution does not prohibit the legislature from conferring on administrative agencies the power to exercise discretion in determining civil penalties within an authorized range provided that adequate guiding standards accompany that discretion. Plenary guiding standards exist to check the exercise of NRCD discretion in its assessment of civil penalties in varying amounts for violations of the Sedimentation Pollution Control Act, commensurate with the seriousness of the violations of the Act.

3. **Appeal and Error § 2— Court of Appeals—one panel bound by decision of another panel**

A panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless that decision has been overturned by a higher court.

APPEAL pursuant to N.C.G.S. § 7A-30(a) and (b) by the North Carolina Department of Natural Resources and Community Development from the decision of a divided panel of the Court of Appeals, reported at 92 N.C. App. 1, 373 S.E. 2d 572 (1988), affirming the judgment vacating a civil penalty entered by *Smith, J.*, at the 10 February 1987 Session of Superior Court, WAKE County. Heard in the Supreme Court 13 February 1989.

Lacy H. Thornburg, Attorney General, by Andrew A. Vanore, Jr., Chief Deputy Attorney General; Daniel F. McLawhorn, Special Deputy Attorney General; and Daniel C. Oakley, Special Deputy Attorney General, for respondent-appellant Department of Natural Resources and Community Development.

Beach & Correll, P.A., by J. Michael Correll, and W. P. Burkhimer, for petitioner-appellees Dennis W. Harris, Natalie G. Harris, and Roy J. Hall.

Carolina Legal Assistance, by Christine O'Connor Heinberg, and The North Carolina Council of Trout Unlimited and The North Carolina Wildlife Federation, by Thomas W. Earnhardt, Special Counsel, amici curiae.

MEYER, Justice.

This case arises from an assessment of a civil penalty against appellees Dennis W. Harris, his wife, Natalie G. Harris, and Roy

J. Hall for violations of the Sedimentation Pollution Control Act of 1973, N.C.G.S. §§ 113A-50 to -66 ("the Act") by the North Carolina Department of Natural Resources and Community Development ("NRCD").

The administrative record tends to show that appellees own and have subdivided two adjacent tracts of land totalling approximately eighteen acres near Lenoir in Caldwell County. While enlarging one of the subdivisions on the property, between October and December 1983, appellees disturbed approximately two and one-half acres of land by grading, cutting and filling, in order to construct a street to provide access to residential lots. Appellees had been assessed civil penalties by NRCD for prior violations of the Act during earlier phases of the subdivision development, but these penalties had been settled.

The site was inspected by NRCD personnel on 20 October 1983. The inspection revealed that measures to control erosion and sedimentation resulting from the activities associated with the subdivision expansion had not been placed on the site. On 24 October 1983, NRCD sent appellees a Notice of Violation, which (1) stated that the property was in violation of the Act, (2) specified the violations and steps necessary to correct them, (3) set a deadline for compliance, and (4) warned that a civil penalty could be imposed if the violations were not corrected.

The violations were not corrected. On 10 November 1983, a Continuing Notice of Violation was mailed to appellees. Site inspections by NRCD personnel and meetings with appellees revealed that by 20 December 1983, adequate erosion control measures had still not been placed on the site and off-site sedimentation was still occurring. On 26 January 1984, pursuant to N.C.G.S. § 113A-64(a), NRCD assessed a civil penalty against appellees of $75.00 per day for fifty-six days beginning 25 October 1983 through 20 December 1983, totalling $4,200.

Appellees requested and received a hearing before an NRCD Hearing Officer. Consistent with the Hearing Officer's recommended decision, the Secretary of NRCD affirmed the penalty in October 1985, and demand for payment was made. Appellees petitioned for judicial review in Superior Court. In a judgment filed 11 February 1987, the trial court vacated the civil penalty. The trial court concluded that although the assessment was "not ef-

fected [sic] by error of law," the authority conferred pursuant to N.C.G.S. § 113A-64 allowed the Secretary of NRCD to assess civil penalties in his "absolute discretion," and thus the statute constituted a legislative grant of judicial power prohibited by article IV, section 3 of the North Carolina Constitution.

A divided panel of the Court of Appeals upheld the trial court's judgment. The majority set aside the trial court's finding that N.C.G.S. § 113A-64 authorized NRCD to assess civil penalties based solely on the Secretary's "absolute discretion," but, relying on *Lanier, Comr. of Insurance v. Vines*, 274 N.C. 486, 164 S.E. 2d 161 (1968), concluded nevertheless that article IV, section 3 of the North Carolina Constitution "does not permit an administrative agency to assess a civil penalty whose amount varies with *any* agency discretion," *In the Matter of Appeal from Civil Penalty*, 92 N.C. App. at 11, 373 S.E. 2d at 578, and that therefore N.C.G.S. § 113A-64 was an unconstitutional attempt to confer reserved judicial powers on an administrative agency. The dissent concluded that (1) the majority declined to follow a prior Court of Appeals' interpretation of *Lanier, N.C. Private Protective Services Bd. v. Gray, Inc.*, 87 N.C. App. 143, 360 S.E. 2d 135 (1987); and (2) the issue of constitutionality was controlled by the fact that N.C.G.S. § 113A-64 included adequate guiding standards to govern NRCD's exercise of adjudicative powers, thereby satisfying the constitutional requirement for such delegations of quasi-judicial powers.

On 18 November 1988, NRCD filed its notice of appeal based on the dissent in the Court of Appeals and also petitioned for discretionary review on the issue of whether article IV, section 3 of the North Carolina Constitution prohibits the legislature from conferring the power on administrative agencies to exercise discretion in determining civil penalties within an authorized range. The petition was allowed 5 December 1988. Accordingly, this appeal presents three questions for review: (1) whether article IV, section 3 of the North Carolina Constitution prohibits the legislature from conferring the power on administrative agencies to assess civil penalties, specifically, the power of NRCD to assess civil penalties under N.C.G.S. § 113A-64; (2) whether article IV, section 3 of the North Carolina Constitution prohibits the legislature from conferring on administrative agencies the power to exercise discretion in determining civil penalties within an authorized range; and (3) whether a panel of the Court of Appeals is

bound by a prior decision of another panel of the same court on the same issue.

I.

[1] The first question we address is whether article IV, section 3 of the North Carolina Constitution prohibits the legislature from conferring the power on administrative agencies to assess civil penalties. In this case, the Court of Appeals majority concluded that the Constitution does not permit NRCD to assess any civil penalties pursuant to N.C.G.S. § 113A-64.

Article IV, section 3 of the North Carolina Constitution provides in part:

> The General Assembly may vest in administrative agencies established pursuant to law such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created.

N.C. Const. art. IV, § 3 (1984).

The statute at issue here provides in pertinent part as follows:

> (a) Civil Penalties.—(1) Any person who violates any of the provisions of this Article or any ordinance, rule, regulation, or order adopted or issued pursuant to this Article by the Commission or by a local government, or who initiates or continues a land-disturbing activity for which an erosion control plan is required except in accordance with the terms, conditions, and provisions of an approved plan, shall be subject to a civil penalty of not more than one hundred dollars ($100.00). No penalty shall be assessed until the person alleged to be in violation has been notified of the violation. Each day of a continuing violation shall constitute a separate violation under G.S. 113A-64(a)(1).
>
> (2) The Secretary, for violations under the Commission's jurisdiction, . . . shall determine the amount of the civil penalty to be assessed under G.S. 113A-64(a) and shall make written demand for payment upon the person responsible for the violation, and shall set forth in detail the violation for which the penalty has been invoked. If payment is not received or equitable settlement reached

> within 30 days after demand for payment is made, the Secretary shall refer the matter to the Attorney General for the institution of a civil action in the name of the State in the superior court of the county in which the violation is alleged to have occurred to recover the amount of the penalty . . . . Any sums recovered shall be used to carry out the purposes and requirements of this Article.

N.C.G.S. § 113A-64(a) (1983). The statute specifically provides that the Secretary has the power to assess a varying civil penalty, up to $100.00 per day. The language of the statute contemplates that the amount of the fine will be commensurate with the seriousness of a person's violation of the Act. The Court of Appeals majority concluded that under this Court's decision in *Lanier, Comr. of Insurance v. Vines*, 274 N.C. 486, 164 S.E. 2d 161, there was no reasonable necessity in this case for conferring upon the Secretary of NRCD the judicial power to impose a monetary penalty. We are convinced that, by relying on obiter dicta in the opinion, the Court of Appeals majority read *Lanier* too broadly and erred in affirming the trial court. We therefore reverse.

In *Lanier*, the State, on the relation of the Commissioner of Insurance, brought a civil action to recover a civil penalty imposed by the Commissioner upon the defendant for violation of the insurance laws of North Carolina. The Court turned to the North Carolina Constitution, article IV, section 3, to determine whether the power to assess a varying civil penalty could be properly conferred upon a member of the executive department. *Lanier*, 274 N.C. at 494, 164 S.E. 2d at 166. The Court explained:

> The legislative authority is the authority to make or enact laws; that is, the authority to establish rules and regulations governing the conduct of the people, their rights, duties and procedures, and to prescribe the consequences of certain activities. Usually, it operates prospectively. The power to conduct a hearing, to determine what the conduct of an individual has been and, in the light of that determination, to impose upon him a penalty, within limits previously fixed by law, so as to fit the penalty to the past conduct so determined and other relevant circumstances, is judicial in nature, not legislative.

Id. at 495, 164 S.E. 2d at 166. The Court was thus "concerned with the extent to which the Legislature [had] undertaken to confer upon an administrative officer a [judicial] power which the Legislature, itself, never had." *Id.* at 496, 164 S.E. 2d at 167. The Court then stated:

> Under Art. IV, §§ 1 and 3, of the North Carolina Constitution, as amended by the vote of the people at the general election in November 1962, *the Legislature may do this, if, but only if, conferring this segment of the judicial power of the State upon the Commissioner of Insurance is "reasonably necessary as an incident to the accomplishment of the purposes for which" the Department of Insurance was created.*

Id. at 496-97, 164 S.E. 2d at 167 (emphasis added) (quoting N.C. Const. art. IV, § 3). In *Lanier*, the Court found "no reasonable necessity for conferring upon the Commissioner the judicial power to impose upon an agent a monetary penalty, varying, in the Commissioner's discretion, from a nominal sum to $25,000 for each violation." *Id.* at 497, 164 S.E. 2d at 167.

The Court went on to note, however, that:

> Whether a judicial power is "reasonably necessary as an incident to the accomplishment of a purpose for which" an administrative office or agency was created *must be determined in each instance in the light of the purpose for which the agency was established and in the light of the nature and extent of the judicial power undertaken to be conferred.*

Id. (emphasis added).

Article IV, section 3 of the Constitution contemplates that discretionary judicial authority may be granted to an agency when reasonably necessary to accomplish the agency's purposes. When shorn of obiter dicta, the holding in *Lanier* is not to the contrary. Further, the opinion is fact-specific; that is, the judicial power to assess a monetary penalty *in that case* was found not to be reasonably necessary to further the purposes of *that* agency. The Court specifically noted that challenges to an agency's judicial power should be addressed on a case-by-case basis. *Lanier* cannot therefore be read to mean that in no instance will there exist a reasonable necessity for conferring upon an agency the judicial power to impose a monetary penalty. Rather, in *Lanier* this

Court addressed an isolated question raised by an uncomplicated statute; it did not decide that the North Carolina Constitution absolutely forbids conferring discretionary civil penalty power on administrative agencies. *See N.C. Private Protective Services Bd. v. Gray, Inc.*, 87 N.C. App. 143, 360 S.E. 2d 135 (1987) (*Lanier* does not hold that all administrative civil penalties are *per se* in violation of article IV, section 3); *cf. Young's Sheet Metal and Roofing, Inc. v. Wilkins, Comr. of Motor Vehicles*, 77 N.C. App. 180, 334 S.E. 2d 419 (1985) (Division of Motor Vehicles could not imply a civil penalty power not created by statute). As the dissenting judge in the Court of Appeals succinctly noted, *Lanier* does not hold that agency exercise of the judicial power to impose a monetary penalty offends our Constitution in all circumstances.

Having concluded that *Lanier* does not foreclose the legislature from constitutionally conferring on an administrative agency the judicial power to assess a monetary penalty, we now consider whether this power is reasonably necessary "in the light of the purpose for which [NRCD] was established and in the light of the nature and extent of the judicial power undertaken to be conferred." *Lanier*, 274 N.C. at 497, 164 S.E. 2d at 168.

The purposes for which NRCD was created are generally stated in N.C.G.S. §§ 113-3 and -8. Section 113-3 provides in part that "[i]t shall be the duty of [NRCD] . . . to aid . . . [i]n the promotion of the conservation and development of the natural resources of the State [and] . . . a more profitable use of lands and forests." N.C.G.S. § 113-3(a)(1), (2) (1987). Section 113-8 provides that NRCD "shall have the duty of enforcing all laws relating to the conservation of marine and estuarine resources." N.C.G.S. § 113-8 para. 4 (1987). One of these laws is the Sedimentation Pollution Control Act of 1973. Its purpose is "to provide for the creation, administration, and enforcement of a program . . . which will permit development of this State to continue with the least detrimental effects from pollution by sedimentation." N.C.G.S. § 113A-51 (1983).

There are several basic objectives in sedimentation control, including (1) identification of critical areas, (2) limiting the size of exposed areas, and (3) limiting the time of exposure. N.C.G.S. § 113A-57 (1983); N.C. Admin. Code tit. 15, r. 4B.0006 (Sept. 1987). Perhaps the most critical concern is that time is of the essence,

but the penalties section of the Act provides no form of "stop work" power in order to halt a violation in progress. N.C.G.S. §§ 113A-64 to -66 (1983). Although NRCD has authority to seek injunctive relief in the courts, N.C.G.S. § 113A-64, by the time an action is brought and an injunction issued, irreparable damage may have already occurred. The power to levy a civil penalty is therefore a useful tool, since even the threat of a fine is a deterrent. We conclude that the civil penalty power is reasonably necessary to the purposes for which NRCD was established. *Lanier, Comr. of Insurance v. Vines*, 274 N.C. 486, 164 S.E. 2d 161; N.C. Const. art. IV, § 3 (1984).

II.

[2] The second prong of the *Lanier* inquiry, that is, whether the power to assess a monetary penalty is reasonably necessary "in the light of the nature and extent of the judicial power undertaken to be conferred," *Lanier*, 274 N.C. at 497, 164 S.E. 2d at 168, is subsumed in the issue of whether article IV, section 3 prohibits the legislature from conferring on administrative agencies, here NRCD, the power to exercise discretion in determining civil penalties within an authorized range. Based on its reading of *Lanier*, and the fact that there the Commissioner of Insurance had discretion to assess a civil penalty varying from a nominal sum to $25,000 per violation, the majority of the Court of Appeals concluded that article IV, section 3 "does not permit an administrative agency to assess a civil penalty whose amount varies with *any* agency discretion." *In the Matter of Appeal from Civil Penalty*, 92 N.C. App. at 11, 373 S.E. 2d at 578.

This Court decided *Lanier* in 1968. As the dissent in the Court of Appeals correctly noted, "[m]echanical application of the *Lanier* rule ignores the progress made in the way the role of administrative agencies is regarded." *Id.* at 20, 373 S.E. 2d at 583 (Becton, J., dissenting). In *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 269 S.E. 2d 547, *reh'g denied*, 301 N.C. 107, 273 S.E. 2d 300 (1980), we acknowledged that:

> [W]e must expect the Legislature to legislate only so far as is reasonable and practical to do and we must leave to [the agency] the authority to accomplish the legislative purpose, *guided of course by proper standards. The modern tendency is to be more liberal in permitting grants of discretion to ad-*

> *ministrative agencies* in order to ease the administration of laws as the complexity of economic and governmental conditions increases. . . .
>
> North Carolina cases have long been consistent with this "modern tendency."

Id. at 402, 269 S.E. 2d at 563 (emphasis added) (citations omitted). And in *Adams v. Dept. of N.E.R. and Everett v. Dept. of N.E.R.*, 295 N.C. 683, 249 S.E. 2d 402 (1978), we stated that transfers of "adjudicative and rule-making powers to administrative bodies [are not constitutionally precluded] provided such transfers are accompanied by adequate *guiding standards* to govern the exercise of the delegated powers." *Id.* at 697, 249 S.E. 2d at 418 (emphasis added) (citations omitted). Since *Lanier* was decided, we have recognized that because of the increasing "complexity of economic and governmental conditions," *Rate Bureau*, 300 N.C. at 402, 269 S.E. 2d at 563, some discretion may be granted to agencies to ensure that they accomplish the purposes for which they were created, provided that such discretion is accompanied by adequate guiding standards.

In *Lanier*, the Commissioner of Insurance had the power to impose a monetary penalty which varied, in his discretion, from a nominal sum to $25,000 for each violation. Such is not the case here, since the civil penalty power conferred on NRCD is legislatively confined to a maximum of $100.00 for each violation of the Act. N.C.G.S. § 113A-64(a) (1983). Further, explicit "mandatory standards" are imposed by N.C.G.S. § 113A-57 which provide specific guidance to NRCD in determining whether violations of the Act have occurred.

> No land-disturbing activity subject to this Article shall be undertaken except in accordance with the following mandatory requirements:
>
> (3) Whenever land-disturbing activity is undertaken on a tract comprising more than one acre, if more than one contiguous acre is uncovered, the person conducting the land-disturbing activity shall install such sedimentation and erosion control devices and practices as are sufficient to retain the sediment generated by the land-disturbing activity within the

boundaries of the tract during construction upon and development of said tract, and shall plant or otherwise provide a permanent ground cover sufficient to restrain erosion after completion of construction or development within a time period to be specified by rule of the Commission.

(4) No person shall initiate any land-disturbing activity if more than one contiguous acre is to be uncovered unless, 30 or more days prior to initiating the activity, an erosion and sedimentation control plan for such activity is filed with the agency having jurisdiction.

N.C.G.S. § 113A-57 (Cum. Supp. 1988). These "mandatory standards" are bolstered by five factors set forth in N.C.G.S. § 113A-64 which must be considered by NRCD in assessing a civil penalty:

> In determining the amount of the penalty, the Secretary shall consider the degree and extent of harm caused by the violation, the cost of rectifying the damage, the amount of money the violator saved by his noncompliance, whether the violation was committed willfully and the prior record of the violator in complying or failing to comply with this Article.

N.C.G.S. § 113A-64(a)(3) (Cum. Supp. 1988). Finally, numerous grounds for judicially reviewing the administrative assessment of civil penalties are available. N.C.G.S. § 150B-51 (1987). We conclude that plenary guiding standards exist here to check the exercise of NRCD discretion in its assessment of civil penalties in varying amounts, commensurate with the seriousness of the violations of the Act.

III.

[3] Finally, we turn to the question of whether a panel of the Court of Appeals is bound by a prior decision of another panel of the same court which addressed the same question but in a different case. In the case sub judice, the majority characterized *N.C. Private Protective Services Bd. v. Gray, Inc.*, 87 N.C. App. 143, 360 S.E. 2d 135, as an attempt to distinguish *Lanier* which contradicted the latter's "express language, rationale and result" and "intrude[d] on the Legislature's delegation of its own legislative functions." *In the Matter of Appeal from Civil Penalty*, 92 N.C. App. at 13, 15, 373 S.E. 2d at 579, 580. Several pages of the

opinion were devoted to a detailed rejection of the *Gray* panel's interpretation of *Lanier*.

This Court has held that one panel of the Court of Appeals may not overrule the decision of another panel on the same question in the same case. *N.C.N.B. v. Virginia Carolina Builders*, 307 N.C. 563, 299 S.E. 2d 629 (1983). The situation is different here since this case and *N.C. Private Protective Services Board v. Gray, Inc.*, 87 N.C. App. 143, 360 S.E. 2d 135, do not arise from the same facts. In *Virginia Carolina Builders*, however, we indicated that the Court will examine the effect of the subsequent decision, rather than whether the term "overrule" was actually employed. We conclude that the effect of the majority's decision here was to overrule *Gray*. This it may not do. Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court. *See Monroe County, Florida v. U.S. Dept. of Labor*, 690 F. 2d 1359 (11th Cir. 1982); *Caldwell v. Ogden Sea Transport, Inc.*, 618 F. 2d 1037 (4th Cir. 1980).

We hold (1) that article IV, section 3 of the North Carolina Constitution does not prohibit the legislature from conferring the power on administrative agencies to assess civil penalties; (2) that article IV, section 3 does not prohibit the legislature from conferring on administrative agencies the power to exercise discretion in determining civil penalties within an authorized range, provided that adequate guiding standards accompany that discretion; and (3) that a panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court.

The decision of the Court of Appeals is reversed and the case remanded to that court for further remand to the Superior Court, Wake County, for proceedings consistent with this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA v. JIMMY LEE WEBSTER

No. 416A88

(Filed 4 May 1989)

Homicide § 19— whether defendant felt his life was threatened—question excluded—error

The trial court erred in a prosecution for first degree murder by sustaining the district attorney's objection to a question as to whether defendant believed that his life was threatened because that evidence was highly relevant to the crucial question of defendant's state of mind at the time of the shooting, his knowledge and belief of danger, and his knowledge and belief of the necessity of action in relation to his plea of self-defense.

APPEAL by defendant from a judgment sentencing him to life imprisonment for murder in the first degree, imposed by *Saunders, J.*, at the 7 March 1988 Criminal Session of Superior Court, RUTHERFORD County. Heard in the Supreme Court 15 February 1989.

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 defendant.

FRYE, Justice.

In this non-capital first degree murder case, defendant was originally charged and arrested on 26 July 1987 for the voluntary manslaughter of Cornelius Lee Jeffries (also known as Bert Jeffries). On that same day an attorney was appointed for defendant. The manslaughter charge was dismissed on 5 August 1987 for lack of probable cause. At the probable cause hearing, defendant was represented by his appointed attorney, James H. Burwell, Jr., who spent approximately five hours on the case.

Two months later, on 5 October 1987, the Rutherford County Grand Jury returned an indictment charging defendant with the murder of Jeffries. On 17 February 1988, the prosecutor served defendant with notice of the return of the bill of indictment and an order for arrest. On that same day James H. Burwell, Jr., was again appointed to represent defendant. When the murder case was called for trial on 7 March 1988, defendant's attorney made

an oral motion to continue. Mr. Burwell represented to the court that he was not ready for trial and that he needed to obtain the testimony of Dr. Fred F. Adams, III, defendant's physician. The motion was denied and the case proceeded to trial. All of the evidence was presented that day. On the following day the jury returned a verdict of guilty of murder in the first degree and defendant was sentenced to life imprisonment.

On direct appeal to this Court, pursuant to N.C.G.S. § 7A-27(a), defendant contends that the trial court "erroneously and unconstitutionally" denied his motion to continue; that the trial court erroneously excluded evidence that was relevant to defendant's state of mind in relation to his plea of self-defense; and that the trial court committed plain error in failing to instruct the jury on defendant's right to defend his home. For the reasons stated in this opinion, we hold that the trial court erred by sustaining the State's objection to the question of whether defendant felt that his life was threatened, thus erroneously excluding evidence that was relevant to defendant's state of mind in relation to his plea of self-defense.

The evidence at trial showed that defendant was forty-six years old and was at all material times in extremely poor health with several serious medical conditions. The evidence also showed that defendant, the victim, and the victim's mother all lived in the same neighborhood in Rutherford County.

Calvin Woods testified for the State that defendant had been in the hospital for seven days in late July 1987, had gotten out of the hospital on 24 July, and was in poor health on 26 July 1987. Defendant was so weak that his mother asked Woods to stay with defendant and take care of him. Woods moved into defendant's mobile home and was caring for defendant, "running around and getting his medicine and stuff." On 26 July a group of people, including Jeffries, gathered at defendant's mobile home to socialize and to welcome defendant home from the hospital. While at the mobile home, Jeffries got into an argument with defendant. Defendant retreated toward his bedroom and Jeffries followed. Woods' brother pleaded that Woods "had better stop it." Woods interceded, got Jeffries by the arm and led him into the front yard. Defendant came to the front door with a shotgun and told Jeffries "to git [sic] on out of his yard away from his house."

Woods then "took [Jeffries] on to the road." Jeffries came back down the road and said that he was coming back in defendant's yard. Woods testified that he told Jeffries not to go onto defendant's property, but that Jeffries "come on anyway." Woods finally convinced Jeffries to leave the neighborhood and drove Jeffries and some others away. Jeffries then had a few drinks. Some time later, the group drove back to defendant's neighborhood, Woods got out of the car, and Jeffries "went on."

Jeffries' mother testified that she heard about the argument and went to defendant's mobile home at about 3 p.m. on 26 July. Defendant was there with some friends, but Jeffries was not with them. Defendant asked Mrs. Jeffries to keep her son away from his mobile home. Defendant first said "I'll kill the m---- f----," but then promised Mrs. Jeffries that he would try to resolve the argument peacefully.

Stanley Woods testified that he was listening to music on a stereo at defendant's mobile home on the afternoon of 26 July. Defendant was weak and sick, was sitting outside, and was being welcomed back from the hospital by friends. Jeffries then came up the road from his mother's house in a "fast pacey walk." Upon seeing Jeffries, defendant went into his mobile home. Jeffries entered defendant's yard and proceeded up the steps leading to the front door of the mobile home. Defendant twice said "don't come in my house m---- f----." Woods then "heard a shot and started running."

Randy Whitesides testified that he was greeting defendant and listening to music outside of defendant's mobile home at about 5:30 p.m. on 26 July. Defendant was sick and weak and on a dialysis machine. Defendant entered his mobile home. Jeffries went "up the steps of the trailer and was standing at the door" when he was shot. Defendant said "m---- f----, didn't I say not to come in my trailer?" and Jeffries said "Jimmy." Whitesides testified that he did not see a gun, but that he then saw fire, heard a shot, and saw Jeffries roll down the steps of defendant's mobile home. Defendant then came outside carrying a shotgun.

Deputy Sheriff Paul Dunn testified that he arrived at defendant's mobile home at approximately 5:30 p.m. on 26 July, that he saw Jeffries "lying with his feet up the concrete steps and his head on the ground," and that defendant voluntarily surrendered.

Emergency Medical Technician Gerald Tony testified that "Mr. Jeffries was on his back and his feet in the doorway of the trailer." Sheriff Detective Clarence Simmons testified that Jeffries was lying on his back and that "[t]he edge[s] of [his] heels were resting on the door frame itself." Simmons testified that defendant made the following statement while in custody: "I'm sorry I had to kill him but I had already run him off one time. I told him if he came back I was going to kill him. I've been in the hospital, I've been sick and I want no m----- f----- coming around my house bothering me." Simmons acknowledged that defendant was quite weak.

Dr. Michael Wheeler testified that he performed an autopsy on Jeffries on 27 July, that he found a gunshot entrance wound in the back left part of Jeffries' neck, that the shotgun barrel "was fired within inches to feet of" Jeffries, that it was a "close range" wound and that Jeffries died from the wound. Wheeler testified that Jeffries was clinically intoxicated at the time of death and had a blood alcohol level equivalent to .20 on the breathalyzer.

The parties stipulated that a letter from defendant's doctor, Fred F. Adams, III, of Shelby Medical Associates, could be read into evidence. Defendant's attorney then read the following to the jury:

> Mr. Webster is a dialysis patient at DCI Dialysis Unit in Shelby, North Carolina. He currently receives dialysis treatments three days per week for approximately four hours each treatment. The patient is considered permanently and totally disabled on the basis of his renal disease. As the result of his chronic renal failure, he is chronically debilitated, has intermittent weakness which is more pronounced after dialysis therapy. The intercurrent or acute illness would further weaken this patient further impairing his physical ability. He also has severe hypertension and receives anti-hypertensive medications which can also produce weakness. He has had hospitalizations within the past twelve months for uncontrolled hypertension and congestive heart failure. Following those hospitalizations a period of recuperation occurred as expected.

Jimmy Henry testified for defendant that he was sitting in defendant's yard at about 5 p.m. on 26 July, that defendant was in

another part of the yard, and that Jeffries came up the road from his mother's house and entered defendant's yard. Defendant said "don't come in [my] yard, to get out of [my] yard." Henry testified that there was more talking, Jeffries was moving, and "the next thing I knew someone going in the trailer and boom, a shot."

Defendant testified that he has had heart disease since 1971, kidney failure since 1980, and that he was taking four hours of kidney dialysis treatment three days a week for kidney failure. He had been in Cleveland Memorial Hospital in Shelby for a week in late July 1987, and was still weak and sick and feeling bad on 26 July after he got home. He spent his time taking medicine and lying down after he got home. Several people, including Jeffries, were visiting defendant inside his trailer at about 11 a.m. on 26 July. At some point he told Jeffries to leave. Jeffries then jumped up and started coming toward him. His cousin grabbed Jeffries and took him outside the mobile home but Jeffries still would not leave. Defendant stayed inside, and someone finally took Jeffries away. Later in the day, Jeffries' mother asked defendant what was wrong. Defendant told her that he did not want Jeffries back in his yard and Mrs. Jeffries said that she would keep her son away. Still later in the day, defendant observed Jeffries in the yard. Defendant testified, "I put my speaker inside the door and closed the door halfway and I went in and sat down on the sofa." Defendant further testified:

> He steps [sic] upon the first step of my trailer. I could see him clearly. I begged him not to come in and he kicked my speaker over. I went into the kitchen where I keep my gun between the table and the refrigerator and I grabbed my gun and shot him. I was afraid in my condition. I could not fight him and that was the only thing I could do.

Following appropriate instructions, the jury was permitted to consider possible verdicts of guilty of first degree murder, guilty of second degree murder, guilty of voluntary manslaughter, or not guilty. The jury returned a verdict of guilty of first degree murder.

The issue dispositive of this appeal is whether the trial court erred when it excluded evidence that was relevant to defendant's belief that his life was threatened in relation to his plea of self-defense. The issue arose when the trial court sustained the dis-

trict attorney's objection to the following question directed to defendant by his attorney on direct examination:

COUNSEL: State whether or not you felt your life was threatened?

DISTRICT ATTORNEY: Objection.

THE COURT: Sustained.

In the instant case the trial judge instructed the jury, in pertinent part, as follows:

> The defendant would be excused of first and second degree murder on the grounds of self-defense if:
>
> First, it appeared to the defendant and he believed it to be necessary to kill the victim in order to save himself from death or great bodily harm, and
>
> Second, the circumstances, as they appeared to the defendant at the time, were sufficient to create such a belief in the mind of a person of ordinary firmness.

The trial court's instruction to the jury was in accord with the established law of this State in homicide cases.

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

State v. Hughes, 82 N.C. App. 724, 726, 348 S.E. 2d 147, 149-50 (1986) (quoting *State v. Bush*, 307 N.C. 152, 158, 297 S.E. 2d 563, 568 (1982)).

> On the other hand, if defendant believed it was necessary to kill the deceased in order to save [himself] from death or great bodily harm, and if 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, but defendant, although without murderous intent, was the aggressor in bringing on the difficulty, or defendant used excessive force, the defendant under those circumstances has only the *imperfect right of self-defense*, having lost the benefit of perfect self-defense, and is guilty at least of voluntary manslaughter (emphasis in original).

State v. Mize, 316 N.C. 48, 52, 340 S.E. 2d 439, 441 (1986).

However, if there is no evidence from which the jury reasonably could find that defendant in fact believed that it was necessary to kill his adversary to protect himself from death or great bodily harm, then the defendant is not entitled to have the jury instructed on self-defense. *State v. Boykin*, 310 N.C. 118, 122, 310 S.E. 2d 315, 318 (1984). In determining whether there was any evidence of self-defense presented, the evidence must be interpreted in the light most favorable to defendant. *State v. Gappins*, 320 N.C. 64, 71, 357 S.E. 2d 654, 659 (1987).

In *State v. Hughes*, 82 N.C. App. 724, 348 S.E. 2d 147, defendant testified that he was scared for his life because he thought the victim was going to do something to him. The Court of Appeals held that the trial court erred in refusing defendant's request that the jury be instructed concerning the law of self-defense. In *State v. Bush*, 307 N.C. 152, 297 S.E. 2d 563 (1982), this Court held that the defendant was not entitled to an instruction on self-defense where the evidence taken in the light most favorable to defendant tended to indicate that defendant had not formed a belief that it was necessary to kill the victim in order to save himself from death or great bodily harm. In *State v. Blankenship*, 320 N.C. 152, 357 S.E. 2d 357 (1987), this Court reversed the Court of Appeals and held that defendant was not entitled to a self-defense instruction because there was no evidence from

which the jury reasonably could find that defendant in fact believed that it was necessary to kill his adversary to protect himself from death or great bodily harm. In *State v. Gappins*, 320 N.C. 64, 357 S.E. 2d 654, defendant relied upon accident rather than self-defense. We held that the evidence, when viewed in the light most favorable to defendant, indicated that defendant was the aggressor, that the killing was an accident and that defendant had not formed either a belief that it was necessary to kill the victim or an intent to kill him in order to protect himself from death or great bodily harm. Thus, there was no error in refusing to give a self-defense instruction.

These cases show the importance of evidence tending to show that defendant killed the victim under a subjective belief that it was necessary to do so in order to protect himself from death or great bodily harm. Thus, failure to permit a defendant to answer a question as to whether he believed that his life was threatened goes to the heart of a defense of perfect or imperfect self-defense.

The trial court erroneously sustained the State's objection to the question about whether defendant felt that his life was threatened because that evidence was highly relevant to the crucial question of defendant's state of mind at the time of the shooting, his knowledge and belief of danger, and his knowledge and belief of the necessity for action in relation to his plea of self-defense. Whether defendant in fact believed that his life was threatened and that it was necessary to kill in order to save himself from death or great bodily harm was a crucial factor for the jury to weigh in determining whether defendant was guilty of murder in the first degree or of some lesser degree of homicide or was not guilty. "[A] jury should, as far as possible, be placed in defendant's situation and possess the same knowledge of danger and the same necessity for action, in order to decide if defendant acted under reasonable apprehension of danger to his person or his life." *State v. Spaulding*, 298 N.C. 149, 158, 257 S.E. 2d 391, 396 (1979) (quoting *State v. Johnson*, 270 N.C. 215, 219, 154 S.E. 2d 48, 52 (1967)).

In the instant case, defendant testified that he has suffered from a heart condition since 1971 and from kidney failure since 1980. He was receiving four hours of kidney dialysis treatment

three days a week for kidney failure. He stated that when the shooting occurred on 26 July he had just been released from the hospital after a week long stay. Defendant stated that on 26 July, "I was still sick and I was weak." There was also considerable evidence of a previous confrontation between defendant and the victim earlier in the day at defendant's home.

Under the circumstances, it was error not to permit defendant to testify as to whether he believed his life was threatened. The jury, and not the court, determines the reasonableness of defendant's belief under the circumstances as they appeared to him, *State v. Hughes*, 82 N.C. App. 724, 728, 348 S.E. 2d 147, 150, unless there is no evidence from which a jury could conclude defendant's belief is reasonable. *State v. Mize*, 316 N.C. 48, 53, 340 S.E. 2d 439, 442 (1986).

We hold that the error was prejudicial. The excluded testimony went to the heart of defendant's self-defense claim. In light of the circumstances of this case and the trial court's instructions on self-defense, the effect of sustaining the objection to the testimony prevented defendant from completing his side of the story. If defendant had been able to present the excluded testimony, he might have been able to convince the jury that he shot Jeffries while under a reasonable belief that it was necessary to do so in order to save himself from death or great bodily harm. Thus, there is a reasonable possibility that, had the error not been committed, a different result would have been reached at trial. N.C.G.S. § 15A-1443 (1988).

Our decision finds support in previous decisions of this Court and the Court of Appeals involving the exclusion of evidence offered by defendants in self-defense homicide cases. *See State v. Spaulding*, 298 N.C. 149, 159, 257 S.E. 2d 391, 397 (prejudicial error to exclude self-defense evidence that defendant knew the victim would be dangerous and evidence of pervasive fear of physical harm in defendant's environment); *State v. Miller*, 282 N.C. 633, 642, 194 S.E. 2d 353, 359 (1973) (prejudicial error to exclude self-defense evidence of defendant's apprehension that he was about to suffer death); *State v. Erby*, 56 N.C. App. 358, 360, 289 S.E. 2d 86, 88 (1982) (prejudicial error to exclude self-defense evidence about why defendant carried a loaded gun).

We find it unnecessary to discuss defendant's other assignments of error since they are not likely to recur at a new trial.

New trial.

WILLIAM W. JENKINS v. AETNA CASUALTY AND SURETY COMPANY

No. 466A88

(Filed 4 May 1989)

1. **Insurance § 85— insured as wife—husband's equity interest in automobile—no transfer of title—exclusion for ownership of unlisted vehicles—not applicable**

A provision in an automobile liability insurance policy excluding coverage for liability arising from the use of an unlisted vehicle "owned" by Patterson, the spouse of defendant's insured, did not apply where Patterson paid $400 cash as the total price for a Camaro and took immediate possession of the vehicle but never received the certificate of title; there was no indication that the owner ever properly executed an assignment of the certificate of title; Patterson purchased the Camaro prior to becoming a covered driver under his wife's policy, as they were not married until the year following the purchase; no certificate of title or registration for the vehicle, which was not in good operating condition, was ever transferred as a result of the transaction involved here; and the Camaro could not be lawfully operated on the highways and had been driven only once in two years. Patterson did not meet the statutory definition of owner in N.C.G.S. § 20-4.01(26), and nothing in the context in which that term is found points to any other definition.

2. **Insurance § 85— automobile liability insurance—exclusion clause—unlisted vehicle furnished for regular use—not applicable**

An exclusion clause in an automobile liability insurance policy for a vehicle furnished to Patterson for his "regular use" did not apply where the evidence indicated that Patterson had driven the vehicle once in two years; it was not in good driving condition; had no license plate or registration; and could not be lawfully operated on the highways.

APPEAL of right by the plaintiff pursuant to N.C.G.S. § 7A-30 of the decision of a divided panel of the Court of Appeals, 91 N.C. App. 388, 371 S.E. 2d 761 (1988), affirming a judgment entered by *Johnson, J.*, in the Superior Court, LEE County, on 9 November 1987. Heard in the Supreme Court on 15 February 1989.

J. Douglas Moretz for the plaintiff-appellant.

Pope, Tilghman, Tart & Taylor, by Ann C. Taylor and Johnson Tilghman, for the defendant-appellee.

MITCHELL, Justice.

The plaintiff filed this civil action seeking to hold the defendant, Aetna Casualty and Surety Company, liable for a judgment entered against the defendant's insured. Both parties made motions for summary judgment. The trial court denied the plaintiff's motion and entered summary judgment for the defendant, and the Court of Appeals affirmed that judgment. Judge Phillips having dissented in the Court of Appeals, the plaintiff appealed to this Court as a matter of right.

The issues presented by this appeal involve whether either of two exclusions in an automobile liability insurance policy issued by the defendant excluded the vehicle in which the plaintiff was injured from coverage under that policy. The majority in the Court of Appeals held that one of the exclusions applied and affirmed summary judgment for the defendant. We conclude that neither exclusion is applicable in this case. Therefore, we reverse the decision of the Court of Appeals and remand this case in order that the summary judgment entered for the defendant may be stricken and summary judgment entered, instead, for the plaintiff.

Based upon the pleadings, depositions, testimony and other matters of record before the trial court at the time it ruled upon the motions of the parties for summary judgment, the material facts were essentially uncontested. The plaintiff suffered personal injuries as a result of a 1985 automobile accident in which he was a passenger in a 1967 Chevrolet Camaro driven by William Troy Patterson. At the time of the accident, Patterson's wife was the named insured in an automobile liability insurance policy issued by the defendant. As a spouse living in the same household with his wife, Patterson was a covered driver under the terms of the policy. The Camaro had never been listed in the policy and therefore was not a covered automobile under the policy. As Patterson was a covered driver, his accident while using the Camaro would have been covered unless it came under a policy exclusion. The policy exclusions at issue excluded coverage for liability aris-

ing from the ownership, maintenance or use of any vehicle, other than those listed as covered vehicles in the policy, which was "owned" by the covered driver or "furnished for [the covered driver's] regular use."

Patterson had purchased the Camaro in September of 1983 from a man known to him only as Junior. The car had no engine and was in need of extensive repairs, but Patterson considered it a "classic" and arranged to buy it for restoration. Patterson paid Junior $400 cash and took possession of the vehicle at Junior's home. Junior told Patterson that he did not actually own the Camaro and was selling it for another man, later identified as Jerome Hall. No certificate of title was passed in the transaction. Junior told Patterson that he had a certificate of title that would be transferred to Patterson, but Patterson "never got around to getting it."

Over the next couple of years, Patterson moved the Camaro, by pulling it with other vehicles, to several different places where he carried on intermittent restoration of the vehicle as the necessary funds were saved. He eventually installed an engine and got the Camaro running, but during this period he never registered the vehicle, never obtained a certificate of title and never listed it on an insurance policy. He said he had planned to comply with all those requirements for the lawful operation of a motor vehicle after he had restored the Camaro to good operating condition.

Patterson eventually left the Camaro with a man who had an automotive repair garage at his home. As of October 1985, the Camaro had been at the garage for a considerable length of time. Patterson decided he should move the car to his own home to finish the restoration.

On 18 October 1985, the plaintiff did not go to work and Patterson picked up the plaintiff's paycheck for him and took it to the plaintiff's home after work. Patterson decided he would move the Camaro that evening, and he and the plaintiff went to the garage. After drinking some beer, Patterson got into the Camaro, for which he had no license plate or registration, to drive it to his house about four miles away. The plaintiff got into the car with Patterson.

The Camaro was wrecked by Patterson when, despite the plaintiff's requests that he slow down, Patterson failed to negotiate a sharp curve at approximately 65 miles per hour. The Camaro ran off the road and overturned, and the plaintiff was thrown from the vehicle and seriously injured.

The plaintiff brought an action against Patterson alleging that Patterson's negligent operation of the Camaro was the proximate cause of the plaintiff's injuries. On 5 December 1986, a judgment was entered against Patterson in the amount of $17,197.99 for the plaintiff's damages resulting from the accident. Thereafter, the plaintiff brought this action against the defendant insurance company alleging that the defendant was liable under its automobile liability policy for satisfaction of the judgment against Patterson.

On appeal of the trial court's summary judgment for the defendant in this action, the Court of Appeals held that the issue of ownership was controlled by an exception to the general rule that, for purposes of tort law and liability insurance coverage, no ownership passes to the purchaser of a motor vehicle until "legal" title is transferred in compliance with N.C.G.S. § 20-72(b). The Court of Appeals held that Patterson, by virtue of paying the full cash price and taking possession of the Camaro, had acquired an equitable ownership interest in the car and "owned" it within the meaning of that term as used in the defendant's insurance policy, notwithstanding the lack of compliance with the title transfer statute. We disagree.

[1] The Motor Vehicle Safety and Financial Responsibility Act, N.C.G.S. §§ 20-279.1 to 20-279.39 (1983), regulates the issuance of motor vehicle liability insurance policies in this State, and the provisions of the Act are included in automobile liability insurance policies by operation of law. *Insurance Co. v. Chantos*, 293 N.C. 431, 238 S.E. 2d 597 (1977). The definition of "owner" as used in the mandatory provisions of the Act is provided by N.C.G.S. § 20-4.01[1] and applies throughout Chapter 20 "[u]nless

1. N.C.G.S. § 20-4.01(26) (1983) defines "owner" as:

A person holding the legal title to a vehicle, or in the event a vehicle is the subject of a chattel mortgage or an agreement for the conditional sale or lease thereof or other like agreement, with the right of purchase upon performance

the context otherwise requires . . . ." N.C.G.S. § 20-4.01 (1983). Except under special circumstances not present in this case, the statute limits the definition of the word "owner" to the person holding legal title. N.C.G.S. § 20-4.01 (1983).

Our motor vehicle statutes also regulate the manner in which legal title and ownership of motor vehicles must be transferred. N.C.G.S. § 20-72 requires proper execution of an assignment and delivery of the certificate of title before "legal" title and ownership pass.[2] Applying the statutory definition of "owner," the statutory requirements for passing title and the statutory requirements for liability insurance, we have held that for purposes of tort law and liability insurance coverage, no ownership passes to the purchaser of a motor vehicle which requires registration until: (1) the owner executes, in the presence of a person authorized to administer oaths, an assignment and warranty of title on the reverse of the certificate of title, including the name and address of the transferee; (2) there is an actual or constructive delivery of the motor vehicle; and (3) the duly assigned certificate of title is delivered to the transferee (or lienholder in secured transactions). *Insurance Co. v. Hayes*, 276 N.C. 620, 640, 174 S.E. 2d 511, 524 (1970). *Hayes* was decided under former N.C.G.S. § 20-

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of the conditions stated in the agreement, and with the immediate right of possession vested in the mortgagor, conditional vendee or lessee, said mortgagor, conditional vendee or lessee shall be deemed the owner for the purpose of this Chapter.

2. N.C.G.S. § 20-72(b) (1983) provides:

In order to assign or transfer title or interest in any motor vehicle registered under the provisions of this Article, the owner shall execute in the presence of a person authorized to administer oaths an assignment and warranty of title on the reverse of the certificate of title in form approved by the Division, including in such assignment the name and address of the transferee; and no title to any motor vehicle shall pass or vest until such assignment is executed and the motor vehicle delivered to the transferee. The provisions of this section shall not apply to any foreclosure or repossession under a chattel mortgage or conditional sales contract or any judicial sale.

Any person transferring title or interest in a motor vehicle shall deliver the certificate of title duly assigned in accordance with the foregoing provision to the transferee at the time of delivering the vehicle, except that where a security interest is obtained in the motor vehicle from the transferee in payment of the purchase price or otherwise, the transferor shall deliver the certificate of title to the lienholder and the lienholder shall forward the certificate of title . . . to the Division within 20 days.

279.1(9) (repealed 1973), which essentially provided the same definition of "owner" as N.C.G.S. § 20-4.01(26). The rationale of *Hayes* applies as well under the § 20-4.01(26) definition of "owner" and was not changed by the legislature's repeal of the repetitive definition in N.C.G.S. § 20-279.1(9). *See Ohio Casualty Ins. Co. v. Anderson*, 59 N.C. App. 621, 298 S.E. 2d 56 (1982), *cert. denied*, 307 N.C. 698, 301 S.E. 2d 101 (1983).

The defendant insurance company had the burden of showing that an exclusion to coverage under its policy was applicable. *Insurance Co. v. McAbee*, 268 N.C. 326, 150 S.E. 2d 496 (1966). The evidence before the trial court in this case established that Patterson paid $400 cash as the total price for the Camaro and took immediate possession of the vehicle, but he never received the certificate of title. There was no indication from the forecast of evidence presented to the trial court that the owner, Jerome Hall, ever properly executed an assignment of the certificate of title. Clearly, the parties to this transaction did not comply with the requirements of N.C.G.S. § 20-72(b) for the transfer of legal title and ownership. As this Court has construed the relevant statutory provisions, there had been no transfer of title and ownership of the Camaro to Patterson. Therefore, Patterson did not "own" the vehicle within the terms of the liability insurance policy.

In concluding that Patterson "owned" the Camaro, the Court of Appeals relied upon an exception to the rules discussed in *Hayes* for determining the ownership of a motor vehicle. Such an exception for one who has an equitable interest in a vehicle was applied by the Court of Appeals in *Ohio Casualty Ins. Co. v. Anderson*, 59 N.C. App. 621, 298 S.E. 2d 56. In *Anderson*, a father purchased a car, paid the entire purchase price, took possession of the car, obtained insurance coverage for the car under an "owner's policy" and paid premiums on the policy. In the purchase transaction, however, he had his son's name placed on the certificate of title, so that legal title was transferred directly from the vendor to the purchaser's son, who was never told that title was in his name. When the father subsequently wrecked the vehicle causing injury to others, the liability insurer contended that the accident was not covered by the father's policy because the son owned the car. The Court of Appeals held in *Anderson* that the father had sufficient equitable interest in the car to make him an "owner" within the coverage of the policy.

This Court's denial of a petition for discretionary review or, as in *Anderson*, of a petition for a writ of *certiorari* to review a decision of the Court of Appeals has no value as precedent. *See Peaseley v. Coke Co.*, 282 N.C. 585, 194 S.E. 2d 133 (1973). Further, it is not necessary that we consider or decide here whether *Anderson* was correctly decided. However, we note that much of the reasoning relied upon by the Court of Appeals in *Anderson* is not applicable to this case. The Court of Appeals was especially concerned in *Anderson* with the overall purpose of our compulsory liability insurance laws—compensation of accident victims who otherwise would not be compensated by their tortfeasors—and how that purpose would be undermined if coverage was denied when the policy at issue "was clearly intended, by both the issuer and the purchaser, to cover the purchaser while operating the vehicle involved in the collision in question." 59 N.C. App. at 625, 298 S.E. 2d at 59. In *Anderson* the Court of Appeals focused upon the fact that the parties had complied with our statutory procedures for transferring title and the fact that the purchaser's son had no knowledge that title was in his name. The Court of Appeals concluded that to deny coverage based on an equitable interest under such facts would defeat the purpose of the Financial Responsibility Act by the mere "technicality" of placement of legal title in the purchaser's son. *Id.*

The Court of Appeals in *Anderson* found those factors so overwhelming that it concluded the statutory definition of "owner" did not even apply in that case. Instead, it concluded on the facts before it that "the context otherwise require[d]" under N.C.G.S. § 20-4.01 that a different definition of "owner" be applied, because a strict application of the definition provided by that statute would defeat the purpose of the Financial Responsibility Act by denying liability coverage. *Id.* In *Anderson*, the Court of Appeals also distinguished cases indicating that the holder of an equitable interest is not an "owner." *E.g., Insurance Co. v. Insurance Co.*, 279 N.C. 240, 182 S.E. 2d 571 (1971). As the Court of Appeals pointed out, the result of the application of the statutory definition of "owner" in such cases was to uphold coverage, while applying that definition in *Anderson* would have denied coverage.

In this case, Patterson did not meet the statutory definition of "owner" in N.C.G.S. § 20-4.01(26), and nothing in the context in

which that term is found points to any other definition. Furthermore, the intent and understanding of the parties in this case are not as clear as in *Anderson.* Patterson purchased the Camaro prior to becoming a covered driver under his wife's policy, as they were not married until the year following the purchase. No certificate of title or registration for the vehicle, which was not in good operating condition, was ever transferred as a result of the transaction involved here. The Camaro could not be lawfully operated on the highways and, from the uncontroverted evidence, had been driven only once in two years. Finally, the result of applying the strict letter of the statute in this case is to uphold coverage, consistent with the general purpose of the Financial Responsibility Act and with *Anderson.*

We conclude that Patterson was not the "owner" of the Camaro as that term is defined in N.C.G.S. § 20-4.01(26), and that the context in which the term was used here does not require or permit the application of any other definition. Therefore, the provision in the policy excluding coverage for liability arising from the use of a vehicle "owned" by Patterson did not apply.

[2] We next turn to the question of whether the Camaro was furnished to Patterson for his "regular use" as that term was used in the other exclusion at issue. The purpose of such terms in liability insurance policies is to provide coverage, without additional premiums, for a driver's infrequent use of other vehicles, but not as a substitute for coverage on a vehicle furnished for his regular use. *See Whaley v. Insurance Co.*, 259 N.C. 545, 131 S.E. 2d 491 (1963).

We have held that the question of whether a vehicle is for a driver's regular use is to be determined by both its *availability* for use and the *frequency* of the use. 259 N.C. at 554, 131 S.E. 2d at 498. *See also Whisnant v. Insurance Co.*, 264 N.C. 195, 141 S.E. 2d 268 (1965) (even when an employer furnishes a vehicle for the regular business-related use of an employee and the vehicle is so used, a single instance of the employee's use of the vehicle for personal purposes is not excluded from liability coverage by the "furnished for regular use" provision). The evidence before the trial court in this case indicated that Patterson had driven the Camaro once in two years. It was not in good driving condition, had no license plate or registration, and could not be lawful-

ly operated on the highways. Its condition made it unfit and unavailable for "regular use," and it was in fact not regularly used but used only once in two years. The Camaro's condition and its lack of use are dispositive on the issue of whether it was for "regular use," and we conclude that it did not come under the meaning of that term as used in the other policy exclusion.

As we conclude that the vehicle in question was neither "owned" by the covered driver nor for his "regular use," neither policy exclusion applied. Therefore, the defendant insurance company was liable for the judgment entered in favor of the plaintiff in his negligence action against Patterson.

For the foregoing reasons, we reverse the decision of the Court of Appeals, which affirmed summary judgment for the defendant. We remand this case to the Court of Appeals for its further remand to the Superior Court, Lee County, for the summary judgment entered for the defendant to be stricken and summary judgment entered, instead, for the plaintiff.

Reversed and remanded.

THOMAS E. VASS v. BOARD OF TRUSTEES OF THE TEACHERS' AND STATE EMPLOYEES' COMPREHENSIVE MAJOR MEDICAL PLAN; GEOFFREY ELTING, DIRECTOR; AND EDS FEDERAL CORPORATION

No. 213PA88

(Filed 4 May 1989)

1. **Administrative Law § 2— Trustees of State Employees' Medical Plan—agency within meaning of APA**

The Board of Trustees of the State Employees' Medical Plan is an "agency" as that term is defined under either the former or current version of the Administrative Procedure Act, and the Act applies to the Board except to the extent and in the particulars that any statute makes specific provisions to the contrary. N.C.G.S. § 150B-2(1) (1987); N.C.G.S. § 150A-2(1) (1978).

2. **Administrative Law § 2— Trustees of State Employees' Medical Plan—statute not exemption from APA**

The language in N.C.G.S. § 135-39.7 that the Board of Trustees of the State Employees' Medical Plan "may make a binding decision" concerning a dispute between an aggrieved individual and the Claims Processor is not an

express and unequivocal exemption of the Board from the requirements of the Administrative Procedure Act; rather, use of the term "binding" in the statute was intended to mean only that the Board's decision would be binding upon the parties absent further review according to law.

3. Administrative Law § 2— coverage under State Employees' Medical Plan—applicability of APA to dispute—no subject matter jurisdiction of civil action

A decision by the Board of Trustees of the State Employees' Medical Plan denying plaintiff's claim for reimbursement for medical expenses was subject to review only under the terms of the Administrative Procedure Act, and where plaintiff had not exhausted the administrative remedies available to him under the Act, the district court had no subject matter jurisdiction of plaintiff's civil action against the Board for breach of contract.

ON discretionary review of the decision of the Court of Appeals, 89 N.C. App. 333, 366 S.E. 2d 1 (1988), remanding this case, in which summary judgment was entered on 30 April 1987 by *Payne, J.*, in District Court, WAKE County, for dismissal for lack of subject matter jurisdiction. Heard in the Supreme Court on 13 December 1988.

Fowler & Baldasare, by Paul Baldasare, Jr., for the plaintiff-appellee.

Lacy H. Thornburg, Attorney General, by Angeline M. Maletto, Assistant Attorney General, for the defendant-appellant.

MITCHELL, Justice.

In 1984, the plaintiff Thomas Vass was a State employee whose health was insured through the Teachers' and State Employees' Comprehensive Major Medical Plan (hereinafter "the Medical Plan"). Under the Medical Plan the State was a self-insurer. EDS Federal Corporation (hereinafter "EDS") was the "Claims Processor" which administered the Medical Plan, and the Board of Trustees of the Medical Plan (hereinafter "the Board") supervised its administration.

For several years prior to 1984, the plaintiff's vision in his right eye had steadily deteriorated. The plaintiff's ophthalmologist referred him to Dr. Frederick B. Kremer, an ophthalmologist and director of the Refractive Eye Surgery Center in Philadelphia, Pennsylvania. After consulting Dr. Kremer, the plaintiff underwent radial keratotomy to correct the vision in his right eye. Radial keratotomy involves making laser incisions on the front

surface of the cornea. The surgery was successfully performed on the plaintiff and, as a result, he incurred medical expenses of $1,725.00.

The plaintiff filed a claim with EDS under the Medical Plan to recover his costs for the surgery. His claim was denied by EDS, and he appealed to the Board. On 14 November 1984, the Board denied his claim, purporting to do so pursuant to: (1) N.C.G.S. § 135-40.6(6)h, which states that "[n]o benefits will be payable for surgical procedure specifically listed by the American Medical Association or the North Carolina Medical Association as having no medical value"; (2) N.C.G.S. § 135-40(b) which states that "[t]he [Medical] Plan benefits will be provided under contracts between the State and the Claims Processor selected by the State . . . and shall be administered by the respective Claims Processor of the State which will determine benefits and other questions arising thereunder"; (3) the recommendation of the Medical Director of EDS, the administrator of the Medical Plan; and (4) the Board's belief that the procedure was basically a substitute for eyeglasses which were not covered under the Medical Plan.

The plaintiff later attempted to convince EDS, administrator of the Medical Plan, to reconsider his case. He then received a letter from the EDS Medical Director, Dr. Sarah T. Morrow, which indicated that the plaintiff had exhausted all administrative appeal processes and that "[t]here is no further appeal other than through litigation." Thereafter, the plaintiff instituted this action for breach of contract against the Board, the Medical Plan Director Geoffrey Elting, and EDS.

The trial court allowed motions to dismiss on behalf of the defendants Elting and EDS. Both the plaintiff and the remaining defendant, the Board, filed motions for summary judgment. The trial court granted summary judgment in favor of the defendant Board and denied the plaintiff's motion. The plaintiff appealed to the Court of Appeals from the trial court's entry of summary judgment in favor of the defendant Board. The Court of Appeals remanded the case to the trial court to be dismissed for lack of subject matter jurisdiction.

The Court of Appeals relied on the current version of the Administrative Procedure Act, codified as Chapter 150B of the Gen-

eral Statutes of North Carolina, in resolving the issues presented by the plaintiff's appeal from the judgment of the trial court. The Court of Appeals concluded that the defendant Board, established by N.C.G.S. § 135-39, is an administrative agency covered by the Act. The Court of Appeals also noted that the Act specifically provides that when a dispute between a State agency and another person arises and cannot be resolved by informal procedures, "either the agency or the person may commence an administrative proceeding to determine the person's rights, duties, or privileges at which time the dispute becomes a 'contested case.' " N.C.G.S. § 150B-22 (1987). The Court of Appeals then ordered this civil action remanded to the trial court to be dismissed for lack of subject matter jurisdiction, apparently on the theory that by failing to initiate such an administrative proceeding to determine his rights, the plaintiff had failed to exhaust the administrative remedies provided him by the Administrative Procedure Act. By *obiter dictum*, the Court of Appeals implied that the plaintiff should thereafter proceed to bring his dispute with the Board "under the Administrative Procedure Act."

The defendant-appellant Board agrees with the Court of Appeals that the trial court lacked subject matter jurisdiction in this dispute, but contends that the plaintiff cannot now pursue any remedy provided by the Administrative Procedure Act. The plaintiff, on the other hand, argues that the Court of Appeals was correct in stating that the "plaintiff's dispute with the Board should be brought under the Administrative Procedure Act" and, by implication, that he is not time-barred from so doing.

The only issue that we find it necessary or proper to address on the record before us is whether the Court of Appeals was correct in holding that the trial court was required to dismiss this civil action due to a lack of subject matter jurisdiction. We conclude that the trial court did not have subject matter jurisdiction and, for reasons hereinafter stated, modify and affirm the result reached by the Court of Appeals.

To decide whether the trial court had subject matter jurisdiction in this case, we first consider whether either the former version of the Administrative Procedure Act, N.C.G.S. Chapter 150A, or the current version, N.C.G.S. Chapter 150B, applies[1] to

1. Former Chapter 150A was rewritten by 1985 N.C. Sess. Laws ch. 746, § 1, effective 1 January 1986, and is now recodified as Chapter 150B.

decisions of the defendant-appellant Board. Both versions clearly state that the purpose of the Administrative Procedure Act is to establish as nearly as possible a uniform system of administrative procedures for State agencies. N.C.G.S. § 150B-1(b) (1987); N.C.G.S. § 150A-1(b) (Cum. Supp. 1981) (rewritten and recodified 1985). Both versions also clearly indicate that the Administrative Procedure Act shall apply to every agency of the executive branch[2] of State government, except to the extent and in the particulars that any statute "makes *specific* provisions to the contrary." N.C.G.S. § 150B-1(c) (1987) (emphasis added); N.C.G.S. § 150A-1(a) (1978 & Cum. Supp. 1981 & Cum. Supp. 1983) (rewritten and recodified 1985) (emphasis added). Further, it is equally clear that the defendant-appellant Board is an "agency" of the executive branch of State government under either version of the Administrative Procedure Act. N.C.G.S. § 150B-2(1) (1987); N.C.G.S. § 150A-2(1) (1978) (rewritten and recodified 1985).

[1] Because the defendant-appellant Board is an "agency" as that term is defined under either version of the Administrative Procedure Act, the Act applies to the Board except to the extent and in the particulars that any statute makes specific provisions to the contrary. The Board contends that article 3 of Chapter 135 of the General Statutes of North Carolina, creating the Medical Plan, makes such "specific provisions" exempting the Board. Specifically, the Board directs our attention to N.C.G.S. § 135-39.7 which provides:

> If, after exhaustion of internal appeal handling as outlined in the contract with the Claims Processor any person is aggrieved, the Claims Processor shall bring the matter to the attention of the Executive Administrator and Board of Trustees, which may make *a binding decision* on the matter in accordance with procedures established by the Executive Administrator and Board of Trustees.

N.C.G.S. § 135-39.7 (1988) (emphasis added).

The Board argues that this statute amounts to a "specific provision" exempting it from the application of the Administra-

2. The term "agency" as used throughout the Act "does not include any agency in the legislative or judicial branch of the State government . . . ." N.C.G.S. § 150B-2(1) (1987).

tive Procedure Act. It contends that the language of the statute stating that the Board may make "binding" decisions reveals a legislative intent that any review of the Board's decisions be limited to judicial review of a petition by the aggrieved party for a writ of certiorari pursuant to article 27 of Chapter 1 of the General Statutes of North Carolina. We do not agree.

[2] It is clear that the General Assembly intended only those agencies it expressly and unequivocally exempted from the provisions of the Administrative Procedure Act be excused in any way from the Act's requirements and, even in those instances, that the exemption apply only to the extent specified by the General Assembly. Therefore, we conclude that N.C.G.S. § 135-39.7 is not a statute which makes "specific provisions to the contrary" as that phrase is used in former N.C.G.S. § 150A-1(a) and current N.C.G.S. § 150B-1(c). The language in N.C.G.S. § 135-39.7 that the Board "may make a binding decision" concerning a dispute between an aggrieved individual and a Claims Administrator of the Medical Plan is not an express and unequivocal exemption of the Board from the requirements of the Administrative Procedure Act. Instead, we conclude that the use of the term "binding" in the statute was intended to mean only that the Board's decision would be binding upon the parties absent further review according to law.

Under the former and present versions of the Administrative Procedure Act, the General Assembly has shown itself to be quite capable of specifically and expressly naming the particular agencies to be exempt from the provisions of the Act and has clearly specified the extent of each such exemption. *E.g.*, N.C.G.S. § 150B-1(d) (1987) (totally exempting certain named agencies by stating that the Act "shall not apply" to them, and partially exempting certain other named agencies by specifying the extent to which the Act shall apply or the agency shall be exempt); N.C.G.S. § 150A-1(a) (Cum. Supp. 1981 & Cum. Supp. 1983) (same). In no version of the Act has the defendant-appellant Board ever been expressly exempted from the Act's requirements. Applying the maxim *inclusio unius est exclusio alterius*, we conclude that the Board's decisions are subject to administrative review under the Act, since the Board has never been specifically exempted by any statute from the Act's requirements. *See Campbell v. Church*, 298 N.C. 476, 482, 259 S.E. 2d 558, 563 (1969) (under the

maxim *expressio unius est exclusio alterius*, mention of specific exceptions implies the exclusion of others). Had the General Assembly intended that the defendant-appellant Board be excluded from the requirements of the Act, we must assume that it would have inserted a specific provision in some statute expressly stating this intent. *See Lemons v. Old Hickory Council*, 322 N.C. 271, 276-77, 367 S.E. 2d 655, 658 (1988). As the General Assembly has not done so, we will not infer any such intent on its part.

The Board next argues that even if its decision denying the plaintiff's claim for reimbursement for medical expenses is not excluded from further review in an administrative proceeding as provided by the Act, any such review in this case must be according to former Chapter 150A—the version of the Act in effect at the time the Board's decision was rendered. The Board further argues that the plaintiff is now time-barred from any such administrative review, because he failed to seek it within the time allowed under that former version of the Act.

The plaintiff responds that the current version of the Act, Chapter 150B, controls with regard to his claim under the Medical Plan, and he still is entitled to commence an administrative proceeding under N.C.G.S. § 150B-22 to have his rights under the Medical Plan determined. Therefore, he argues that the Court of Appeals was correct in stating that his "dispute with the Board should [and by implication still properly could] be brought under the Administrative Procedure Act."

Since we conclude that the General Assembly has never excluded decisions of the Board from administrative review under any version of the Administrative Procedure Act, we neither consider nor decide which version of the Act would apply to the facts of this case nor whether this plaintiff is now time-barred from commencing an administrative proceeding under the Act. Such issues are not properly presented for decision by this Court in the context of this appeal which involves questions concerning the subject matter jurisdiction of the trial court over this civil action for breach of contract.

[3] Under either the present or former versions of the Administrative Procedure Act, the plaintiff was entitled to judicial review of the Board's decision only after he had exhausted all administrative remedies. N.C.G.S. § 150B-43 (1987); N.C.G.S. § 150A-43

(1978) (rewritten and recodified 1985); *In re Kapoor*, 303 N.C. 102, 277 S.E. 2d 403 (1981) (decided under former § 150A-43). The Board's decision denying the plaintiff's claim was subject to judicial review only under the terms of the Administrative Procedure Act and, at the time he brought this action in the District Court, the plaintiff had not exhausted the administrative remedies available to him under the Act. Therefore, the Court of Appeals did not err in concluding that the trial court was without subject matter jurisdiction and that the plaintiff's civil action must be dismissed, thereby preventing the plaintiff from bypassing the requirements of the Act. *See Porter v. Dept. of Insurance*, 40 N.C. App. 376, 253 S.E. 2d 44, *disc. rev. denied*, 297 N.C. 455, 256 S.E. 2d 808 (1979). We affirm the decision of the Court of Appeals to this extent. As the trial court did not have subject matter jurisdiction over this case, it is also necessary that summary judgment entered by the trial court for the defendant be vacated.

This case is remanded to the Court of Appeals in order that the summary judgment of the trial court for the defendant may be vacated and the case dismissed.

Modified and affirmed.

TOWN OF BEECH MOUNTAIN, ELLEN ANDERSON, CARL T. BROWNING AND WIFE, MARTHA BROWNING, JOHN W. EARNHARDT AND WIFE, PATRICIA W. EARNHARDT, GEORGE E. HANDLEY, JR. AND WIFE, KATHLEEN HANDLEY, DOUGLAS W. JACKSON AND WIFE, MARY LOU E. JACKSON, EDWARD L. McKINZIE AND WIFE, JACQUELINE S. McKINZIE, AND W. K. MIMS AND WIFE, FRANCES G. MIMS v. COUNTY OF WATAUGA, JAMES G. COFFEY, CARL FIDLER, LARRY STANBERRY, JAY L. TEAMS, DAVID J. TRIPLETT, AS COMMISSIONERS OF WATAUGA COUNTY, AND HELEN A. POWERS, SECRETARY, N.C. DEPARTMENT OF REVENUE, AND C. C. CAMERON, BUDGET OFFICER FOR THE STATE OF NORTH CAROLINA

No. 409A88

(Filed 4 May 1989)

1. Constitutional Law § 20— per capita distribution of sales and use tax—nonresident property owners—strict scrutiny test not appropriate

The strict scrutiny test for resolving equal protection claims was not applicable to an action in which plaintiffs alleged that per capita distribution of sales and use tax revenues created an arbitrary distinction between those who

reside in Watauga County for more than six months of the year and those who reside primarily out of state or in other counties. Out-of-county and out-of-state property owners have clearly suffered no oppression or disadvantage meriting particular consideration from the judiciary and display none of the traditional indicia of a suspect class. There is no interference with a fundamental right in that the per capita revenue distribution method cannot be said to inhibit free interstate migration or to significantly burden the right to travel since all Beech Mountain property owners are equally affected.

2. **Constitutional Law § 20; Taxation § 15— per capita revenue distribution—rational relationship test—constitutional**

The per capita distribution of sales and use tax revenues based on a six-month residence test did not violate equal protection under the rational relationship test in that the legislature could reasonably have determined that individuals dwelling within a particular municipality for more than six months of the year would be likely to purchase more items of tangible personal property than would individuals primarily residing elsewhere.

3. **Constitutional Law § 19.1— per capita revenue distribution—nonresident property owners—no violation of privileges and immunities clause**

Per capita distribution of sales and use tax revenues did not violate the privileges and immunities clause in the federal constitution in that Beech Mountain property owners who maintain their primary residence elsewhere are treated no differently from property owners who reside in Beech Mountain year-round.

APPEAL by plaintiffs pursuant to N.C.G.S. § 7A-30(1) from a decision of the Court of Appeals, 91 N.C. App. 87, 370 S.E. 2d 453 (1988), affirming order granting defendants' motion to dismiss by *Lamm, J.*, at the 7 December 1987 session of Superior Court, WATAUGA County. Heard in the Supreme Court 14 February 1989.

Smith, Patterson, Follin, Curtis, James & Harkavy, by Michael K. Curtis, for plaintiff-appellants.

Eggers, Eggers & Eggers, by Stacy C. Eggers III, and Womble Carlyle Sandridge & Rice, by Anthony H. Brett and Jean Schulte Scott, for Watauga County and Watauga County Board of Commissioners, defendant-appellees.

Lacy H. Thornburg, Attorney General, by Newton G. Pritchett, Jr., Assistant Attorney General, for Helen A. Powers, Secretary N.C. Department of Revenue, and C. C. Cameron, Budget Officer of the State of North Carolina, defendant-appellees.

MARTIN, Justice.

On this appeal plaintiffs raise various constitutional challenges to the per capita distribution under N.C.G.S. § 105-472 of Watauga County's sales and use tax revenues. We hold that per capita distribution offends neither the state constitution nor the federal constitution and, accordingly, we affirm the Court of Appeals.

Plaintiffs in this action are the Town of Beech Mountain and certain individuals who own residential property within the town's boundaries. Plaintiff property owners include full-time residents of the town, and residents of other North Carolina counties and other states who own vacation property within the town. They filed this action seeking (1) an injunction to prohibit the county from distributing tax revenues on a per capita basis, and (2) a declaratory ruling determining that the per capita allocation of tax revenues is unconstitutional.

The trial court, pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, dismissed the complaint for failure to state a claim upon which relief could be granted. The Court of Appeals affirmed, unanimously holding that the per capita method of distribution did not violate plaintiffs' constitutional rights.

The statutory scheme at issue directs the board of county commissioners in each taxing county to determine in April of each year the method of distribution to be used for local sales and use tax revenues during the following fiscal year. N.C.G.S. § 105-472 (Cum. Supp. 1988). The statute lists two options: the ad valorem method and the per capita method.

The ad valorem method allocates revenues to each municipality based upon the percentage that the ad valorem taxes levied in a municipality bears to the total county ad valorem tax levy. *Id.* The per capita method, on the other hand, allocates to each municipality a percentage of the tax revenues equal to the percentage of the county population that the municipal population represents. *Id.*

Under the per capita method, a town's population is determined by calculating the number of individuals residing there for more than six months of the year. According to the complaint, 98 percent of Beech Mountain's property owners maintain their pri-

mary residence elsewhere. Thus, although plaintiffs allege that at the peak of the tourist season up to 15,000 people may actually dwell in Beech Mountain on any given day, only 239 of these individuals are considered residents for purposes of determining town population under the per capita distribution method.

For the fiscal years up to and including 1986-87, Watauga County distributed its tax revenues on an ad valorem basis. For the fiscal year 1987-88, however, the County shifted to the per capita method. Plaintiffs allege that this change resulted in a 93 percent decrease in the sales tax revenues distributed to Beech Mountain, forcing the municipality to raise city taxes and reduce services. For this reason they seek to overturn the authorizing statute on constitutional grounds.

[1] Plaintiffs first argue that the per capita or "population" method of revenue distribution denies them equal protection under both the federal and state constitutions by creating an arbitrary distinction between those who reside in Watauga County more than six months of the year and those who reside primarily out-of-state or in other North Carolina counties. We find no merit to this assertion.

Courts traditionally employ a two-tiered analysis to resolve equal protection claims. *Texfi Industries v. City of Fayetteville*, 301 N.C. 1, 269 S.E. 2d 142 (1980). When a legislative act operates to the disadvantage of a suspect class or interferes with the exercise of a fundamental right, the upper tier or "strict scrutiny" standard is applied, requiring the government to demonstrate that the challenged statutory classification is necessary to promote a compelling governmental interest. When the claim involves neither a suspect class nor a fundamental right, the lower tier or "rationality" standard is employed. Under this standard, the government need only show that the challenged classification bears some rational relationship to a legitimate governmental interest. *Id.*

In determining the appropriate standard of review in this particular case, we first consider whether the per capita method of revenue distribution operates to the disadvantage of a suspect class. The United States Supreme Court defines a suspect class as one which has been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to

such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio School District v. Rodriguez*, 411 U.S. 1, 28, 36 L.Ed. 2d 16, 40, *reh'g denied*, 411 U.S. 959, 36 L.Ed. 2d 418 (1973).

Plaintiffs gamely attempt to characterize property owners primarily residing out-of-county or out-of-state as a politically powerless underclass. For obvious reasons, however, we decline to recognize nonresident individuals owning second homes in North Carolina resort areas as a downtrodden minority. Such a group has clearly suffered no oppression or disadvantage meriting particular consideration from the judiciary and displays none of the traditional indicia of a suspect class.

Nor do we find that plaintiffs have been denied the exercise of a fundamental right. Plaintiffs suggest that the increase in taxes and reduction in services occasioned by the per capita distribution method discourages citizens of other counties and states from purchasing property in Beech Mountain, thereby violating their right to travel.

The right to travel protects the federal interest in free interstate migration. *Shapiro v. Thompson*, 394 U.S. 618, 22 L.Ed. 2d 600 (1969). Although the right to travel is considered a fundamental right, *Jones v. Helms*, 452 U.S. 412, 69 L.Ed. 2d 118 (1981), restrictions based on residency do not warrant strict scrutiny merely because they impinge to some limited extent on its exercise. *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 39 L.Ed. 2d 306 (1974). Only those statutory classifications which so burden the right to travel that they function, in effect, as *penalties* upon those migrating to a new state are subject to the strict scrutiny test. *E.g., Memorial Hospital v. Maricopa County*, 415 U.S. 250, 39 L.Ed. 2d 306 (one-year residency requirement to receive indigent medical care); *Dunn v. Blumstein*, 405 U.S. 330, 31 L.Ed. 2d 274 (1972) (one-year residency requirement to exercise right to vote); *Shapiro v. Thompson*, 394 U.S. 618, 22 L.Ed. 2d 600 (one-year residency requirement to receive welfare benefits).

Here the per capita revenue distribution method authorized by the statute does not rise to the level of a penalty upon nonresidents. All Beech Mountain property owners—resident and nonresident alike—are equally affected by this method of distribution. Nothing in the record indicates that Beech Mountain's nonresi-

dent property owners pay higher taxes, receive fewer services, or are otherwise treated differently from its resident property owners. Therefore, the statute cannot be said to inhibit free interstate migration or to significantly burden the right to travel.

[2] Because we conclude that the statute neither operates to the disadvantage of a suspect class nor interferes with the exercise of a fundamental right, we need not apply the strict scrutiny test. Instead, we focus our inquiry on whether the statute bears a rational relationship to a conceivably legitimate governmental objective. Generally speaking, this rationality test is the appropriate standard to apply to purely economic regulations such as those governing the sales and use tax. *In re Assessment of Taxes Against Village Publishing Corp.*, 312 N.C. 211, 322 S.E. 2d 155 (1984), *appeal dismissed*, 472 U.S. 1001, 86 L.Ed. 2d 710 (1985).

Under the rationality standard of review, "[s]tate legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality." *McGowan v. Maryland*, 366 U.S. 420, 425-26, 6 L.Ed. 2d 393, 399 (1961). As long as there exists a reasonable basis for the disputed classification, this Court will not interfere with the legislature's decision. *Powe v. Odell*, 312 N.C. 410, 322 S.E. 2d 762 (1984).

Plaintiffs insist that per capita revenue distribution is not rationally related to a legitimate state interest. We disagree. The legislature could reasonably have determined that individuals dwelling within a particular municipality for more than six months of the year would be likely to purchase more items of tangible personal property than would individuals primarily residing elsewhere. Thus, as the Court of Appeals aptly concluded, "[t]he per capita method of distribution provides a reasonable means of returning revenues in an amount proportionate to those from whom they were collected." *Town of Beech Mountain v. County of Watauga*, 91 N.C. App. 87, 91, 370 S.E. 2d 453, 455 (1988). Providing a means of allocating revenues among the municipalities of a county is a legitimate governmental objective. Plaintiffs have failed to allege facts sufficient, if proven, to overcome the presumption of constitutionality.

[3] Plaintiffs next contend that per capita revenue distribution violates the privileges and immunities clause of the federal con-

stitution. This argument, too, is meritless. The privileges and immunities clause "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Toomer v. Witsell*, 334 U.S. 385, 395, 92 L.Ed. 1460, 1471, *reh'g denied*, 335 U.S. 837, 93 L.Ed. 389 (1948). As previously noted, Beech Mountain property owners who maintain their primary residence elsewhere are treated no differently from property owners who reside in Beech Mountain year-round. The statute contains no impermissible distinction based on state citizenship. The privileges and immunities clause is simply not implicated in this case.

Because plaintiffs are not entitled to relief under any state of facts which could be proved in support of their claim, dismissal for failure to state a claim upon which relief could be granted was proper. *St. Paul Fire & Marine Ins. Co. v. Freeman-White Assoc., Inc.*, 322 N.C. 77, 366 S.E. 2d 480 (1988).

The decision of the Court of Appeals is hereby

Affirmed.

CAROL CLARK, PERSONAL REPRESENTATIVE OF THE ESTATE OF WAYNE SCOTT JORDAN, AND ARLIN CLARK AND WIFE, CAROL CLARK, AS INDIVIDUALS v. INN WEST, A NORTH CAROLINA PARTNERSHIP, D/B/A RAMADA INN; RAMADA INN, A DELAWARE CORPORATION; JAMES E. BRANDIS AND WIFE, ANN BRANDIS; DEBRA ARA; WALLACE HYDE; CLIFTON E. SILER AND WIFE, DOROTHY E. SILER; BETTY S. HINTZ AND HUSBAND, WILLARD A. HINTZ; AND MARY THRASH BOYD AND HUSBAND, ALBERT L. BOYD

No. 180PA88

(Filed 4 May 1989)

Intoxicating Liquor § 24— dram shop law—sale to underage person—single-car accident—no right of action by personal representative

The personal representative of the estate of an underage person who consumes alcoholic beverages and dies from injuries in a single-car accident may not recover damages under the Dram Shop Act, N.C.G.S. § 18B-121, from the seller of the beverages. The decedent could not have maintained an action for his own injuries because the underage person is excluded from the definition of aggrieved party in N.C.G.S. § 18B-120(1), and the General Assembly did not intend to allow the intoxicated decedent's personal representative, who merely

stands in his stead, to recover damages caused by the decedent's own indiscretions.

ON discretionary review of a decision of the Court of Appeals, reported at 89 N.C. App. 275, 365 S.E. 2d 682 (1988), affirming in part and reversing in part an order entered by *Kirby, J.*, at the 13 April 1987 Civil Session of Superior Court, HAYWOOD County. Heard in the Supreme Court 15 March 1989.

Coward, Cabler, Sossomon & Hicks, P.A., by J. K. Coward, Jr., for plaintiff-appellees.

Roberts Stevens & Cogburn, P.A., by Steven D. Cogburn, Glenn S. Gentry, and Landon Roberts, for defendant-appellants.

Hafer, Day & Wilson, P.A., by F. Eugene Hafer and Betty S. Waller, for North Carolina Hotel & Motel Association, amicus curiae.

WHICHARD, Justice.

Defendants seek reversal of a decision of the Court of Appeals that reversed the trial court's order dismissing plaintiffs' complaint for failure to state a claim upon which relief can be granted. The issue is whether the personal representative of the estate of a nineteen-year-old who consumes alcoholic beverages and dies from injuries sustained in a single-car accident may recover damages under N.C.G.S. § 18B-121[1] from the seller of the

1. This statute provides:

An aggrieved party has a claim for relief for damages against a permittee or local Alcoholic Beverage Control Board if:

(1) The permittee or his agent or employee or the local board or its agent or employee negligently sold or furnished an alcoholic beverage to an underage person; and

(2) The consumption of the alcoholic beverage that was sold or furnished to an underage person caused or contributed to, in whole or in part, an underage driver's being subject to an impairing substance within the meaning of G.S. 20-138.1 at the time of the injury; and

(3) The injury that resulted was proximately caused by the underage driver's negligent operation of a vehicle while so impaired.

N.C.G.S. § 18B-121 (1983).

beverages. We answer in the negative, and we thus reverse the Court of Appeals.

Plaintiffs alleged the following: On 5 December 1985 Wayne Scott Jordan (decedent), age nineteen, bought and consumed four "double shots" of tequila and four bottles of beer in the lounge located on the premises of defendant motel Inn West, which is owned or leased by the individual defendants other than defendant Debra Ara. Defendant Debra Ara, Inn West's employee, served the alcoholic beverages to decedent. Decedent became visibly intoxicated and left the lounge. While driving toward his home, decedent crashed his car near the Haywood-Buncombe county line. He died at 4:37 a.m. on 6 December 1985 from injuries sustained in the crash. Decedent's injuries were proximately caused by his negligent operation of a vehicle while under the influence of alcohol.

Plaintiffs asserted claims under the Wrongful Death Act, N.C.G.S. § 28A-18-2, and under the Dram Shop Act, N.C.G.S. § 18B-121. Defendant answered asserting various defenses, including contributory negligence. By order of 16 April 1987, the trial court granted defendants' motion pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) to dismiss on the ground that the complaint failed to state a claim upon which relief can be granted under either statute.

On appeal, the Court of Appeals affirmed the dismissal of the wrongful death claim and decedent's parents' individual claims under the Dram Shop Act, but it reversed the dismissal of the Dram Shop Act claim by the personal representative. Plaintiffs did not seek discretionary review; thus, the propriety of the dismissal of the wrongful death claim, and of the parents' individual claims under the Dram Shop Act,[2] is not before us. Defendants petitioned

2. In dismissing the parents' claims as individuals under the Dram Shop Act, the Court of Appeals stated: "Dismissal of the personal representative's claim under G.S. 18B-120 *et seq.* was error. However, dismissal of the claims of [the parents] as individuals was proper. A parent cannot maintain an action in his individual capacity for the wrongful death of his child." *Clark v. Inn West*, 89 N.C. App. 275, 279, 365 S.E. 2d 682, 685 (1988). As stated above, plaintiffs did not seek discretionary review; thus, their standing, as individuals, to sue under the Dram Shop Act is not before us.

We note, however, that parents are not expressly excluded from the definition of "aggrieved party" under N.C.G.S. § 18B-120(1). "Injury" is defined by subsection

for discretionary review of the reinstatement of the Dram Shop Act claim by the personal representative. On 7 September 1988 we allowed the petition.

Article 1A of Chapter 18B of the North Carolina General Statutes authorizes a claim for damages for injury caused by the negligent selling or furnishing of alcoholic beverages to underage persons. " 'Underage person' means a person who is less than the age legally required for purchase of the alcoholic beverage in question." N.C.G.S. § 18B-120(3) (1983). The age legally required for purchase of "spirituous liquor," such as the tequila here, is twenty-one. N.C.G.S. § 18B-302 (1983). An "aggrieved party has a claim for relief for damages against a permittee or local Alcohol Beverage Control Board" if the permittee or Board negligently sold or furnished an alcoholic beverage to an underage person and consumption of the beverage caused or contributed to impairment of the underage person and injury was proximately caused by the underage person's negligent operation of a vehicle while so impaired. N.C.G.S. § 18B-121 (1983). The term "aggrieved party" includes "a person who sustains an injury as a consequence of the actions of the underage person, but does not include the underage person . . . ." N.C.G.S. § 18B-120(1) (1983). Thus, had decedent lived, he could not have recovered for his injuries.

The Court of Appeals nevertheless held that the personal representative of decedent's estate was an aggrieved party and therefore could recover under N.C.G.S. § 18B-121. *Clark*, 89 N.C. App. at 279, 365 S.E. 2d at 685. The court stated:

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(2) to include "loss of means of support"; subsection (2) further provides that "[n]othing in G.S. 28-18-2(a) or subdivision (1) of this section shall be interpreted to preclude recovery under this Article for loss of support . . . on account of . . . death of the underage person . . . ." N.C.G.S. § 18B-120(2) (1983). Thus, the statute does not preclude recovery by the parents for *loss of support* by their underage child, if the underage child in fact supported the parents.

Here, however, the complaint alleges only that the decedent *would have* provided income and support for his parents in the future. Support cannot be lost until it is in fact provided. Thus, the complaint does not allege sufficient facts to establish the parents' actual dependence on the decedent for income and support. *See Robertson v. White*, 11 Ill. App. 2d 177, 181, 136 N.E. 2d 550, 553 (1956) ("[T]here is no support in precedent in dram shop cases for damages based on a future potentiality of support not presently provable."). The trial court therefore properly dismissed the parents' individual claims brought under the Dram Shop Act.

> To determine who is the aggrieved party entitled to bring an action for damages under G.S. 18B-121, we must look not only to the definition of "aggrieved party" in G.S. 18B-120(1) but also to the wrongful death statute. "All statutes dealing with the same subject matter are to be construed *in pari materia*—i.e., in such a way as to give effect, if possible, to all provisions." . . . Under the wrongful death statute, the personal representative of the deceased is the proper plaintiff. . . . Construing the statutes together, as we must, the personal representative is the aggrieved party. Dismissal of the personal representative's claim under G.S. 18B-120 *et seq.* was error.

Id. at 278-79, 365 S.E. 2d at 685 (citations omitted).

We disagree with this conclusion. The plain language of the statute precludes the underage person from recovering for his own injuries. N.C.G.S. § 18B-120 (1983). The wrongful death statute provides for survivorship only of claims that could have been brought by the decedent had he lived. N.C.G.S. § 28A-18-2 (1984); *Carver v. Carver*, 310 N.C. 669, 673, 314 S.E. 2d 739, 742 (1984). Here, the decedent could not have maintained an action for his own injuries because the underage person is excluded from the definition of an aggrieved party in N.C.G.S. § 18B-120(1). Therefore, no claim survives his death, and his personal representative may not maintain an action under the Dram Shop Act.

This decision comports with the modern view that the intoxicated person may not recover against a seller or server of intoxicating beverages for self-inflicted damage. 1 J. Mosher, *Liquor Liability Law* § 3.03 (1988). Even absent express statutory preclusion such as that present here, "most courts interpret these statutes to preclude such causes of action." *Id.* at 3-7. "If relief is denied to a drinker, neither the intoxicated person *nor his estate* may sue." *Id.* at 3-9 (emphasis added). We agree with the Iowa Supreme Court that "the . . . Dram Shop Act was passed to aid in the protection of the public from damages inflicted on it by intoxicated persons, but this does not mean the Act . . . was intended to allow a person who overindulges to recoup his losses incurred as a result of his intoxication." *Evans v. Kennedy*, 162 N.W. 2d 182, 186 (Iowa 1968) (construing Iowa dram shop statute to deny claim on behalf of estate of fatally injured intoxicated

person against liquor licensees who served him). Our General Assembly expressly has denied a right of recovery under the Dram Shop Act to the intoxicated decedent himself. We believe it is equally clear that it did not intend to allow the intoxicated decedent's personal representative, who merely stands in his stead,[3] to recover damages caused by the decedent's own indiscretions.

Accordingly, the decision of the Court of Appeals is reversed. The case is remanded to the Court of Appeals with instructions to remand to the Superior Court, Haywood County, for reinstatement of the order dismissing the claims.

Reversed.

STATE OF NORTH CAROLINA v. JAMES GORDON PARKS

No. 580A88

(Filed 4 May 1989)

1. **Jury § 6.3— voir dire—disallowance of question staking out jurors**

The trial court in a murder prosecution did not abuse its discretion in refusing to permit defense counsel to ask prospective jurors whether any of them felt that defendant must be guilty of something, no matter what the circumstances, if defendant had a gun in his hand, pulled the trigger, and the death of another resulted therefrom, since counsel may not ask questions that tend to stake out a juror as to what his decision would be under a given state of facts.

2. **Jury § 6.3— voir dire—understanding of reasonable doubt—disallowance of question to one juror—no abuse of discretion**

The trial court in a murder prosecution did not abuse its discretion in refusing to permit defense counsel to ask one prospective juror whether she felt that she would uphold her service as a juror equally well by returning a verdict of not guilty if she had a reasonable doubt as she would by returning a verdict of guilty if she were satisfied beyond a reasonable doubt, since the question was designed to enable defense counsel to evaluate whether the juror completely understood the principles of reasonable doubt and the State's burden of proof, and defense counsel had previously questioned this juror on these principles of law and fully explored both areas with other potential jurors as the jury *voir dire* progressed.

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3. *See* N.C.G.S. § 28A-18-1 (1984); 2 N. Wiggins, *Wills and Administration of Estates in North Carolina* § 241 (1964).

APPEAL as of right by the State pursuant to N.C.G.S. § 7A-30(2) from a decision of a divided panel of the Court of Appeals, reported at 92 N.C. App. 181, 374 S.E. 2d 138 (1988), awarding defendant a new trial upon his conviction by a jury of second-degree murder and the judgment entered thereon by *Rousseau, J.*, at the 15 January 1988 Session of Superior Court, FORSYTH County. Heard in the Supreme Court 11 April 1989.

Lacy H. Thornburg, Attorney General, by Debbie K. Wright, Assistant Attorney General, and Randy L. Miller, Associate Attorney General, for the State-appellant.

Harrell Powell, Jr., and Garry Whitaker for defendant-appellee.

MEYER, Justice.

Defendant was convicted of the shooting death of Gloria Wherry. The evidence presented at trial tended to show the following. After meeting Ms. Wherry at a lounge in Kernersville on the evening of 19 December 1986 and buying her a drink, defendant agreed to drive Ms. Wherry and her two minor children to Welcome, North Carolina, "to see her folks." When defendant and Ms. Wherry arrived at her home to pick up the children, Ms. Wherry introduced defendant to Robert Graham, whom she said was her brother. Graham was staying with Ms. Wherry. Ms. Wherry told Graham that defendant was going to take them to Welcome. Ms. Wherry, her children, Graham and defendant then got into defendant's car.

Defendant testified that Ms. Wherry gave conflicting instructions as to the direction in which defendant was to drive. Graham suggested that they buy some liquor and have a party. Defendant realized that he had "gotten [himself] into something that [he] wanted to get [himself] extracted from" and "was looking for a way out." After defendant had driven around in silence for approximately twenty minutes, he pulled into the driveway of his house and told the passengers to leave. Defendant went into his house and then came out with a .22 rifle.

Defendant further testified that after Graham, Ms. Wherry and the children had left his property, they began to move back toward his house. Though it was dark and he could not see them, defendant then fired a warning shot into the ground at a forty-degree angle away from the sound of their voices. Defendant testified that he did not intend to shoot anyone.

Ms. Wherry sustained a gunshot wound to the head from which she later died.

Defendant was found guilty of the second-degree murder of Gloria Wherry and was sentenced to a fifteen-year prison term. Defendant appealed to the Court of Appeals. The Court of Appeals, with one judge dissenting, held that the trial court had abused its discretion by sustaining the State's objections to two of defendant's questions to prospective jurors during jury voir dire.

The two questions at issue arose as follows. First, defense counsel inquired of all the prospective jurors:

> MR. POWELL: My question is: Is there anyone on the jury who feels that because the Defendant had a gun in his hand, no matter what the circumstances might be, that if that—if he pulled the trigger to that gun and that person met their death as a result of that, that simply on those facts alone that he must be guilty of something?
>
> COURT: All right. Sustained to that.
>
> MR. POWELL: I'd like the record to show that even though the Court sustained the objection that I believe Mr. Doomy raised his hand and said that would affect him.
>
> MR. BARRETT: Objection, Your Honor.
>
> COURT: Well, I sustained the question. I don't know what Mr. Barrett said or somebody else said.

Second, defense counsel directed the following question to one prospective juror:

> MR. POWELL: Let me ask this question of all the jurors. Well, let me stick with Ms. Hinton with one more question. Ms. Hinton, as a juror, do you feel that you would have upheld your service as a juror equally as well by returning a verdict of not guilty if you had a reasonable doubt as you would of returning a verdict of guilty if you were satisfied beyond a reasonable doubt?
>
> MR. BARRETT: Objection.
>
> COURT: Sustained.
>
> MR. POWELL: Ms. Hinton, do you have any question? You said that from what you'd seen and what you'd heard you'd tend to favor the enforcement of law.

The Court of Appeals majority concluded that the trial court's action in sustaining the State's objections to these two questions prevented defendant from (1) ascertaining whether a challenge for cause existed, (2) intelligently exercising his peremptory challenges, and (3) selecting an impartial jury. The Court of Appeals majority awarded defendant a new trial. We reverse.

In reviewing the jury voir dire questions at issue here, we examine the entire record of the jury voir dire, rather than isolated questions. *State v. Bracey*, 303 N.C. 112, 277 S.E. 2d 390 (1981). We note that while counsel may diligently inquire into a juror's fitness to serve, the extent and manner of that inquiry rests within the trial court's discretion. *State v. Bryant*, 282 N.C. 92, 191 S.E. 2d 745 (1972), *cert. denied*, 410 U.S. 987, 35 L.Ed. 2d 691 (1973). Moreover, in order to establish reversible error, a defendant must show prejudice in addition to a clear abuse of discretion on the part of the trial court. *State v. Avery*, 315 N.C. 1, 20, 337 S.E. 2d 786, 797 (1985); *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).

[1] The first question appears to be an attempt to indoctrinate potential jurors as to the substance of defendant's defense. Counsel may not ask questions that tend to stake out a juror as to what his decision would be under a given set of facts. *State v. Vinson*, 287 N.C. 326, 215 S.E. 2d 60 (1975), *death penalty vacated*, 428 U.S. 902, 49 L.Ed. 2d 1206 (1976). Although defense counsel was free to inquire into the potential jurors' attitudes concerning the specific defenses of accident or self-defense, he did not do so. Rather, this question contained a hypothetical fact situation. Jurors may not be asked what kind of verdict they would render under certain named circumstances. *State v. Phillips*, 300 N.C. 678, 268 S.E. 2d 452 (1980).

[2] The second question was apparently designed to enable defense counsel to evaluate whether juror Hinton completely understood the principles of reasonable doubt and the State's burden of proof. Defense counsel had previously questioned this juror on these principles of law, and indeed, defense counsel fully explored both areas with other potential jurors as the jury voir dire progressed.

We find no abuse of discretion in the trial court's sustaining the State's objections to these two questions. Moreover, even assuming an abuse of discretion, defendant has failed to show that he was prejudiced. We note that defendant excused both Mr. Doomy and Ms. Hinton. Defendant's right to an impartial jury was not violated here. *State v. Bracey*, 303 N.C. 112, 277 S.E. 2d 390.

We hold that the Court of Appeals erred in concluding that the trial court abused its discretion in sustaining the State's objections to the two jury voir dire questions. The decision of the Court of Appeals is

Reversed.

TEDDY GLENN POLLARD v. EUGENE PADEN SMITH, AND EUGENE PADEN SMITH, ADMINISTRATOR OF THE ESTATE OF MARGARET ELIZABETH SMITH

No. 311PA88

(Filed 4 May 1989)

Subrogation § 1; Master and Servant § 99.4— injury to highway patrolman—settlement with third party—no notice to Department of Crime Control and Public Safety—settlement void

A settlement between a highway patrolman injured in an automobile accident and the estate of the other party involved in the collision was void where the Department of Crime Control and Public Safety had paid workers' compensation benefits to the patrolman and did not give its written consent to the settlement. N.C.G.S. § 97-10.2(j) must be read *in pari materia* with the rest of the section, which requires that the Department give a written consent before a settlement may be made.

ON discretionary review pursuant to N.C.G.S. § 7A-31 of the decision of the Court of Appeals, 90 N.C. App. 585, 369 S.E. 2d 84 (1988), affirming an order entered by *Phillips, J.*, at the 18 May 1987 Civil Session of Superior Court, CARTERET County. Heard in the Supreme Court 13 February 1989.

This is an appeal by the North Carolina Department of Crime Control and Public Safety from an order of superior court determining the amount to be paid to the plaintiff from the proceeds of a settlement upon which the Department claimed a lien under the

Workers' Compensation Act. The plaintiff, a highway patrolman, was injured while on duty in a collision with an automobile driven by Margaret Elizabeth Smith. Ms. Smith was killed in the collision. The Department paid approximately $17,000 to Mr. Pollard in workers' compensation benefits.

The plaintiff brought this action for personal injuries against the estate of Margaret Elizabeth Smith and the Department notified the plaintiff's attorney that it claimed a lien for its workers' compensation payments on any recovery. After a pre-trial conference with a judge had been held and while the case was pending on the trial calendar the plaintiff settled his case against the estate. The Department did not give its consent to the settlement. The case was settled on or about 18 May 1987 and without any notice to the Department the plaintiff petitioned the superior court for an order distributing the funds. The superior court ordered that all proceeds from the settlement be paid to the plaintiff.

The Court of Appeals affirmed the order of the superior court. We granted the petition for discretionary review.

Law Offices of Marvin Blount, Jr., by Marvin Blount, Jr. and Albert Charles Ellis, for plaintiff appellee.

Lacy H. Thornburg, Attorney General, by Victor H. E. Morgan, Jr., Assistant Attorney General, for The North Carolina Department of Crime Control and Public Safety, appellant.

WEBB, Justice.

The Department makes two assignments of error. It says first that it was error for the superior court to order the disbursal of the proceeds from the settlement without notice to the Department. In its second assignment of error the Department contends the court erred in ordering the entire amount of the settlement to be given to the plaintiff.

As to its contention that it was error not to give the Department notice and a chance to be heard before disbursing the funds the Department argues that the action of the superior court violates the constitutions of the United States and North Carolina. *McMillan v. Robeson County*, 262 N.C. 413, 137 S.E. 2d 105 (1964).

In our view of the case it is not necessary to reach the constitutional question.

The rights of an employer who has paid workers' compensation and an employee in respect to a common law cause of action against a third party are governed by N.C.G.S. § 97-10.2. That section provides in subsections (b), (c), and (d) that in certain circumstances either the employer or the employee may bring the action. Either party who brings the action has the right to settle it subject to the provisions of subsection (h). Subsection (h) provides: "[n]either the employee or his personal representative nor the employer shall make any settlement . . . without the written consent of the other." In 1983 N.C.G.S. § 97-10.2 was amended by adding subsection (j) which in pertinent part says:

> [I]n the event that a settlement has been agreed upon by the employee and the third party when said action is pending on a trial calendar and the pretrial conference with the judge has been held, either party may apply to the resident superior court judge of the county in which the cause of action arose or the presiding judge before whom the cause of action is pending, for determination as to the amount to be paid to each by such third party tortfeasor.

We believe subsection (j) must be read *in pari materia* with the rest of the section. *Walker v. Bakeries Co.*, 234 N.C. 440, 67 S.E. 2d 459 (1951). Other parts of the section provide a procedure for settling a case. We do not believe the legislature intended this procedure to be ignored when settling a case pursuant to subsection (j). The procedure requires that the Department give a written consent before a settlement may be made.

The settlement between plaintiff and the defendants in this case is void because it does not comply with N.C.G.S. § 97-10.2(h) in that the Department did not give its written consent to the settlement. The Department was not prejudiced by not receiving notice of the motion to disburse the funds.

In the light of our disposition of this case we do not pass on the Department's second assignment of error. We reverse the decision of the Court of Appeals and remand for further proceedings consistent with this opinion.

Reversed and remanded.

NORA SHORE, PLAINTIFF v. DOYLE BROWN AND WIFE, COLEEN B. BROWN, DEFENDANTS AND THIRD-PARTY PLAINTIFFS v. LUMBERMENS MUTUAL CASUALTY COMPANY AND GENERAL MOTORS CORPORATION, THIRD-PARTY DEFENDANTS

No. 470PA88

(Filed 4 May 1989)

Abatement and Revival § 8.2— failure to defend—prior pending action—summary judgment for defendant—proper

The trial court correctly granted summary judgment in favor of defendant Lumbermens in an action in which the Browns alleged that Lumbermens breached its contractual duty by failing to defend them because that identical issue was already pending in a prior action between the same parties in another county. The pending of a prior action between the same parties for the same cause of action in a court of competent jurisdiction works an abatement of a subsequent action either in the same court or another court of the same state having jurisdiction.

ON petition for discretionary review of the decision of the Court of Appeals, in an unpublished opinion, reversing the entry of summary judgment for Lumbermens Mutual Casualty Company by *Rousseau, J.*, at the 30 June 1987 session of Superior Court, YADKIN County. Heard in the Supreme Court 11 April 1989.

Franklin Smith for defendants and third-party plaintiffs, appellees.

Parker, Poe, Thompson, Bernstein, Gage & Preston, by Irvin W. Hankins III and Kevin A. Dunlap, for third-party defendant Lumbermens Mutual Casualty Company, appellant.

MARTIN, Justice.

We hold that the Court of Appeals erred in reversing the trial court's entry of summary judgment for Lumbermens Mutual Casualty Company.

This appeal arises from an automobile collision in which Nora Shore and Joan Hinson were injured when their car was struck by the car operated by Coleen Brown and owned by Doyle Brown. On 13 October 1986 at 11:17 a.m., the case of *Doyle Brown and Coleen B. Brown v. Lumbermens Mutual Casualty Company and General Motors Corporation* (hereinafter *Brown v. Lumbermens*) was filed, the Browns alleging that Lumbermens breached its con-

tractual duty arising on their insurance policy by failing to defend them in Joan Hinson's suit against the Browns. This case was filed in Davie County.

On 13 October 1986 at 5:29 p.m. in Yadkin County, Nora Shore filed this action against the Browns. On 6 January 1987, the Browns filed the third-party complaint against Lumbermens which is the subject of this appeal. In this cross-action the Browns again alleged that in violation of its contractual duty under the policy, Lumbermens failed to provide them with a defense of this action.

On 6 March 1987, Lumbermens filed a motion for summary judgment on the grounds, among others, that the court did not have subject matter jurisdiction over the claims alleged against Lumbermens because the same claims had been adjudicated in the Davie County action and therefore the claims are barred by the doctrine of res judicata. Lumbermens' motion further stated that at the time the third-party complaint was filed against it in the Shore action, the same claims had already been alleged against it in the prior pending action in Davie County.

On 7 July 1987, the trial court allowed Lumbermens' motion and dismissed the third-party action against Lumbermens. On appeal the Court of Appeals held that in *Brown v. Lumbermens* it had reversed the summary judgment for Lumbermens on the claim of violating its contractual duty to defend; therefore, summary judgment should not have been entered for Lumbermens on that claim in the Shore case. Other issues decided by the Court of Appeals are not before us on this appeal.

The Court of Appeals failed to consider the doctrine of prior action pending in deciding this appeal. In this the Court of Appeals erred. If the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal. If the correct result has been reached, the judgment will not be disturbed even though the trial court may not have assigned the correct reason for the judgment entered. *Sanitary District v. Lenoir*, 249 N.C. 96, 105 S.E. 2d 411 (1958); *Hayes v. Wilmington*, 243 N.C. 525, 91 S.E. 2d 673 (1956). Although the trial court based the summary judgment on res judicata, which the Court of Appeals found was error, the record and Lumbermens' motion clearly support

the doctrine of prior action pending as a basis for the summary judgment.

When the third-party complaint was filed in this action alleging that Lumbermens failed to provide the Browns with a defense under the insurance contract, that identical issue was already pending in a prior action between the same parties in Davie County. At the summary judgment hearing, the trial court had before it the record in the case of *Brown v. Lumbermens*, Davie County, raising the same issue between the parties.

The authorities are legion in North Carolina that the pending of a prior action between the same parties for the same cause of action in a court of competent jurisdiction works an abatement of a subsequent action either in the same court or another court of the same state having jurisdiction. *E.g., Conner Co. v. Quenby Corp.*, 272 N.C. 214, 158 S.E. 2d 22 (1967); *Sales Co. v. Seymour*, 255 N.C. 714, 122 S.E. 2d 605 (1961); *Pittman v. Pittman*, 248 N.C. 738, 104 S.E. 2d 880 (1958); *Cox v. Cox*, 246 N.C. 532, 98 S.E. 2d 883 (1957). All claims between the Browns and Lumbermens will be adjudicated in the prior pending action of *Brown v. Lumbermens* in Davie County. We hold that the third-party claim by the Browns against Lumbermens in the case sub judice is abated and that the trial court properly granted summary judgment in favor of Lumbermens.

The decision of the Court of Appeals reversing the summary judgment for Lumbermens on the third-party complaint allegations that Lumbermens violated its duty to defend the Browns is reversed. The cause is remanded to the Court of Appeals for further remand to the Superior Court, Yadkin County, for reinstatement of the summary judgment in favor of Lumbermens.

Reversed in part and remanded.

DAVID E. BRANCH, ADMINISTRATOR OF THE ESTATE OF CHERYL LYNN BRANCH v. THE TRAVELERS INDEMNITY COMPANY AND UNIGARD MUTUAL INSURANCE COMPANY

No. 457PA88

(Filed 4 May 1989)

Insurance § 69— underinsured motorist coverage—settlement without insurer's consent—no bar to recovery

An insured plaintiff's entry into a settlement with a tortfeasor after a failed attempt to procure the consent of defendant underinsured motorist coverage carrier did not bar his claim for underinsured motorist benefits as a matter of law. However, the case must be remanded to the trial court to determine whether defendant insurer was prejudiced by plaintiff's failure to procure its consent to the settlement.

Justice WEBB dissenting.

Justice MEYER joins in this dissenting opinion.

ON defendant's petition for writ of certiorari to review a decision of the Court of Appeals, 90 N.C. App. 116, 367 S.E. 2d 369 (1988), reversing and remanding judgment entered by *Snepp, J.*, on 9 June 1987 in MECKLENBURG County Superior Court. Heard in the Supreme Court 14 February 1989.

Tucker, Hicks, Hodge and Cranford, P.A., by John E. Hodge, Jr., for plaintiff-appellee.

Wade and Carmichael, by J. J. Wade, Jr., for defendant-appellant.

FRYE, Justice.

The issues in this case are virtually identical to those in *Silvers v. Horace Mann Ins. Co.*, 324 N.C. 289, 378 S.E. 2d 21 (1989), and *Parrish v. Grain Dealers Mutual Ins. Co.*, 324 N.C. 323, 378 S.E. 2d 419 (1989). Factually, this case differs only in that a settlement was reached without a lawsuit after a failed attempt to procure the consent of the underinsured motorist coverage carrier to the settlement. These differences are not material to our disposition of this appeal.

For the reasons fully and aptly stated in *Silvers* and *Parrish*, we hold that plaintiff's entry into a settlement with the tortfeasor

without defendant's consent does not bar his claim for underinsured motorist benefits as a matter of law.

The decision of the Court of Appeals is affirmed. However, the case must be remanded to the Court of Appeals for further remand to the trial court to determine whether defendant was prejudiced by plaintiff's failure to procure its consent to the settlement.

Modified and affirmed.

Justice WEBB dissenting.

I dissent for the reasons stated in my dissent in *Silvers v. Horace Mann Ins. Co.*, 324 N.C. 289, 378 S.E. 2d 21 (1989).

Justice MEYER joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. LARRY SPENCE AND ROBERT NEWMAN

No. 477PA88

(Filed 4 May 1989)

ON discretionary review of a decision of the Court of Appeals, 91 N.C. App. 288, 372 S.E. 2d 98 (1988) (opinion unpublished), which found no error in defendants' trial before *Brannon, J.*, at the 4 April 1987 Criminal Session of Superior Court, DURHAM County. Heard in the Supreme Court on 11 April 1989.

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

Robin E. Hudson for defendant appellant Spence; Craig B. Brown for defendant appellant Newman.

PER CURIAM.

After careful consideration of the briefs and arguments we conclude the petition for discretionary review was improvidently allowed.

Discretionary review improvidently allowed.

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

CANADY v. CLIFF

No. 118P89.

Case below: 93 N.C. App. 50.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 4 May 1989.

DELLINGER v. MICHAL

No. 115P89.

Case below: 92 N.C. App. 744.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 4 May 1989.

HINTON v. PERDUE FOODS

No. 125P89.

Case below: 92 N.C. App. 755.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 May 1989.

IN RE ESTATE OF BRYANT

No. 133P89.

Case below: 92 N.C. App. 755.

Petition by George A. Bryant, Jr. for discretionary review pursuant to G.S. 7A-31 denied 4 May 1989.

IN RE WILSON

No. 149P89.

Case below: 93 N.C. App. 166.

Petition by respondent for discretionary review pursuant to G.S. 7A-31 denied 4 May 1989.

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

LANGLEY v. R. J. REYNOLDS TOBACCO CO.

No. 46P89.

Case below: 92 N.C. App. 327.

Petition by defendant and third-party plaintiff (Kane, Inc.) for discretionary review pursuant to G.S. 7A-31 denied 4 May 1989. Petition by defendant (Tobacco Co.) for discretionary review pursuant to G.S. 7A-31 denied 4 May 1989.

LOWDER v. ALL STAR MILLS

No. 90P89.

Case below: 92 N.C. App. 598.

Petition by several defendants for discretionary review pursuant to G.S. 7A-31 dismissed 4 May 1989.

McGLADREY, HENDRICKSON & PULLEN v. SYNTEK FINANCE CORP.

No. 128P89.

Case below: 92 N.C. App. 708.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 May 1989.

RUFFIN WOODY AND ASSOCIATES v. PERSON COUNTY

No. 14P89.

Case below: 92 N.C. App. 129.

Motion by plaintiff for reconsideration of the petition to review the decision of the Court of Appeals dismissed 4 May 1989.

STATE v. CANNON

No. 113P89.

Case below: 92 N.C. App. 383.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 4 May 1989.

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

STATE v. COLVARD

No. 134P89.

Case below: 92 N.C. App. 756.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 May 1989.

STATE v. FIELDS

No. 127P89.

Case below: 92 N.C. App. 756.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 May 1989.

STATE v. HAMAD

No. 35A89.

Case below: 92 N.C. App. 282.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 4 May 1989.

STATE v. JOSEY

No. 117A89.

Case below: 92 N.C. App. 757.

Petition by Lisa R. Josey for discretionary review pursuant to G.S. 7A-31 allowed 4 May 1989. Motion by the Attorney General to dismiss appeal by Ernest M. Josey for lack of substantial constitutional question allowed 4 May 1989. Petition by Ernest M. Josey for discretionary review pursuant to G.S. 7A-31 denied 4 May 1989.

STATE v. LEONARD

No. 137P89.

Case below: 92 N.C. App. 757.

Motion by the Attorney General to dismiss appeal for lack of significant public interest allowed 4 May 1989. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 May 1989.

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

STATE v. PARKER

No. 71P89.

Case below: 89 N.C. App. 724.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 4 May 1989.

STATE v. ROBERSON

No. 147P89.

Case below: 93 N.C. App. 83.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 May 1989.

STATE v. STURGILL

No. 96P89.

Case below: 92 N.C. App. 599.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 May 1989.

STATE v. WELLS

No. 35A89.

Case below: 92 N.C. App. 282.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 4 May 1989.

STATE v. WISE

No. 161PA89.

Case below: 93 N.C. App. 305.

Petition by Attorney General for writ of supersedeas and temporary stay allowed 24 April 1989. Petition by the Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 4 May 1989.

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

SUTTON v. JEVIC TRANSPORTATION

No. 59P89.

Case below: 92 N.C. App. 245.

Petition by third party defendant (Rea Const. Co.) for discretionary review pursuant to G.S. 7A-31 denied 4 May 1989.

TOLARAM FIBERS, INC. v. TANDY CORP.

No. 126P89.

Case below: 92 N.C. App. 713.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 May 1989.

WALSH v. HOLZ

No. 120P89.

Case below: 92 N.C. App. 757.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 4 May 1989.

STATE OF NORTH CAROLINA v. SHAFEEQ WAHEED SHAMSID-DEEN

No. 367PA88

(Filed 8 June 1989)

1. **Criminal Law § 34.8; Rape and Allied Offenses § 4.1— prior sexual acts against victim—admissibility to show common scheme**

In a prosecution of defendant for the first degree rape of his twenty-year-old daughter, prior similar sexual acts committed by defendant against his daughter over an eleven-year period were not too remote to be considered as evidence of defendant's common scheme or plan to abuse his daughter sexually. When similar acts have been performed continuously over a period of years, the passage of time serves to prove, rather than disprove, the existence of a plan.

2. **Criminal Law § 162— failure to object to testimony—waiver**

Defendant waived his right to assert error on appeal to the admission of testimony where he failed to except to an adverse ruling on voir dire, but admitted that the evidence was competent, and failed to object upon presentation of the testimony before the jury. N.C.G.S. § 8C-1, Rule 404(b).

3. **Criminal Law § 34.8; Rape and Allied Offenses § 4.1— sexual acts with victim's sisters—admissibility to show common scheme**

In a prosecution of defendant for first degree rape of his twenty-year-old daughter, testimony by the victim's sisters that defendant had forced them to have sexual intercourse with him in the past was admissible to show a common plan or scheme embracing the offense charged where the evidence revealed a pattern by defendant over a twenty-year period of forcing his daughters to submit to intercourse as they reached puberty and continuing to assault them, using whatever force was necessary, into their adulthood and after they had left home.

4. **Criminal Law § 146.4— constitutional questions—necessity for raising in trial court**

Constitutional claims not raised at trial or in the assignments of error will not be considered on appeal.

5. **Criminal Law § 86.1— religious beliefs of defendant—questions not plain error**

In a prosecution of defendant for the rape of his daughter, questions asked defendant on cross-examination concerning his religious beliefs did not constitute fundamental or plain error where the appellate court could not conclude that the jury probably would have reached a different verdict absent the questions regarding defendant's religion.

6. **Criminal Law § 169.3— objection to evidence—same evidence admitted without objection**

The benefit of an objection to a question asked defendant as to whether a father in a Muslim family is a very powerful figure was lost when essentially the same question was asked without objection immediately thereafter.

7. Criminal Law § 86.1; Rape and Allied Offenses § 4— religious teachings of children—question to defendant not improper

In a prosecution of defendant for the first degree rape of his twenty-year-old daughter, a question asked defendant during cross-examination about his religious beliefs as to whether his children were taught not to have sex with anyone but their father was not an improper question insulting the Islamic religion where the context makes it clear that Muslim doctrine forbids premarital sex, and the State's apparent motive for questioning defendant about his religion was to show how he was able to intimidate his daughters into having sexual relations with him over a long period of time.

Justice MITCHELL concurring.

Justice MARTIN joins in this concurring opinion.

ON writ of certiorari from a judgment imposing a mandatory sentence of life imprisonment entered by *Lewis (Robert D.), J.*, at the 9 May 1984 Criminal Session of Superior Court, MECKLENBURG County, upon defendant's conviction of first degree rape. Heard in the Supreme Court 9 May 1989.

Lacy H. Thornburg, Attorney General, by Clarence J. Delforge, III, for the State.

Irving Joyner for defendant-appellant.

WHICHARD, Justice.

Defendant was convicted of the first degree rape of his daughter and sentenced to life imprisonment. We find no error.

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

The victim, defendant's twenty-year-old daughter, testified that during the first week of August 1983 defendant called her at work and told her he wanted to talk things over and reconcile their relationship. The victim initially refused to see him, but defendant repeated that he "would be a different person" and "just wanted to talk things out" with her. She then agreed to have dinner with him. He picked her up from work and took her to a restaurant. Defendant told the victim that he was sorry for the trouble and embarrassment he had caused her in April 1983. The two had not been on speaking terms since April. After dinner they sat in the car in the parking lot of the restaurant and talked

further. The victim fell asleep in the car because she had risen that morning at 4:00 a.m. in order to be at work at 5:00 a.m.

The victim testified that when she awoke she and defendant were out in the country in a wooded area. Defendant was on top of her trying to pull her pants down. He pulled her out of the front seat and pushed her into the back seat of the car. Defendant told the victim she was "going to give him some" or he would kill her. He picked up a gun from the floor of the car and pointed it at her. This scared the victim so that she "let him do what he had to do." Defendant touched her breasts and vagina, then inserted his penis in her vagina. Afterwards, defendant drove the victim back to her car.

The victim did not report the incident to the police. Later that month or the next the victim talked to her younger brother on the telephone. As a result of that conversation the victim became very upset and contacted the social services department. Personnel from the department then contacted the police regarding the rape.

The victim testified that defendant had forced her to submit to his sexual advances since she was five years old. When she was five defendant began fondling her genitals. When she turned nine defendant began having intercourse with her approximately once a week. As she grew older the intercourse occurred almost daily. Defendant threatened the victim with guns, knives, and beatings if she resisted him. Defendant hit the victim with his fists many times when she rejected his overtures.

The victim testified that she left home to go to college in Greensboro. While she lived in the dormitory defendant often sent her letters, flowers and candy, and he called her daily. He visited frequently and asked her to go off with him. The victim tried to avoid defendant by not answering telephone calls or messages. She did have intercourse with defendant more than one time in her dormitory room.

Defendant visited the victim in April 1983 at her dormitory. Defendant told her he wanted to be with her, which she interpreted to mean he wanted to have sexual intercourse with her. The victim refused and left the dormitory to go to a party. She saw defendant again later that evening in the parking lot of a

fast-food restaurant. The victim was sitting in a car with her boyfriend when defendant pulled up beside them in his car. Defendant told her to get out of the car because he wanted to talk to her. She went to his car and sat in the passenger seat with her feet outside the car. Defendant called the victim various pejorative names and hit her in the face. She laughed and told him she hoped he enjoyed it because it would never happen again. The two exchanged words and defendant hit her in the face again, then reached in the back seat and got a gun. He told the victim "he would blow [her] f--king head off." Defendant pulled the victim out of the car and "stomped" on her, bruising her legs and bursting her eardrum. After this incident defendant continued to call, leave notes on the victim's car, and attempt to visit her. The victim dropped out of school soon after this and moved in with one of her sisters in another city.

The victim testified that she had been pregnant four times between 1980 and 1983. Each pregnancy was the result of sexual intercourse with defendant, and each pregnancy was terminated by abortion. Defendant arranged and paid for three of the four abortions. The victim paid for the last abortion because she was not on speaking terms with defendant.

The victim's twenty-nine-year-old sister (Sister A)[1] testified that defendant is her father. She testified that the victim told her about the incident with defendant in early August 1983. Sister A testified that she married at age eighteen and left home. Defendant would come to visit her in her apartment while her husband was at work. If she refused to open the door, he would keep knocking until she became embarrassed and let him in. Once inside, defendant physically would force her to have sexual intercourse with him. Sister A testified that it did not take much force because she was so accustomed to having him force her to have intercourse. Her father had been beating her to force her to submit to intercourse since she was nine years old. Defendant stopped visiting her and forcing her to have sex after she threatened to tell her husband. She was pregnant once while in

1. In order to avoid further embarrassment to victims or witnesses who have been sexually molested, it is this Court's policy to avoid use of their names. *See State v. Hosey*, 318 N.C. 330, 332 n.1, 348 S.E. 2d 805, 807 n.1 (1986).

junior high school and suffered a miscarriage. She terminated another pregnancy by abortion.

The victim's twenty-seven-year-old sister (Sister B) testified that defendant is her father. She married and left home at age eighteen. Defendant formerly visited her in her apartment during the daytime while her husband was at work. Defendant would tell her to "give him some," then take off her clothes and have intercourse with her. If she resisted, he would grab her by the arm and shove her to the floor. Sister B was afraid of defendant because he had choked her to force her to submit to intercourse in the past. Before Sister B married, defendant pulled a knife on her and told her he would rather see her dead than with somebody else. The last time he came to her apartment she took off her shoe and beat him with it. After that, defendant's overtures ceased.

Sister B testified that the victim told her about the incident in August 1983 shortly after it happened. The victim told Sister B that defendant had a gun with him and had persuaded the victim to go to dinner with him because he said he wanted to reconcile their relationship. Sister B testified that defendant had used a similar ruse with her once, then took her to a motel room and attempted to have intercourse with her.

One of defendant's daughters (Sister C) and one of his sons (Brother A) testified on his behalf. Sister C testified that she attended college in Greensboro during the time the victim was a college student. The sisters saw each other almost daily. Sister C remembered the April 1983 incident because she had been at a sorority banquet that evening. The victim's boyfriend called Sister C from the fast-food restaurant after the altercation, and Sister C went to see the victim. The victim said she and defendant had fought because he wanted to take away her car. The victim said, "I'm going to get him if it's the last thing I do." Sister C saw her father later that evening and he said he tried to take away the car because the victim was driving without insurance. Defendant then took the license plate off the car.

Sister C testified that the victim never told her about the August 1983 incident. She denied knowing that her father came to Greensboro frequently to visit the victim. She denied telling Sister B that she had told defendant he was sick and needed help.

Sister C denied that she had testified in a juvenile court proceeding that she was embarrassed about the family problems coming to light and feared her future career would be affected adversely.

Brother A testified that he knew the victim was pregnant in the summer of 1983. The victim told him that her boyfriend had impregnated her. The victim never told Brother A that defendant raped her in August 1983. Brother A knew about the April 1983 incident but he believed the argument was over defendant taking away the victim's car.

Brother A denied telling Sister B that when he was younger defendant "used to mess with [him], too." He denied telling Sister B, after a related court proceeding, that she should not have told the judge what he had said. He denied that he moved in with Sister A for a while because defendant had been "messing with [him] again." He denied seeing defendant come out of the victim's bedroom at night when they all lived at home and denied saying, "What are you doing in there messing with [the victim]?"

Defendant testified that he had no communication with the victim in August 1983. He had not seen her since the argument in April. He went to see the victim in April to tell her he was taking the car because the insurance had expired. When he found her at the fast-food restaurant and told her he was taking the car, she became angry and cursed. She had been drinking or smoking dope. She slapped defendant and scratched his face, so he hit her one time. The victim refused to give defendant the keys to the car, so he took the license plate.

Defendant next saw the victim in May at Sister C's graduation, where the victim refused to speak to defendant. He did not contact her in August 1983 and did not take her to dinner. Defendant denied having sexual intercourse with the victim in August 1983 or at any time. He denied that he had had sexual relations with "every single one" of his nine children. Defendant denied that he had taken away the car from the victim in April 1983 to punish her for refusing to submit to his sexual advances. He denied arranging for three abortions for the victim and denied that the signatures on the medical records were his. He denied owning a gun recently. He once owned a shotgun but gave it to his brother many years ago. Defendant denied visiting the victim

frequently while she was at college and denied sending her letters, cards, and flowers, except on her birthday. He denied that the signatures on several letters introduced by the State were his.

The State called the victim's college roommate in rebuttal. She testified that defendant visited the victim in Greensboro two or three times a week during the victim's two years of college. Defendant called the victim on the telephone five or six times a day. The victim often refused to talk with defendant; when she did answer the call, the conversation was never pleasant. The roommate testified that she knew nothing about the April 1983 incident outside the fast-food restaurant.

The victim's suitemate from the college dormitory testified that defendant formerly visited the victim in her dormitory room on weekends when the victim's roommate was away. Defendant and the victim would go into the victim's room and lock the door.

The State recalled Sister B. She testified that Sister C said she had talked to defendant and told him incest was a taboo. Sister C told Sister B she had made defendant leave the victim's bedroom at night when they all lived at home. Sister B also testified that she had talked with Brother A about the family situation. After another court proceeding, he told her she should not have repeated what he told her in confidence. Sister B identified her father's signature on the letter introduced by the State.

Defendant first argues that the trial court erred by allowing the victim and her sisters to testify regarding defendant's prior acts of sexual misconduct with them. Defendant brings forward fourteen exceptions to the testimony of the victim relating to her history of sexual abuse at the hands of defendant and defendant's assault on her in April 1983. Before the victim was allowed to testify regarding defendant's prior acts of misconduct, the trial court conducted a lengthy voir dire examination to determine the proposed contents of the victim's testimony. At the conclusion of the hearing defense counsel stated, "I believe this testimony as it relates to the threats and the use of weapons is competent. This is the first time I've heard this testimony, and I think you would have to rule the evidence to be competent." Immediately thereafter, defendant lodged one general objection when the prosecutor asked the victim, "When was the first time your father ever

put his penis inside your vagina?" The trial court overruled the objection, and defendant did not specify his grounds for objection. Defendant did not object to the victim's testimony on which the remaining thirteen exceptions are based.

"A general objection, if overruled, is ordinarily no good, unless, on the face of the evidence, there is no purpose whatever for which it could have been admissible." 1 Brandis on North Carolina Evidence § 27, at 136 (3d ed. 1988); *see State v. Ward*, 301 N.C. 469, 477, 272 S.E. 2d 84, 89 (1980). Defendant has not demonstrated that the testimony was inadmissible for any purpose. While evidence of other crimes or acts committed by a criminal defendant is generally inadmissible in a prosecution for an independent offense, evidence of a prior act may be introduced "when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission." *State v. McClain*, 240 N.C. 171, 176, 81 S.E. 2d 364, 367 (1954).[2] This rule was later codified in 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.

N.C.G.S. § 8C-1, Rule 404(b) (1988).

[1] This Court frequently has held that evidence of prior similar sex offenses committed by the defendant with the prosecuting witness falls within the *McClain* "common scheme" exception. *State v. Hobson*, 310 N.C. 555, 561, 313 S.E. 2d 546, 549 (1984). Defendant contends, however, that the prior instances of sexual misconduct were too remote in time to fall within this exception. *State v. Jones*, 322 N.C. 585, 369 S.E. 2d 822 (1988) (evidence of

2. For actions and proceedings commenced after 1 July 1984, the admissibility of evidence of crimes for which the defendant is not on trial is governed by Rule 404(b) of the North Carolina Rules of Evidence. *See* N.C.G.S. § 8C-1 editor's note; 1983 N.C. Sess. Laws ch. 701, § 3. The present case was tried prior to the effective date of the Rules of Evidence.

seven-year-old assaults on unrelated victim too remote under Rule 404(b)); *State v. Shane*, 304 N.C. 643, 285 S.E. 2d 813 (1982) (pre-Rules case awarding new trial on basis of improperly admitted evidence of remote prior sexual misconduct). We disagree. The victim testified that defendant's sexual attentions toward her began when she was nine and continued until the date of the crime specified in the indictment. The prior acts formed a distinct pattern of forced sexual intercourse over an eleven-year period, saving only the hiatus from April 1983 to August 1983. While a lapse of time between instances of sexual misconduct slowly erodes the commonality between acts and makes the probability of an ongoing plan more tenuous, *Jones*, 322 N.C. at 590, 369 S.E. 2d at 824, the continuous execution of similar acts throughout a period of time has the opposite effect. When similar acts have been performed continuously over a period of years, the passage of time serves to prove, rather than disprove, the existence of a plan. We thus hold that the prior acts were not too remote to be considered as evidence of defendant's common scheme to abuse the victim sexually. *State v. Browder*, 252 N.C. 35, 38, 112 S.E. 2d 728, 730-31 (1960) (first acts and other acts not too remote where acts continuous over period of years).

Even assuming arguendo the inadmissibility of the victim's testimony that she was nine years old the first time defendant had intercourse with her, similar evidence was later admitted without objection. The victim testified without objection that defendant began fondling her at age five, that the first act of intercourse was very painful, and that defendant performed sexual acts upon her once a week when she was between the ages of ten and twelve and daily as she grew older. Any benefit of the prior objection was lost by the failure to renew the objection, and defendant is deemed to have waived his right to assign error to the prior admission of the evidence. *State v. Ramey*, 318 N.C. 457, 462, 349 S.E. 2d 566, 570 (1986); *State v. Gordon*, 316 N.C. 497, 503, 342 S.E. 2d 509, 513 (1986); *State v. Morgan*, 315 N.C. 626, 641, 340 S.E. 2d 84, 94 (1986).

[2] Defendant failed to object at trial to the testimony upon which the remaining thirteen exceptions are based. "Failure to make timely objection or exception at trial waives the right to assert error on appeal, . . . and a party may not, after trial and judgment, comb through the transcript of the proceedings and

randomly insert an exception notation in disregard of the mandates of App. R. 10(b)." *State v. Gardner*, 315 N.C. 444, 447, 340 S.E. 2d 701, 704-05 (1986) (citations omitted). *See* N.C.R. App. P. 10(b)(1); N.C.G.S. § 15A-1446(b) (1988); *State v. Reid*, 322 N.C. 309, 312, 367 S.E. 2d 672, 674 (1988). A defendant need not renew his objection upon presentation of testimony before the jury in order to preserve the question of admissibility for appellate review if he has excepted to an adverse ruling following a voir dire hearing. *State v. Mems*, 281 N.C. 658, 666-67, 190 S.E. 2d 164, 170 (1972). Here, however, defendant did not except to the adverse ruling on voir dire, but instead admitted that the evidence was "competent."

Defendant has not argued that admission of the victim's testimony amounted to plain error, and such an argument could not prevail in light of defense counsel's statement following voir dire examination of the victim that the evidence was competent. To hold otherwise would invite the creation of reversible error by counsel during trial.

[3] Defendant also assigns error to the admission of the sisters' testimony that defendant had forced them to have sexual intercourse with him in the past. Defendant contends that any alleged sexual misconduct by him toward Sister A or Sister B was too remote in time from the August 1983 rape to be admitted properly for the purpose of showing a systematic plan. Evidence of prior acts of sexual misconduct may be admissible to show defendant's intent, motive, or plan to commit the crime charged. *State v. Boyd*, 321 N.C. 574, 577, 364 S.E. 2d 118, 119 (1988) (evidence that defendant molested his wife's eight-year-old female cousin admissible in trial for rape of defendant's thirteen-year-old stepdaughter); *State v. DeLeonardo*, 315 N.C. 762, 769-71, 340 S.E. 2d 350, 356-57 (1986) (evidence relating to defendant's sexual activity with his three-year-old daughter admissible in trial for sexual offense against defendant's minor sons). In *DeLeonardo*, we specifically stated that the challenged evidence would have been admissible under the *McClain* common scheme exception, as well as under Rule 404(b). *DeLeonardo*, 315 N.C. at 770, 340 S.E. 2d at 356.

"[T]he facts of each case ultimately decide whether a defendant's previous commission of a sexual misdeed is peculiarly perti-

nent in his prosecution for another independent sexual crime." *Shane*, 304 N.C. at 654, 285 S.E. 2d at 820. The facts here demonstrate sufficient similarity between the prior acts and the crime specified in the indictment to justify the trial court's admission of evidence of defendant's prior sexual misconduct. The evidence revealed defendant's pattern of forcing his daughters to submit to intercourse as they reached puberty and continuing to assault them, using whatever force necessary, into their adulthood and after they had left home. As in *Boyd* and *DeLeonardo*, family members were allowed to testify about their own sexual abuse by a defendant to show a male relative's systematic plan to sexually exploit the members of his family. As stated in *State v. Goforth*, 59 N.C. App. 504, 297 S.E. 2d 128 (1982), *rev'd and remanded for resentencing on other grounds*, 307 N.C. 699, 307 S.E. 2d 162 (1983), evidence of defendant's prior misconduct with other family members properly was admitted to show that "defendant systematically engaged in nonconsensual sexual relations with his [daughters] as they matured physically, a pattern of conduct embracing the offense charged." *Id.* at 506, 297 S.E. 2d at 129. *See also Gordon*, 316 N.C. at 505, 342 S.E. 2d at 513 (evidence that defendant had intercourse with three-year-old daughter admissible to show common scheme in trial for rape of six-year-old daughter).

Defendant argues that the admission of evidence of his prior acts of misconduct spanning a twenty-year period was reversible error because the evidence was so prejudicial that the jury must have been predisposed not to believe any evidence presented on defendant's behalf. We disagree. While the evidence was prejudicial to the defendant, it was not unfairly prejudicial. Defendant cross-examined all the witnesses against him and the court gave a proper limiting instruction to the jury regarding the evidence of defendant's prior acts of misconduct. *Id.* at 505, 342 S.E. 2d at 514.

[4] Defendant argues that the trial court's admission of evidence regarding his prior acts of misconduct violates his state and federal constitutional due process rights. These constitutional claims were not raised at trial or in the assignments of error and thus will not be considered on appeal. *State v. Benson*, 323 N.C. 318, 321-22, 372 S.E. 2d 517, 519 (1988); *State v. Hunter*, 305 N.C. 106, 112, 286 S.E. 2d 535, 539 (1982). Further, these arguments are

essentially a restatement of the rationale for the general rule excluding evidence of defendant's prior acts of misconduct. *See McClain*, 240 N.C. at 173-74, 81 S.E. 2d at 365-66. As discussed above, the evidence in question was admitted properly under a well-established exception to the general rule of exclusion.

Defendant next argues that the trial court erred by permitting the prosecutor to cross-examine defendant regarding his religious beliefs. Defendant assigns error to the following line of questioning:

> Q. It's true isn't it, Mr. Shamsid-Deen, in the black Muslim religion, the father of the family is a very dominant and very powerful figure?
>
> [objection overruled]
>
> A. No, that's not true.
>
> Q. It's true, isn't it, Mr. Shamsid-Deen, that in the black Muslim family the father's word is law, isn't that correct?
>
> A. No, that is not correct.
>
> Q. And that when the father is not at home the oldest male son rules the household, isn't that true?
>
> A. No, that's not true.
>
> Q. Is it true, Mr. Shamsid-Deen, that in a black Muslim household that the females are expected to be and are upon pain of punishment very submissive?
>
> A. You seem to have a pretty good knowledge of something you've read, but we didn't practice it that way.
>
> Q. Premarital sex is forbidden in the black Muslim religion, isn't that true, Mr. Shamsid-Deen?
>
> A. You keep saying black Muslims. There's no such thing as black Muslims. We are Muslims, but we are not black Muslims. We are members of the Islamic faith, who are Muslims nationwide. There's no such thing as a black Muslim.
>
> Q. Thank you, sir. Is premarital sex forbidden in your religion, Mr. Shamsid-Deen?
>
> A. I believe it is forbidden in any religion.

Q. Is it forbidden in yours?

A. In the religion we practice, yes, morally, yes.

Q. And that is the way you have raised your daughters and your sons?

A. That is the way we were taught.

Q. And your children were taught that they were not to have sex with anyone before they were married, is that true? Except for their own father, is that true, Mr. Shamsid-Deen?

[objection overruled]

A. Except for their husband when they are married.

Q. Mr. Shamsid-Deen, did you have a sword in your home when your children were small that you used to play with while you held your children on your lap?

A. No, I don't recall that. No.

Q. Do you recall telling your daughters about the sword and that anyone who did not tell the truth and did not do what their father told them to would have their heads cut off with it?

A. No, that's a lie.

We note initially that defendant opened the door to this line of questioning. In cross-examining the victim, defendant elicited from her that she and her family were Muslims. Moreover, defendant objected at trial to only two of the questions to which he now assigns error. The remaining questions will not be considered as the basis for reversible error on appeal because of defendant's failure to make timely objection. *Gardner*, 315 N.C. at 447, 340 S.E. 2d at 704-05.

[5] Defendant asserts that allowing the questions to be asked, even in the absence of objection, amounted to fundamental error. We perceive no fundamental or plain error because we cannot conclude that the jury probably would have reached a different verdict absent the questions regarding defendant's religion. *Reid*, 322 N.C. at 313, 367 S.E. 2d at 674; *State v. Odom*, 307 N.C. 655, 661, 300 S.E. 2d 375, 378-79 (1983).

[6] Regarding the first question to which defendant objected, *i.e.*, whether the father in a Muslim family is a very powerful figure, defendant answered in the negative. Essentially the same question was asked without objection immediately thereafter. Therefore, any benefit of the prior objection was lost. *Ramey*, 318 N.C. at 462, 349 S.E. 2d at 570; *Gordon*, 316 N.C. at 503, 342 S.E. 2d at 513; *Morgan*, 315 N.C. at 641, 340 S.E. 2d at 94.

[7] The second question to which defendant objected was whether the children were taught not to have sex with anyone but their father. Defendant answered in the negative. This question can in no way be construed as an insult to the Islamic religion, as defendant argues, because the context makes clear that Muslim doctrine forbids premarital sex.

State v. Kimbrell, 320 N.C. 762, 360 S.E. 2d 691 (1987), cited by defendant, is readily distinguishable. There, the trial court allowed the prosecutor, over defendant's repeated objections, to cross-examine the defendant regarding his "devil-worshipping" activities. The satanic activities at issue were irrelevant to the crime charged, and evidence of them was introduced to arouse the passion and prejudice of the jury. Here, by contrast, the State's apparent motive for questioning defendant about his religion was to show how he was able to intimidate his daughters over such a long period of time, continuing even after they left home. In this context, the overruling of defendant's general objection was proper.

Defendant's remaining exceptions under this assignment of error pertain only to questions to which defendant objected at trial. The trial court sustained defendant's objections, and defendant did not answer the questions. Therefore, no prejudice to defendant resulted. The assignment of error is overruled.

Defendant received a fair trial free from prejudicial error.

No error.

Justice MITCHELL concurring.

I concur in the decision of the Court and write separately only to emphasize that, since the defendant's trial commenced prior to 1 July 1984, this case has not been decided under the

North Carolina Rules of Evidence. Therefore, questions concerning the admissibility of evidence of other offenses by the defendant are controlled in the present case by *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954) and cases decided thereunder, not by N.C.G.S. § 8C-1, Rule 404(b).

Under our new Rule 404(b), it is not the case—as we *sometimes* stated under *McClain*—that evidence of other offenses falls under a "general rule of exclusion" subject to certain "exceptions." *Cf.* 1 Brandis on North Carolina Evidence § 91 (3d ed. 1988) (reviewing the erratic nature of our methods of stating the applicable rule under *McClain* in prior cases and, at times, in the same opinion). It is clear now that, "as a careful reading of Rule 404(b) clearly shows, evidence of other offenses is *admissible* so long as it is *relevant to any fact or issue* other than the character of the accused." *State v. Weaver*, 318 N.C. 400, 403, 348 S.E. 2d 791, 793 (1986) (quoting 1 Brandis on North Carolina Evidence § 91 (2d rev. ed. 1982)) (emphasis added). " 'Relevant evidence' means evidence having any tendency to make the existence of *any fact* that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1988) (emphasis added).

> Thus, even though evidence may tend to show other crimes, wrongs, or acts by the defendant and his propensity to commit them, it is admissible under Rule 404(b) so long as it also "is relevant for some purpose *other than* to show that defendant has the propensity for the type of conduct for which he is being tried."

State v. Bagley, 321 N.C. 201, 206, 362 S.E. 2d 244, 247 (1987) (quoting *State v. Morgan*, 315 N.C. 626, 637, 340 S.E. 2d 84, 91 (1986)).

These recent cases decided under Rule 404(b) and others relying upon them state a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged. I recognize that, in stating the rule under *McClain*, our "different methods of statement (at times appearing in the same opinion) produced no clear disparity in results." 1 Brandis on North Carolina Evidence,

§ 91 (3d ed. 1988). However, I think it will be helpful to the Bar and only proper for this Court to continue along one clear course in stating the general rule to be applied under our new Rule 404(b), rather than adopting an erratic course as was the case under *McClain*. I believe that our recent cases support such a clear course under Rule 404(b) in the form of the general rule of inclusion I have set forth, and I hope we will not deviate from that course in future cases.

Justice MARTIN joins in this concurring opinion.

STATE OF NORTH CAROLINA v. ERNEST RICHARD COFIELD

No. 335PA88

(Filed 8 June 1989)

1. Grand Jury § 3.3— selection of foreman—racial discrimination

The State failed to rebut defendant's prima facie showing of racial discrimination in the selection of a grand jury foreman in a prosecution for rape and breaking or entering where the district attorney asked the judge on the opening day of court but prior to the actual opening of court to appoint a black grand jury foreman; the judge, who had just rotated into the district, responded that he could not make a commitment at that time; court was opened and nine new members were called to the grand jury to join the returning nine members, for a total of thirteen blacks and five whites; the judge then summoned the district attorney, the clerk of court and the sheriff to the bench to select a grand jury foreman; the judge asked the officials to confer and to make a recommendation; the sheriff knew one of the jurors, who was recommended; the juror, who was white, was pointed out to the judge; the judge testified that he had no prior idea of who the grand juror was or of his race; and the recommended grand juror was appointed as grand jury foreman. It is obvious that all black grand jurors and all white grand jurors other than the one chosen were excluded from consideration, and the conclusion of the trial judge who heard defendant's motion to dismiss the indictment that the selection of the grand jury foreman in this case was racially neutral was not supported by the findings of fact. This opinion applies only to this case and cases in which the indicting grand jury's foreman is selected after the certification date of this opinion. Art. I, §§ 19 and 26 of the N. C. Constitution.

2. Criminal Law § 138.29— rape—nonstatutory aggravating factor—continued mental and emotional suffering

In an appeal in which defendant's conviction for second degree rape was set aside on other grounds, the Supreme Court upheld a finding in aggravation that the victim continued to suffer mentally and emotionally from the incident

where the uncontradicted evidence before the court was that three years and eight months after the defendant's attack on her the victim was still experiencing nightmares in which she saw defendant laughing while raping and strangling her and was still feeling that something was wrong with her as a result of defendant's attack. There was evidence that the victim's trauma was the result of extraordinary circumstances not inherent in second degree rape in that the victim testified that defendant repeatedly stated that she would tell and that he would be hung for the rape and, although the victim told defendant that she would tell no one, he responded by choking her into unconsciousness. N.C.G.S. § 15A-1340.3.

Justice MITCHELL concurring in the result.

Justice WEBB dissenting.

APPEAL by defendant pursuant to N.C.G.S. § 7A-31 from an order and a judgment entered by *Hobgood, Hamilton H., J.*, at the 17 and 18 February 1988 Special Session of NORTHAMPTON County Superior Court. Heard in the Supreme Court 14 February 1989.

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

John W. Gresham and Malcolm Ray Hunter, Jr., Appellate Defender, by Daniel R. Pollitt, Assistant Appellate Defender, for defendant-appellant.

Gulley, Eakes, Volland and Calhoun, by Michael D. Calhoun, for North Carolina Civil Liberties Union Legal Foundation, amicus curiae.

MEYER, Justice.

On 2 July 1984, the Northampton County grand jury indicted defendant on one count of first-degree rape and one count of felonious breaking or entering. Defendant filed a pretrial motion to dismiss the indictment on the grounds of racial discrimination in the selection of the grand jury foreman. The trial court denied the motion. Defendant was tried at the 30 July 1984 Session of Northampton County Superior Court before Allsbrook, J., and a jury. The jury found defendant guilty of second-degree rape and felonious breaking or entering. The trial court sentenced defendant to a term of thirty years on the rape conviction and a consecutive term of three years on the breaking or entering conviction. Defendant appealed.

A panel of the Court of Appeals, with one judge dissenting, affirmed the trial court's refusal to dismiss the indictment, but unanimously remanded the case for resentencing. *State v. Cofield*, 77 N.C. App. 699, 336 S.E. 2d 439 (1985). Defendant appealed to this Court the affirmation of the trial court's refusal to dismiss the indictment.

This Court held that defendant had made out a prima facie case of racial discrimination in the selection of the grand jury foreman. The case was remanded for a hearing so that the State might have an opportunity to rebut defendant's prima facie showing and for resentencing. *State v. Cofield*, 320 N.C. 297, 357 S.E. 2d 622 (1987) (*Cofield I*).

At the hearing on remand, the trial court found that the foreman of the grand jury which indicted defendant had been selected in a racially neutral manner and allowed the indictment to stand. Defendant entered an oral notice of appeal. The trial court then proceeded with defendant's resentencing. After presentation of evidence from the State and defendant, the trial court found that the aggravating factors outweighed the mitigating factors in the rape conviction and sentenced defendant to a term of eighteen years imprisonment. The trial court also sentenced defendant to a consecutive term of three years on the breaking or entering conviction. Defendant appealed the sentence on the rape conviction.

On 15 July 1988 defendant filed a petition for discretionary review prior to determination by the Court of Appeals. This Court allowed defendant's petition on 6 October 1988.

I.

[1] The first question we address is whether the trial court erred in determining that the State had rebutted defendant's prima facie case of racial discrimination in the selection of the foreman of the grand jury that indicted him. We conclude that the trial court erred.

The State presented evidence to rebut defendant's prima facie case of racial discrimination through the persons who took

part in the grand jury foreman selection process—the presiding judge, the clerk of superior court and the district attorney.[1]

Judge Allsbrook testified that on the opening day of Northampton Superior Court in July 1984, but prior to the actual opening of court, he was approached by the district attorney, who requested him to appoint a black as the foreman of the grand jury. Judge Allsbrook responded that he could not make a commitment at that time. Judge Allsbrook testified that such a commitment would have been inappropriate because he had just rotated into the district, had not yet opened court, had no idea who the nine returning grand jurors were and did not know who else would be selected to serve as grand jurors.

After court was opened, Judge Allsbrook asked the clerk of court to call nine new members of the grand jury to join the returning nine members. Judge Allsbrook testified at the hearing that he could not recall the exact gender or racial composition of the grand jury, but he did recall that it was composed of both men and women and blacks and whites. The record reveals that this particular grand jury was composed of thirteen blacks and five whites.

Judge Allsbrook then summoned the district attorney, the clerk of court and the sheriff to the bench and informed them that he wished to select a grand jury foreman. The clerk of court and the sheriff were told of the district attorney's request that a black be appointed. Judge Allsbrook asked the officials to confer and to make a recommendation. The sheriff knew one of the jurors, a Mr. Edward Regan. The sheriff informed Judge Allsbrook that Mr. Regan was retired, had moved back to North Carolina and was at that time living locally. Mr. Regan was characterized as a highly educated man who had held a responsible position with a company. He was further described as a very dependable, mature individual, who had served on the grand jury during the previous six months. The sheriff and the clerk of court agreed that Mr. Regan would be the best choice for the position of grand jury foreman. Once the recommendation was made, Mr. Regan was pointed out to Judge Allsbrook. Mr. Regan was a white male

1. Sheriff Bob Corey, who also took part in the recommendation process, died prior to the hearing on remand.

in his mid-sixties. Judge Allsbrook testified that prior to his being pointed out to him, he had no idea who Mr. Regan was and no idea of his race. Judge Allsbrook also testified that he had never either appointed or failed to appoint a grand jury foreman on the basis of race.

Finally, Judge Allsbrook testified that the qualities he sought in a grand jury foreman included leadership abilities, fairness, the ability to follow instructions and preferably some grand jury experience. He routinely conferred with the elected officials in the courtroom in order to benefit from their experience with the grand jury during the previous six months. On this occasion, after a short conversation with Mr. Regan, Judge Allsbrook appointed him as the grand jury foreman.

The clerk of superior court testified to the procedure used to select Mr. Regan as grand jury foreman and to the procedure generally used by Judge Allsbrook. The transcript reveals that the clerk's testimony corroborates that of the judge. The clerk further testified that he had never made a recommendation for a grand jury foreman on the basis of race; rather, the attributes he sought were community leadership, education and the ability to moderate.

The district attorney testified that he requested the judge to appoint a black grand jury foreman. He also testified that Judge Allsbrook had never indicated that he would not appoint a particular person because of race, and in this instance, the judge indicated that he was considering appointing a black grand jury foreman. The district attorney made no recommendation for foreman in this instance because he knew none of the grand jurors.

Defendant presented the following evidence to support his prima facie showing of racial discrimination in the selection of the grand jury foreman. Six black members of the grand jury which indicted defendant testified. Some of them were lifelong county residents who were college graduates, state employees and business owners. They testified that no effort was made to ascertain their qualifications for the position of grand jury foreman.

Defendant also presented certain statistical evidence based upon Judge Allsbrook's selection of foremen over approximately a ten-year historical period. While such evidence is pertinent to

establishing a prima facie case of discrimination, it has little relevance in determining whether the foreman of the particular grand jury which indicted the defendant in this case was selected as a result of racial discrimination. A discussion of this statistical evidence is unnecessary to our decision in this case.

In its order after the remand hearing, the trial judge made the following findings of fact:

> 15. The undersigned Judge has heard the evidence presented by the parties and has had the opportunity to see and to listen to the witnesses and determine credibility. The Court finds the reasons given by Judge Allsbrook for his appointment of Edward Regan are credible and not pretextural [sic].
>
> 16. In making this credibility determination, this Court has listened to and considered the statistical evidence presented by defendant Cofield concerning Judge Allsbrook's history of appointing grand jury foremen. This evidence is relevant, if at all, only on the issue of whether Judge Allsbrook's stated reasons for appointing Edward Regan are merely pretextural [sic]. This evidence fails to undermine Judge Allsbrook's testimony concerning his reasons for appointing Edward Regan. The statistical evidence did not control the factors of the educational level of the prior appointees by [Judge] Allsbrook, their previous grand jury service, or recommendations for appointment made by the grand jury itself.

The trial judge then concluded as a matter of law that:

> 1. The State has rebutted the prima facie case put forth by the defendant by showing that Judge Allsbrook's selection of the grand jury foreman in this case was not based on the race of the individual and therefore was racially neutral.

In *Cofield I* we stated:

> Discrimination in the selection of grand jury foremen is no less wrong, and no less contrary to the letter and spirit of our constitution, than discrimination in the selection of jurors generally. . . . The foreman, by his very title, is distinguished from other members of the grand jury. . . . Because

> the foreman is thus set apart, it is as important to ensure racial neutrality in the selection of this officer as it is to avoid racial discrimination in the selection of grand and petit jurors generally.

State v. Cofield, 320 N.C. 297, 303, 357 S.E. 2d 622, 626.

In *Cofield I* we also defined the two methods by which racial discrimination could be demonstrated on a prima facie basis. We stated:

> [A] black defendant may make out a prima facie case of racial discrimination in the [grand jury] foreman's selection by showing either (1) that the selection procedure itself was not racially neutral, or (2) that for a substantial period in the past relatively few blacks have served in the position of foreman even though a substantial number have been selected to serve as members of grand juries.

Id. at 308-09, 357 S.E. 2d at 629. We determined that in defendant's case, he had produced sufficient evidence to satisfy the second of these tests. However, we also stated:

> Although defendant's evidence is enough to make out a prima facie case of such discrimination, the state may rebut defendant's prima facie case on remand by offering evidence that *the process used in selecting the grand jury foreman in these proceedings* was in fact racially neutral.

Id. (emphasis added). The scope of our inquiry on this issue is limited to a review of that evidence pertinent to the procedure used to select the foreman of the grand jury *which indicted defendant in this case.*

In *State v. Mitchell*, 321 N.C. 650, 653, 365 S.E. 2d 554, 556 (1988), this Court recognized that *Batson v. Kentucky*, 476 U.S. 79, 90 L.Ed. 2d 69 (1986), and *Cofield I* stand for the analogous propositions that potential jurors may not be excluded nor grand jury foremen selected on racially discriminatory grounds. Accordingly, if the State can show both a racially neutral selection process and a racially neutral reason for the grand jury foreman's selection in this case, it will have successfully rebutted defendant's prima facie showing of racial discrimination in that selection.

The determination here—that is, whether racially neutral criteria offered in explanation of the selection of the foreman were used—is largely a determination of credibility and, as such, is a finding of fact to which great deference must be paid. *Batson v. Kentucky*, 476 U.S. at 98 n.21, 90 L.Ed. 2d at 89 n.21; *State v. Jackson*, 322 N.C. 251, 368 S.E. 2d 838 (1988). The general rule in North Carolina is that a trial court's findings of fact which are supported by the evidence are binding on appeal even where the evidence is conflicting. *State v. Corley*, 310 N.C. 40, 311 S.E. 2d 540 (1984); *State v. Stevens*, 305 N.C. 712, 291 S.E. 2d 585 (1982).

In this case, Judge Allsbrook testified that he looked for qualities such as leadership ability, fairness, the ability to follow instructions and preferably some prior grand jury experience in the person whom he selected as grand jury foreman. These are legitimate *racially neutral* selection criteria which are reasonably related to the leadership role of the grand jury foreman. *See Cofield I*, 320 N.C. at 303, 357 S.E. 2d at 626 ("As the titular head of the grand jury, the foreman is first among equals, both in the eyes of his fellow jurors and in the eyes of the public."). Mr. Regan, the person appointed as foreman of the grand jury which indicted defendant, fitted Judge Allsbrook's grand jury foreman selection criteria by virtue of his education and work experience, as well as his prior grand jury experience. Further, defendant's expert witness acknowledged that his statistical computations did not demonstrate that Judge Allsbrook engaged in racial discrimination in the selection of the grand jury foreman in this instance. Finally, the trial court had the opportunity to observe and to listen to the witnesses at the hearing and was therefore in the best position to determine their credibility.

Based on the relevant evidence presented and the credibility of the witnesses, the trial court concluded as a matter of law that the State had successfully rebutted defendant's prima facie showing of racial discrimination in Judge Allsbrook's selection of the foreman of the grand jury which indicted him. *See State v. Wright*, 274 N.C. 380, 163 S.E. 2d 897 (1968); *State v. Wilson*, 262 N.C. 419, 137 S.E. 2d 109 (1964). We have determined that this conclusion is not supported by the findings of fact.

While we are satisfied that there was not the slightest hint of racial motivation in Judge Allsbrook's selection of Mr. Regan

as grand jury foreman, our inquiry does not end there. We conclude that the selection process used here was not racially neutral because it excluded from consideration as foreman all of the black grand jury members.

The trial court found that neither the district attorney nor the clerk of court knew any of the grand jurors. The sheriff apparently recommended Mr. Regan because he knew him personally. The sheriff did not indicate that he knew any other grand jurors. Because only Mr. Regan, who is white, was considered, it is obvious that all black grand jurors were excluded from consideration. It is likewise obvious that all white grand jurors, other than Mr. Regan, were also excluded. We therefore conclude that the trial court's conclusion that "the selection of the grand jury foreman in this case . . . was racially neutral" is unsupported by the findings of fact which did not address the failure of the appointing judge to consider all grand jurors.

In *Cofield I*, we noted that by adoption of article I, section 26, the people of North Carolina "have recognized that the judicial system of a democratic society must operate evenhandedly . . . [and] must also be *perceived* to operate evenhandedly." *State v. Cofield*, 320 N.C. at 302, 357 S.E. 2d at 625. We concluded that racial discrimination in the selection of grand jury foremen violates article I, sections 19 and 26 of the North Carolina Constitution, which provides respectively that "[n]o person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin," and that "[n]o person shall be excluded from jury service on account of sex, race, color, religion, or national origin." N.C. Const. art. I, §§ 19, 26 (1970). The spirit of article I, section 26 of our Constitution requires that *all* grand jurors be considered for appointment as grand jury foreman.[2]

The statistics produced by defendant's expert in this case showed that, by using the recommendation method described

2. The author of the concurring opinion concludes that "a random selection method similar to that by which a name is drawn from a container when selecting the members of the grand jury under N.C.G.S. § 15A-622(b) will, in all probability, be the most clearly racially neutral and, therefore, constitutional method of selecting the foreman of the grand jury which can be devised." We do not consider or decide whether such a random method meets the requirement "that *all* grand jurors be considered for appointment as grand jury foreman."

above, (1) not every grand juror has the same chance of being appointed grand jury foreman, and (2) blacks have relatively less chance of being appointed grand jury foreman than do non-blacks. Because all black members and all but one white member of the grand jury in the case sub judice were eliminated from consideration for the position of grand jury foreman by the recommendation process used here, the process was not racially neutral and was a violation of article I, section 26 of our Constitution.

A method of selecting a grand jury foreman that meets the racially neutral standard must ensure that all grand jurors are considered by the presiding judge for his selection and that his selection be made on a racially neutral basis.

Because we have for the first time interpreted our state Constitution to require that, in meeting the racially neutral standard for selecting the foreman of the grand jury, the trial judge must consider all the grand jurors, our holding in that regard will apply only to this case and cases in which the indicting grand jury's foreman is selected after the certification date of this opinion. *State v. Peoples*, 311 N.C. 515, 319 S.E. 2d 177 (1984).

II.

[2] We now address one of defendant's further assignments of error, since the issue may recur if defendant is reindicted and retried. The assignment of error relates to the resentencing phase of the hearing on remand. The facts of this case are as stated by the Court of Appeals in *State v. Cofield*, 77 N.C. App. 699, 336 S.E. 2d 439:

> On 25 June 1984, shortly after 9:00 a.m., the victim, "Debra," answered a knock at her front door. When she answered, a man wearing a blue work uniform asked for water for his logging truck which was parked outside. Debra closed the door, retrieved jugs from her kitchen and took them to an enclosed back porch to fill them. While she filled the jugs, the man entered the enclosure and asked for more water and then for a cigarette. Debra returned from her kitchen with a package of cigarettes in her hand. The man stepped to the kitchen door and received the cigarettes. While Debra turned to close the kitchen door, the man grabbed her and dragged her to her bedroom and raped her. Before he fled, the man choked

> Debra until she lost consciousness. Debra later identified her assailant as defendant, Ernest Richard Cofield, a truck driver for a local logging company.

Id. at 700-01, 336 S.E. 2d at 440. The trial judge imposed consecutive sentences of thirty years for second-degree rape and three years for felonious breaking or entering. The Court of Appeals held that the trial court had erroneously found the nonstatutory aggravating factor "[t]hat after committing the offense of second degree rape and thereafter stating to the victim that she was going to tell on him and have him hung, the defendant then choked her until she was unconscious." *Id.* at 704, 336 S.E. 2d at 442. The court remanded for resentencing. Although the Court of Appeals did not reach defendant's contention that the trial court also erroneously found as an aggravating factor that the victim continues to suffer mentally and emotionally from this incident, it did caution that "the trial court should . . . be aware that a certain degree of emotional injury is inherent in all rape and it is presumed that the Legislature was guided by this fact when it set the presumptive sentence [twelve years] for [second-degree] rape." *Id.* at 705, 336 S.E. 2d at 442.

At the sentencing phase on remand, and after the presentation of evidence and the arguments of counsel, the trial judge found in aggravation that defendant committed the offense while on pretrial release on another felony charge, that he has a prior conviction or convictions punishable by more than sixty days confinement and that the victim continues to suffer mentally and emotionally from this incident. In mitigation the trial court found that defendant has no significant record of criminal convictions, that he has an exemplary prison record and that he has had an exemplary work record. The trial judge then determined that the factors in aggravation outweighed the factors in mitigation and sentenced defendant to a term of eighteen years for the second-degree rape and a consecutive term of three years for the breaking or entering. Defendant does not appeal the sentence for breaking or entering. However, in regard to the eighteen-year sentence for second-degree rape, he argues that insufficient evidence exists to support the nonstatutory aggravating factor that the victim continues to suffer mentally and emotionally from the second-degree rape.

Defendant asserts that this Court's prior decisions, psychiatric literature and research studies all recognize that seriously debilitating mental and emotional conditions frequently occur in victims in the aftermath of forcible rape. He contends that the evidence in this case does not show that the victim here suffered in excess of the conditions normally present in the aftermath of rape.

At the resentencing hearing, the State introduced the following evidence on the issue of the victim's mental and emotional suffering:

> Q. Would you give—would you tell His Honor if you have any—suffer from any nightmares or thoughts, what your mental state has been since you—since the trial of this case in 198-—1984, I believe.
>
> A. I have nightmares sometimes, and I think about it.
>
> Q. When you have nightmares, can you tell His Honor what you see in your nightmares?
>
> A. I see him [defendant].
>
> Q. What do you see, what is happening when you see him?
>
> A. Raping me, he is strangling me and laughing.
>
> Q. Since this happened—since the trial of this case, have you had occasion to go talk to anybody or get any help?
>
> A. No, because I don't want anybody to know.
>
> Q. You feel like something is wrong because he did it to you, something is wrong with you?
>
> A. (Nods affirmatively.)
>
> Q. Would you answer that question?
>
> A. Yes.

In the context of the Fair Sentencing Act, one of the primary purposes of sentencing is to impose a punishment commensurate with the injury caused by the crime. N.C.G.S. § 15A-1340.3 (1988). Although the Court of Appeals did not directly address the merits of defendant's contention on this issue in *State v. Cofield*, 77

N.C. App. 699, 336 S.E. 2d 439, the court correctly noted that where a trial court "properly finds physical or emotional injury in excess of that normally present in an offense, [it] may consider the injury [*either*] as an additional factor in aggravation *or* as proof that the offense was especially heinous, atrocious, or cruel." *Id.* at 705, 336 S.E. 2d at 442 (emphasis added) (citing *State v. Blackwelder*, 309 N.C. 410, 413 n.1, 306 S.E. 2d 783, 786 n.1 (1983)). The test, therefore, is whether the State proved by a preponderance of the evidence that the victim's mental and emotional injury in this case was in excess of the injury normally present in the offense. *See State v. Blackwelder*, 309 N.C. at 414, 306 S.E. 2d at 786; N.C.G.S. § 15A-1340.4(a) (1988).

The uncontradicted evidence before the trial court at the resentencing hearing was that three years and eight months after defendant's attack on her, the victim was still experiencing nightmares in which she saw defendant laughing while raping and strangling her and was still feeling that "something [was] wrong with [her]" as a result of defendant's attack. In addition, there was evidence that the victim's trauma was the result of extraordinary circumstances not inherent in second-degree rape. Second-degree rape is defined as vaginal intercourse with a person not legally a spouse which is by force and against the will of the victim. *State v. Morrison*, 84 N.C. App. 41, 351 S.E. 2d 810 (1987); N.C.G.S. § 14-27.3 (1986). Unlike first-degree rape, second-degree rape does not involve a weapon, serious personal injury or multiple assailants. *State v. Locklear*, 320 N.C. 754, 360 S.E. 2d 682 (1987); N.C.G.S. § 14-27.2 (1986). The victim testified that defendant repeatedly stated that she would "tell" and that he would be "hung" for the rape. Although the victim told defendant that she would tell no one, defendant responded by choking her into unconsciousness. Clearly, the victim thought that her death was imminent. We conclude that this evidence was sufficient to prove by a preponderance that the victim suffered mental and emotional injury in excess of that normally present in second-degree rape. This assignment of error is overruled.

We hold that the State failed to rebut defendant's prima facie showing of racial discrimination in the selection of the foreman of the grand jury which indicted defendant. The verdict and judgments against defendant are set aside and the indictments quashed. Defendant, however, is not entitled to his dis-

charge. The State has the power to reindict him and may decide to do so. *State v. Cofield*, 320 N.C. 297, 309, 357 S.E. 2d 622, 629. We further hold that, in the resentencing phase, the evidence was sufficient to show by a preponderance that the victim suffered mental and emotional injury in excess of that normally present in second-degree rape.

Reversed.

Justice MITCHELL concurring in result.

I agree that the verdicts and judgments against the defendant must be vacated and that the indictment returned against him by the grand jury must be quashed. I am unable, however, to agree entirely with the reasons stated by the majority for reaching this result. Additionally, I am not in agreement with the majority's decision to discuss issues concerning sentencing which are irrelevant to the disposition of this case on appeal. Accordingly, I concur only in the result reached by the majority.

I agree that the actual selection of the grand jury foreman in the present case amounted to unintentional racial discrimination in violation of article I, section 26 of the Constitution of North Carolina, because all black members of the grand jury were denied the opportunity to serve as foreman by the recommendation process used. I am not at all sure, however, that I agree with the majority's view of the method or methods of selecting a grand jury foreman which will comply with that section's prohibition against racial discrimination.

In particular, I believe that the only qualifications the grand jury foreman may be required to possess under our laws are those qualifications any person is required by N.C.G.S. § 9-3 to possess in order to serve as a juror or as a member of the grand jury. Therefore, I do not agree with the majority's statement that all grand jurors must be "considered" for appointment as grand jury foreman, if that statement is to be read as implying that some sort of conscious weighing, balancing or comparing of the "qualifications" of the grand jurors must be undertaken in selecting a person for the position of foreman of the grand jury. Quite the contrary, I believe that a random selection method similar to that by which a name is drawn from a container when selecting

members of the grand jury under N.C.G.S. § 15A-622(b) will, in all probability, be the most clearly racially neutral and, therefore, constitutional method of selecting the foreman of the grand jury which can be devised. In my view, article I, section 26 assures that every grand juror will have an equal opportunity to serve as foreman—not that all grand jurors will be "considered" for that position.

Nor do I join in that part of the opinion of the majority discussing the sentencing of this "defendant," which I consider entirely *obiter dictum*. As a result of the majority's holding today, he does not stand convicted of any crime and is, at this point at least, not formally charged with any crime. Therefore, I find the majority's advice concerning his sentence somewhat strange at best.

For the foregoing reasons, I concur only in the result reached by the majority.

Justice WEBB dissenting.

I dissent for the reasons set forth in my dissenting opinion to the first opinion of this Court in this case.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY v. DONNA JEAN HOLLAND

No. 391PA88

(Filed 8 June 1989)

1. **Torts § 5; Judgments § 36.3— automobile accident—joint tortfeasors—no collateral**

The trial judge correctly granted summary judgment in favor of the mother of a child killed in an automobile accident where the mother had been driving the car in which the child was riding when the accident occurred; the mother and her husband, as administrator of the estate of the child, filed suit against the other driver, Wall, alleging that Wall negligently caused the accident; Wall answered alleging contributory negligence in the operation of the automobile and failure to use a child restraint system; the mother was not named a defendant or third party defendant to the action; the jury determined that the mother was injured by the negligence of Wall and that the mother did not by her own negligence contribute to the injury; the jury further found that

the child's death was proximately caused by the negligence of her mother and of defendant Wall; the jury awarded damages of $100,000 to the father as administrator of the estate; the father accepted $50,000 from plaintiff insurance company as settlement of the judgment against Wall; and the insurance company then sued the mother, defendant Holland, for contribution of one-half of the settlement. The doctrine of collateral estoppel is not available to show the mother's joint liability to the estate of the daughter; since the mother was not a party to the wrongful death claim and was not made a third party defendant for the purpose of contribution, neither her liability to her daughter's estate nor her liability to Wall as a joint tortfeasor was established by the judgment in the original action.

2. Automobiles and Other Vehicles § 84— failure to use child restraint system— death of child

The trial judge correctly entered summary judgment for defendant Holland in an action brought by State Farm for contribution where defendant Holland's car was involved in an accident with plaintiff's insured, Wall; defendant Holland's child died from injuries in the accident; a jury found plaintiff's insured negligent and awarded damages to the child's estate; and plaintiff insurance company brought this action for contribution. The failure of Holland, the child's mother, to restrain the child in a child restraint system in violation of N.C.G.S. § 20-137.1 did not constitute actionable negligence and was therefore not the proximate cause of the wrongful death of the child; Holland thus cannot be jointly liable with the insured for the damages awarded to the estate of the child in the wrongful death action.

Justice MARTIN dissenting.

ON discretionary review of the decision of the Court of Appeals, 90 N.C. App. 730, 370 S.E. 2d 70 (1988), reversing and remanding the judgment entered by *Albright, J.*, at the 16 November 1986 Session of Superior Court, GUILFORD County. Heard in the Supreme Court 13 February 1989.

Frazier, Frazier & Mahler, by James D. McKinney, for plaintiff-appellee.

Smith Helms Mulliss & Moore, by Stephen P. Millikin and Alan W. Duncan, for defendant-appellant.

FRYE, Justice.

The question before the Court is whether the Court of Appeals correctly reversed the trial court's entry of summary judgment in favor of defendant. In order to answer this question, we must determine whether a *Carver* issue, decided adversely to the mother of a deceased child in a wrongful death action, can serve

as the basis for collateral estoppel so as to conclusively establish the liability of that parent for the purposes of contribution. For the reasons stated hereafter, we answer both questions in the negative.

The facts in this case are as follows: On 14 December 1983, Donna Jean Holland (hereinafter Holland) and Jo Ann Cowan Wall (hereinafter Wall) were operating their vehicles in High Point, North Carolina, and collided at an intersection. Alicia Holland, the three-month-old daughter of Holland, was a passenger in the automobile Holland operated. The child suffered serious injuries from the accident and died shortly thereafter. Holland was also injured in the accident. On 6 June 1984, Holland, on her own behalf, and her husband, as administrator of the estate of Alicia Holland, filed suit against Wall alleging that Wall negligently caused the accident which injured Holland and resulted in the death of Alicia Holland. Wall answered alleging contributory negligence as to Holland's claim. As a defense to the wrongful death claim brought by the administrator, Wall alleged that the child's death was caused solely by Holland's negligent operation of the automobile. As a further defense to the wrongful death claim, Wall alleged that Holland was negligent in failing to properly use a child restraint system as required by N.C.G.S. § 20-137.1, that Holland's negligence was imputable to her husband, and since they were the sole beneficiaries of the wrongful death claim, that claim should be dismissed so as to prevent Holland and her husband from benefiting from their own wrong. Holland was not made a named defendant or third party defendant to the action.

The case was tried in August 1985 and the following issues were presented to, and answered by, the jury:

> 1. Was the Plaintiff, Donna Jean Holland, injured by the negligence of the Defendant, Jo Ann Cowan Wall?
>
> ANSWER: Yes
>
> 2. Did the Plaintiff, Donna Jean Holland, by her own negligence contribute to her injury?
>
> ANSWER: No
>
> 3. What amount, if any, is the Plaintiff, Donna Jean Holland, entitled to recover for personal injuries?

ANSWER: $4,589.02

4. Was the death of Alicia Jean Holland proximately caused by the negligence of the Defendant, Jo Ann Cowan Wall?

ANSWER: Yes

5. Was the death of Alicia Jean Holland proximately caused by the negligence of the Plaintiff, Donna Jean Holland?

ANSWER: Yes

6. What amount of damages is Alan Gregg Holland, Sr. Administrator of the estate of Alicia Jean Holland entitled to recover by reason of the death of Alicia Jean Holland?

ANSWER: $100,000.00.

On 19 August 1985, Judge James M. Long entered judgment against defendant Wall in favor of plaintiff Donna Jean Holland in the amount of $4,589.02 and against defendant Wall in favor of plaintiff-administrator in the amount of $100,000.00. State Farm Mutual Automobile Insurance Company (hereinafter State Farm), as the insurer of Wall, paid the judgment in favor of Holland. The administrator of the estate accepted $50,000 from State Farm in settlement of the $100,000 judgment against Wall and marked the judgment satisfied in full.

In the instant case, State Farm sued Holland for contribution of one-half of the $50,000 settlement pursuant to N.C.G.S. § 1B-1, *et seq.* Holland's motion for summary judgment was granted by Judge Douglas Albright. State Farm appealed to the Court of Appeals. The Court of Appeals held that Holland was collaterally estopped to deny her negligence in causing her daughter's death and that State Farm was entitled to contribution from Holland because Wall and Holland were joint tortfeasors. The Court of Appeals reversed the grant of summary judgment for Holland and remanded the case to the trial court for entry of summary judgment for State Farm. *State Farm Mutual Auto. Ins. Co. v. Holland*, 90 N.C. App. 730, 370 S.E. 2d 70 (1988). We now reverse.

[1] Plaintiff State Farm seeks contribution pursuant to N.C.G.S. § 1B-1, *et seq.* from defendant Holland for one-half of the $50,000 paid by State Farm to the estate of Alicia Holland. N.C.G.S. § 1B-1 provides in pertinent part:

> (a) [W]here two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though the judgment has not been recovered against all or any of them.
>
> (b) The right of contribution exists only in favor of a tort-feasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tort-feasor is compelled to make contribution beyond his own pro rata share of the entire liability.

N.C.G.S. § 1B-1(a) and (b) (1983 & Cum. Supp. 1988). The statute expressly grants a right of contribution to a joint tortfeasor who has paid more than his pro rata share of common liability to the injured party.

However, the right to contribution does not exist unless two or more parties are joint tortfeasors. *Pearsall v. Duke Power Co.*, 258 N.C. 639, 129 S.E. 2d 217 (1963); *Clemmons v. King*, 265 N.C. 199, 143 S.E. 2d 83 (1965). Two or more parties are joint tortfeasors when their negligent or wrongful acts are united in time or circumstance such that the two acts constitute one transaction or when two separate acts concur in point of time and place to cause a single injury. *Clemmons v. King*, 265 N.C. at 202, 143 S.E. 2d at 86. The burden is on the tortfeasor seeking contribution to show that the right exists, *Pascal v. Burke Transit Co.*, 229 N.C. 435, 50 S.E. 2d 534 (1948); *Stansel v. McIntyre*, 237 N.C. 148, 74 S.E. 2d 345 (1953), and to allege facts which show liability to the injured party as well as a right to contribution. *Clemmons v. King*, 265 N.C. at 202, 143 S.E. 2d at 86.

The personal representative of a person killed by the negligence of two joint tortfeasors may, at his election, sue one or both of the tortfeasors. If he sues both and the jury finds them to be joint tortfeasors, the resulting judgment is joint and several and the party paying more than his pro rata share of the judgment is entitled to contribution from the other. Where the plaintiff elects to sue only one of the joint tortfeasors, the original defendant may have others joined as additional or third party defendants. *See Pascal v. Burke Transit Co.*, 229 N.C. 435, 50 S.E. 2d 534; *Phillips v. Mining Co.*, 244 N.C. 17, 92 S.E. 2d 429 (1956); N.C.G.S. § 1B-3(d)(3) (1983 & Cum. Supp. 1988).

If the jury determines that both defendants are liable as joint tortfeasors to the plaintiff in the action, either defendant who satisfies the judgment by paying more than his pro rata share may invoke the right of contribution against the other defendant. Also, where one of the joint tortfeasors is not made a party to the original action, either by the plaintiff or the original defendant, the original defendant may nevertheless, by separate action, seek contribution from the other tortfeasor. In such a case he must establish, not only that a judgment has been entered against him, but that the other party is in fact a joint tortfeasor, that is, that the other party is liable jointly with the original defendant to the plaintiff for the wrongful death damages. N.C.G.S. §§ 1B-1(a) and 1B-3(c) (1983 & Cum. Supp. 1988).

The doctrine of collateral estoppel is not available to the plaintiff, State Farm, in the instant case to show Holland's joint and several liability to the estate of Alicia Holland. Since Holland was not a party to the wrongful death claim and was not made a third party defendant for the purpose of contribution, neither her liability to the estate of Alicia Holland nor her liability to Wall as a joint tortfeasor was established by the judgment in the original action.

The Court of Appeals relied on the opinion in *Carver v. Carver*, 310 N.C. 669, 314 S.E. 2d 73 (1984), in support of its holding that defendant Holland is collaterally estopped from denying that her negligence caused her daughter's death. *Carver* involved a wrongful death action brought by the estate of a child who was killed in an automobile accident caused by the negligence of the child's mother. The trial court entered summary judgment in favor of the defendant mother of the child. The Court of Appeals reversed the trial court's entry of summary judgment. In an opinion written by Justice Exum (now Chief Justice), this Court held that the Court of Appeals was correct in reversing the judgment of the trial court. The Court further held that losses to the negligent mother could not be considered in assessing damages for the wrongful death of the child because the recovery obtained resulted from the negligence of the mother.

In the instant case, the Court of Appeals concluded that the jury finding, that Holland's negligence proximately caused the death of the child, was material and relevant to the disposition of

Holland v. Wall and necessary and essential to the resulting judgment. *State Farm v. Holland*, 90 N.C. App. 730, 733, 370 S.E. 2d 70, 72. We agree with the Court of Appeals that in the instant case, as in *Carver*, the purpose for the jury determination that the mother's negligence was a proximate cause of the death of the child was to determine the amount of damages to be assessed against the individual defendant. We do not agree, however, that the jury's verdict resulted in a determination of defendant's joint liability with Wall to the estate of Alicia Holland.

A *Carver* issue cannot serve as the basis for collateral estoppel in an action for contribution among joint tortfeasors, at least under the circumstances of this case. In the wrongful death action, the mother was not a party-defendant, and no judgment establishing her liability to the estate was entered. Even though the jury considered the issue of the mother's negligence as it affected the award of damages, there was no adversarial consideration of the issue with regard to making her liable to the estate for any damages. Holland was not sued by the estate of Alicia Holland nor joined as a third party defendant by the sole defendant to the lawsuit. Therefore, Holland had no reason to defend on the issue of liability and no right to require a defense from her liability carrier who would bear the ultimate responsibility for paying any judgment against her.

A jury finding from a prior trial that two or more defendants were negligent does not necessarily establish the joint liability of the parties for the purposes of *res judicata* or collateral estoppel. This principle is illustrated in the case of *Gunter v. Winders*, 253 N.C. 782, 117 S.E. 2d 787 (1961). The jury in the prior trial of *Dalyrmple v. Gunter, Allen and Cottle* determined that two defendants, Allen and Cottle, had committed separate acts of negligence. Gunter then sued Allen, Cottle and others in a separate civil action. The lower court sustained the defendants' plea in bar of the suit upon the ground that the issues of negligence and contributory negligence had already been determined in *Dalyrmple*. On appeal, this Court held that the allegations and findings of separate acts of negligence in a prior trial did not on their face establish the joint and concurrent negligent acts of the parties and, thus, the prior decision did not provide the basis for the court to sustain a plea of *res judicata* in bar of a trial on the issues of the joint and concurrent negligence of Allen and Cottle.

The Court also held that a judgment against two or more defendants in a tort action should not be held to be conclusive unless their rights and liabilities were put in issue by their pleadings.

The holding in *Gunter* as applied to the instant case would preclude the use of the judgment in *Holland v. Wall* as a bar to a second trial on the issue of defendant's negligence. Although the jury found that Holland's negligence was a proximate cause of the death of Alicia Holland, the jury's finding did not establish the joint and concurrent negligence of Holland and Wall.

In the prior proceeding, Holland was not named as a defendant by the plaintiff, or a third party defendant by the original defendant Wall. Thus, neither the judge nor jury in the case determined that Holland and Wall were liable as joint tortfeasors to the plaintiff in that action.

Nevertheless, the original defendant in that action now seeks to use the judgment which was entered against only the original defendant as collateral estoppel against Holland. The original defendant contends, and the Court of Appeals agreed, that collateral estoppel applies since the jury made a determination that Holland's negligence was a proximate cause of the death and because the determination was necessary to the resulting judgment. We disagree for two reasons. First, assuming that the issue was necessary to the resulting judgment, the resulting judgment was against the original defendant and not Holland. Even if we assume that the judgment was against Holland in the sense that it effectively deprived her of any right to receive benefits from the estate based on proceeds from the wrongful death action, the judgment did not establish any liability on her part to the estate. She is liable to the estate only if a judgment could be entered against her in favor of the estate.

Second, to permit an original defendant against whom a judgment is entered in a claim for the wrongful death of a child to collect one-half of the judgment from the parent, based solely on a *Carver* issue, would effectively remove any need to make the parent a third party defendant. The practical effect of such a holding would be to prevent the parent's insurer from having an opportunity to defend a claim against the parent.

In the prior proceeding, since Holland was not made a party defendant and no claim was made against her, her insurer has had no opportunity to defend so as to protect its interest. We conclude that the contribution statute was not intended to have such an effect and that collateral estoppel should not apply under the facts of this case. Thus, the Court of Appeals erred in ordering summary judgment for plaintiff State Farm.

[2] Ordinarily, we would remand the case in order to give State Farm an opportunity to prove that Holland is in fact a joint tortfeasor with Wall as a basis for contribution. However, State Farm's sole basis for establishing joint liability in this case is its allegation of Holland's negligence as related to a violation of N.C.G.S. § 20-137.1. Therefore, we now address the issue of whether defendant's failure to fasten her child in a child restraint system as required by N.C.G.S. § 20-137.1, as it existed at the time of the accident, constituted actionable negligence. We hold that it did not.

In *Miller v. Miller*, 273 N.C. 228, 160 S.E. 2d 65 (1968), this Court rejected the seat belt defense in North Carolina for the purpose of either barring the entire claim or for the purpose of mitigating damages in an automobile accident case. The Court held that the duty to wear a seat belt did not exist either at common law or by statute. Consequently, the failure to wear a seat belt was neither negligence per se nor evidence of negligence. In a recent case, a unanimous panel of the Court of Appeals, relying on our decision in *Miller*, held that plaintiff's failure to wear his seat belt at the time of the collision was not contributory negligence and that it was not error to refuse to instruct the jury that plaintiff's failure to wear his seat belt should be considered in the mitigation of plaintiff's damages. *Hagwood v. Odom*, 88 N.C. App. 513, 364 S.E. 2d 190 (1988).

N.C.G.S. § 20-137.1, as it existed at the time of the accident in question in *Holland v. Wall*, provided in pertinent part as follows:

> (a) Every driver . . . who is transporting his own child of less than two years of age, when the driver is operating his own motor vehicle (or family purpose vehicle), shall have such child properly secured in a child passenger restraint system . . . .

(b) Any person violating this section during the period from July 1, 1982, to June 30, 1984, shall be given a warning ticket only. Thereafter a fine of ten dollars ($10.00) will be levied against violators. No driver license points shall be assessed for a violation of this section.

(c) A violation of this section shall not constitute negligence per se or contributory negligence per se.

N.C.G.S. § 20-137.1 (1983).

In *Miller*, decided in 1968, the Court indicated that any decision to link the use of seat belts to a standard of reasonable care should be left to the wisdom of the General Assembly. In 1981, the General Assembly enacted N.C.G.S. § 20-137.1. 1981 N.C. Sess. Laws ch. 804. While this statute required the use of seat belts in specific situations, it also expressly provided that a violation would not constitute negligence per se or contributory negligence per se.[1] Ordinarily, the violation of a statute enacted for the safety and protection of the public constitutes negligence per se, i.e., negligence as a matter of law. *Cowan v. Murrows Transfer Co.*, 262 N.C. 550, 554, 138 S.E. 2d 228, 231 (1964). However, a violation declared by the statute not to be negligence per se requires the application of the common law rule of ordinary care. *Id.* Under *Miller*, the failure to wear a seat belt, nothing else appearing, does not violate the common law rule of ordinary care. Construing the statute in light of this Court's decision in *Miller*, it is

1. The statute was amended in 1985 to increase the age to six years, change the fine to $25.00, and add the clause italicized below. 1985 N.C. Sess. Laws ch. 218. The statute, as it existed at the time of the trial in *Holland v. Wall* provided (and still provides):

(a) Every driver who is transporting a child of less than six years of age shall have the child properly secured in a child passenger restraint system (car safety seat) which met applicable federal standards at the time of its manufacture . . . .

. . . .

(c) Any person convicted of violating this section may be punished by a fine not to exceed twenty-five dollars ($25.00) . . . .

(d) [N]or shall a violation constitute negligence per se or contributory negligence per se *nor shall it be evidence of negligence or contributory negligence.*

N.C.G.S. § 20-137.1 (Cum. Supp. 1988) (emphasis added).

clear that a violation of the statute as it existed at the time of the accident, standing alone, did not constitute actionable negligence.

As applied to the instant case, the failure of Holland to restrain the child in a child restraint system in violation of the statute did not constitute actionable negligence and was therefore not the proximate cause of the wrongful death of her child. Thus, Holland cannot be jointly liable with Wall for the damages awarded to the estate in the wrongful death action. Accordingly, the trial judge correctly entered summary judgment in Holland's favor in this action brought by State Farm for contribution.

In summary, we hold that the Court of Appeals erred in reversing the trial court's entry of summary judgment for the defendant. Accordingly, we reverse the decision of the Court of Appeals and remand the case to that court for further remand to the trial court for reinstatement of the summary judgment in favor of defendant.

Reversed and remanded.

Justice MARTIN dissenting.

I dissent from the holding and reasoning of the majority as to Mrs. Holland's duty to secure her child in a restraint system.

The majority opinion slips into error in its reliance upon *Miller v. Miller*, 273 N.C. 228, 160 S.E. 2d 65. It is true this Court did hold in *Miller* that the allegation that plaintiff failed to wear a seat belt was not an allegation of facts constituting contributory negligence. However, it is necessary to note and understand that the plaintiff in *Miller* was an adult and there was not in effect at that time a statute requiring the use of seat belts.

Our case is not concerned with the duty, if any, of an adult to wear a seat belt for his own protection while traversing the highways. We are concerned with a much more serious and important issue: the duty of drivers of vehicles to attend to the safety of infants under the age of two years by securing such children in a child passenger restraint system. N.C.G.S. § 20-137.1 (1983).

This statute imposed an affirmative duty upon all drivers of motor vehicles to properly secure their children, under the age of two years, in child passenger restraint systems when transport-

ing such children in motor vehicles. The statute expressly states that a violation of it does not constitute negligence per se or contributory negligence per se. However, at the time of these events a violation of the statute constituted *evidence* of negligence to be considered by the jury in determining whether plaintiff had carried its burden to prove negligence under the common law. When a statutory violation is not negligence per se, the jury must consider such violation, if they find it occurred, along with all the other facts and circumstances in the case in determining whether the defendant has breached his common law duty of due care. *Johnson v. Bass*, 256 N.C. 716, 125 S.E. 2d 19 (1962); *Moore v. Bezalla*, 241 N.C. 190, 84 S.E. 2d 817 (1959); *Bank v. Phillips*, 236 N.C. 470, 73 S.E. 2d 323 (1954); *Spruill v. Summerlin*, 51 N.C. App. 452, 276 S.E. 2d 736 (1981).

The majority mistakenly assumes that because a violation of the statute is not negligence per se, it is also not evidence of negligence. *Miller* falls woefully short of supporting this defective legal theory. In *Miller* there was no statute imposing a duty on a guest passenger to wear a seat belt. Here, there is a statute imposing the duty on a driver-parent to properly secure his child. This statute was for the protection of infants. It must be remembered that a child cannot refuse to enter the vehicle, nor can the child take safety precautions while a passenger in the car. Surely it cannot be seriously debated that the violation of this statutory duty to a helpless child is not evidence of negligence! Our legislature evidently considered such a violation to be evidence of negligence, otherwise there would be no reason for its inexplicably recondite decision to amend the act in 1985.

This Court has no knowledge of how many claims on the behalf of children may be in existence based upon violations of the statute prior to its amendment in 1985. The statute of limitations on such claims does not commence to run until the child reaches majority. N.C.G.S. § 1-17 (1983). I, for one, will not adhere to a holding depriving helpless children of this statutory protection.

I vote to remand the case for a jury determination of the joint tort-feasor issue.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; NANTAHALA POWER AND LIGHT COMPANY; ALUMINUM COMPANY OF AMERICA; AND TAPOCO, INC. v. LACY THORNBURG, ATTORNEY GENERAL; PUBLIC STAFF; HENRY J. TRUETT; CHEROKEE, GRAHAM, JACKSON AND SWAIN COUNTIES; THE TOWNS OF ANDREWS, BRYSON CITY, DILLSBORO, ROBBINSVILLE, AND SYLVA; THE TRIBAL COUNCIL OF THE EASTERN BAND OF CHEROKEE INDIANS; MURIEL MANEY; AND DEROL CRISP

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; NANTAHALA POWER AND LIGHT COMPANY; ALUMINUM COMPANY OF AMERICA; AND TAPOCO, INC. v. LACY THORNBURG, ATTORNEY GENERAL; PUBLIC STAFF; HENRY J. TRUETT; CHEROKEE, GRAHAM, JACKSON AND SWAIN COUNTIES; THE TOWNS OF ANDREWS, BRYSON CITY, DILLSBORO, ROBBINSVILLE, AND SYLVA; THE TRIBAL COUNCIL OF THE EASTERN BAND OF CHEROKEE INDIANS; AND DEROL CRISP

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; NANTAHALA POWER AND LIGHT COMPANY; ALUMINUM COMPANY OF AMERICA; TAPOCO, INC.; AND JACKSON PAPER MANUFACTURING COMPANY v. LACY THORNBURG, ATTORNEY GENERAL; PUBLIC STAFF; CHEROKEE, GRAHAM, JACKSON AND SWAIN COUNTIES; THE TOWNS OF ANDREWS, BRYSON CITY, DILLSBORO, ROBBINSVILLE, AND SYLVA; THE TRIBAL COUNCIL OF THE EASTERN BAND OF CHEROKEE INDIANS; HENRY J. TRUETT; HOWARD PATTON; VERONICA NICHOLAS; O. W. HOOPER, JR.; ALVIN E. SMITH; AND LARRY LYNN BAILEY

Nos. 505A88
506A88
507A88

(Filed 8 June 1989)

1. **Electricity § 3; Utilities Commission § 46— electric rate cases—remand after U. S. Supreme Court decision—new evidentiary hearing unnecessary**

Where three general rate cases were remanded to the Utilities Commission following a decision of the U. S. Supreme Court that the roll-in method adopted by the Commission for determining Nantahala's rates was preempted by action of the FERC, the Commission was not required to hold new evidentiary hearings to determine whether a roll-in method which does not interfere with FERC approved entitlements is appropriate in these cases but could use evidence received at previous evidentiary hearings and set rates based on a theory advanced at those hearings.

2. Electricity § 3; Utilities Commission § 46— electric rate cases—remand after U. S. Supreme Court decision—failure to hold new hearing—no violation of statute or due process

Refusal of the Utilities Commission to hold an evidentiary hearing in three general rate cases after the three dockets had been remanded following a decision by the U. S. Supreme Court did not violate N.C.G.S. § 62-81(a) or deny appellants due process where several evidentiary hearings were previously held in these dockets, all parties were allowed to offer evidence and present contentions concerning the proper methods for setting rates, and the Commission set rates based on this evidence.

3. Electricity § 3; Utilities Commission § 36— Nantahala and Tapoco not unified system—binding effect of FERC order—misapprehension of law

A finding by the Utilities Commission that it was bound by an FERC order to hold that Nantahala and Tapoco do not constitute a unified system constituted a misapprehension of the law but was not prejudicial error.

4. Electricity § 3; Utilities Commission § 46— rate orders reversed by state courts—method found unlawful by U. S. Supreme Court—reinstatement of rates originally allowed

Where the Utilities Commission's original orders in three general rate cases were reversed by the North Carolina appellate courts because of the Commission's failure to give adequate consideration to a method which has now been found to be unlawful by the U. S. Supreme Court, it was not error for the Commission to reinstate the rates it originally allowed without further evidentiary hearings.

5. Electricity § 3; Utilities Commission § 36— electric rates—rate of return exceeding request—return not excessive because of refund

The Utilities Commission did not improperly allow Nantahala a rate of return exceeding the amount it requested in its filing, although Nantahala requested a rate of return of 11.53% and the Commission allowed 12.54%, where the Commission ordered a refund based on compensation Nantahala received from Tapoco pursuant to an FERC order, and based on this refund the amount paid by ratepayers was thus not more than the rate requested.

6. Electricity § 3; Utilities Commission § 36— payments by Tapoco to Nantahala—reduction in Nantahala's revenue requirement

The Utilities Commission did not err in showing the amount paid by Tapoco to Nantahala pursuant to an FERC order as a reduction in the amount of an increase in revenue required by Nantahala to produce a 12.54% rate of return rather than treating this item as a reduction of the purchased power expense.

7. Electricity § 3— electric rates—Nantahala's revenue requirement on stand alone basis

The evidence was sufficient for the Utilities Commission to determine Nantahala's revenue requirement on a stand alone basis where the witnesses testified to Nantahala's test year cost of service both on a stand alone and a roll-in basis.

APPEAL by intervenors from orders of the North Carolina Utilities Commission entered 13 November 1987 and 17 February 1988. Heard in the Supreme Court 13 March 1989.

This appeal involves the setting of rates in three general rate cases. This case has been the subject of numerous opinions in the appellate courts of this state and in the United States Supreme Court. The case was commenced on 3 November 1976 with the filing for a rate increase by Nantahala Power and Light Company, Docket No. E-13, Sub. 29. Nantahala and Tapoco, Inc. were at the time this proceeding started wholly owned subsidiaries of Aluminum Company of America (Alcoa). Each of them is engaged in the generation of hydroelectric power in western North Carolina. Tapoco sells power to no one but Alcoa for use in its aluminum operations in Tennessee. Nantahala sells power to the public in six counties in western North Carolina.

At the time the case originated Nantahala, Tapoco, Alcoa and the Tennessee Valley Authority (TVA) had entered into an agreement called the New Fontana Agreement (NFA) under which TVA regulated the generation of power by Nantahala and Tapoco. TVA received all the power generated by the two companies and returned a certain amount per year to them. There was an apportionment agreement between Nantahala and Tapoco which determined how the power which they received from TVA was to be divided between them. The NFA and the apportionment agreement were filed with and approved by the Federal Energy Regulatory Commission (FERC).

At the first hearing before the Utilities Commission the intervenors moved that Tapoco and Alcoa be made parties to the proceedings and that Nantahala and Tapoco be treated as one company for rate making purposes. The Utilities Commission refused to make Tapoco and Alcoa parties and refused to consider the two companies as one utility for rate making purposes. The Court of Appeals at 40 N.C. App. 109, 252 S.E. 2d 516 (1979) reversed the Utilities Commission and remanded the case for consideration of treating the two power companies as one utility for rate making purposes.

This Court at 299 N.C. 432, 263 S.E. 2d 583 (1980) affirmed the part of the opinion of the Court of Appeals which remanded the case for consideration of making Alcoa and Tapoco parties

and of treating the two power companies as one company for rate making purposes. We held that because of the manner in which Nantahala and Tapoco had structured the distribution of power generated by the two companies a consideration of treating the two companies as one seemed particularly appropriate. We said that there was evidence that the companies through the NFA and apportionment agreement had structured the distribution of power to suit Alcoa's industrial needs rather than the needs of Nantahala's customers. We said that a roll-in method of determining the rates of Nantahala's customers under which the two power companies would be treated as one utility for rate making purposes might be appropriate to eliminate any inequities to Nantahala arising from the agreements.

The case was remanded to the Utilities Commission which made Alcoa and Tapoco parties. Each of the corporations was held to be a public utility and after making findings of fact the Commission held that a roll-in method was appropriate to fix retail rates for Nantahala. Under the roll-in method used by the Commission Nantahala and Tapoco were treated as a single integrated company. That is (a) the assets, properties, plants and working capital requirements of the two companies were joined in one rate base; (b) the joint revenues and expenses of the single system were totalled; and (c) the combined system was assigned the rate of return previously approved by the Commission for Nantahala alone. From these three elements, the combined system revenue requirement (expenses + rate base × rate of return) was derived. The combined system cost of service was then allocated between the public load customers in North Carolina and Alcoa, using generally accepted jurisdictional allocation factors in setting rates for other companies which operate in more than one state.

The Court of Appeals at 65 N.C. App. 198, 309 S.E. 2d 473 (1983) rejected the companies' argument that the Commission was in error for not using the NFA and the apportionment agreement in setting rates for Nantahala. The companies contended that these agreements had been approved by the FERC and the Utilities Commission was preempted from questioning them. The Court of Appeals held that the Utilities Commission had not disturbed the entitlements which Nantahala received under the NFA and the apportionment agreement but had calculated in a

proper way the cost to Nantahala of the entitlement power it received.

This Court affirmed the Court of Appeals at 313 N.C. 614, 332 S.E. 2d 397 (1985). We held the Utilities Commission had found that the NFA and the apportionment agreement were structured not for the benefit of the customers of Nantahala but for the benefit of Alcoa. We said that based upon this finding the Commission did not have to use the entitlements received under the agreements in setting rates.

In 1980 Nantahala filed another application for an increase in rates, Docket No. E-13, Sub. 35. In this case the Utilities Commission used a roll-in method in fixing the rates as it had done in the previous case. This method was affirmed by the Court of Appeals at 66 N.C. App. 546, 311 S.E. 2d 619 (1984) and by this Court at 314 N.C. 246, 333 S.E. 2d 217 (1985).

In 1983 Nantahala filed another application for a rate increase in Docket No. E-13, Sub. 44. At this time the NFA and apportionment agreement had been replaced by separate agreements between Tapoco and TVA and Nantahala and TVA. The Utilities Commission found that there were no concealed benefits to Tapoco or Alcoa in the two new agreements and refused to use a roll-in method to set the rates for Nantahala. This Court reversed and remanded at 314 N.C. 122, 333 S.E. 2d 453 (1985). We held that the record did not show there had been such a change in circumstance simply because the NFA and the apportionment agreement had been replaced by the two new agreements that the Utilities Commission could give only minimal consideration to a roll-in.

Our opinion in Sub. 29 was appealed to the United States Supreme Court. That Court at 476 U.S. 953, 90 L.Ed. 2d 943 (1986) reversed. It held that under the filed rate doctrine FERC has the exclusive jurisdiction to set interstate wholesale power rates. It has done so with the NFA and apportionment agreements and we are preempted from questioning the entitlements received by Nantahala under those agreements. The other two judgments of this Court were vacated and remanded to us for further consideration in light of the United States Supreme Court's opinion in Sub. 29. We remanded the three cases at 318 N.C. 277, 278-79, 347 S.E. 2d 459, 460 (1986) for further proceedings consistent with

the opinions filed by this Court but not inconsistent with the opinion of the United States Supreme Court.

While these cases were in litigation in the courts of this state and the United States Supreme Court FERC determined that Nantahala had not received a fair share of power under the apportionment agreement. It held Nantahala should have received 44 million more kwh allocation of power annually than it received. Tapoco was required to pay Nantahala for this amount of power. This decision by FERC was affirmed by the United States Court of Appeals for the Fourth Circuit. *Nantahala Power and Light Co. v. FERC*, 727 F. 2d 1342 (4th Cir. 1984).

On remand the Commission entered identical orders in Sub. 29 and Sub. 35. It found:

> The United States Supreme Court has decided that, for purposes of calculating the rates to be charged Nantahala's North Carolina retail customers, this Commission cannot choose a method of allocation of entitlements and purchased power between Tapoco and Nantahala that differs from the allocation of entitlements and purchased power adopted by Federal Energy Regulatory Commission (FERC). Thus, the United States Supreme Court has determined that this Commission's jurisdictional authority is preempted by federal law.

The Commission concluded the purpose of the roll-in had been to remove inequities to Nantahala in the NFA and apportionment agreements which purpose the United States Supreme Court had found to be improper. The Commission also found it was "not free to allow the intervenors to fashion a new roll-in with a different basis, different mechanics and different results as though the eleven years of history of these cases had not transpired." The Commission calculated the rates which Nantahala was entitled to charge on a stand alone basis in Sub. 29 and Sub. 35 and ordered them into effect. In Sub. 44 the Commission affirmed its prior order except that it retained the cause pending an investigation by FERC to determine the reasonableness of the new exchange agreement to Nantahala.

The intervenors appealed.

Lacy Thornburg, Attorney General, by Richard L. Griffin, Assistant Attorney General, Attorney for Using and Consuming Public, appellant.

Robert Gruber, Executive Director, by James D. Little, Staff Attorney, The Public Staff, Attorneys for Using and Consuming Public, appellant.

Crisp, Davis, Schwentker, Page & Currin, by William T. Crisp and Robert F. Page, for the Counties of Cherokee, Graham, Jackson, Macon and Swain; The Towns of Andrews, Bryson City, Dillsboro, Robbinsville and Sylva; The Tribal Council of the Eastern Band of the Cherokee Indians; and Henry J. Truett, et al., appellants.

Hunton & Williams, by Edward S. Finley, Jr., for Nantahala Power and Light Company, appellee.

LeBoeuf, Lamb, Leiby & MacRae, by Ronald D. Jones and David R. Poe, for Aluminum Company of America and Tapoco, Inc., appellees.

Steve C. Griffith, Jr., Senior Vice President and General Counsel, and Ellen T. Ruff, Deputy General Counsel, for Duke Power Company, Amicus Curiae.

WEBB, Justice.

[1] The appellants-intervenors contend that it was error for the North Carolina Utilities Commission to deny new hearings after the three dockets had been remanded following the decision of the United States Supreme Court. They base this argument on what they say is a misunderstanding by the Commission of the opinion of the United States Supreme Court and the opinions and remand orders of this Court.

The appellants say that a roll-in method for setting rates under which Nantahala and Tapoco are treated as one company has not been prohibited by the United States Supreme Court. They argue that the Utilities Commission should have held a hearing at which evidence could have been received and the Commission could determine whether a roll-in method which does not interfere with the FERC approved entitlements is appropriate in this case. The appellants contend it was error for the Commission

not to consider a roll-in method for setting rates in light of this Court's previous opinions directing it to do so, which the appellants contend have only been abrogated by the opinion of the United States Supreme Court to the extent that any such roll-in will not reallocate low-cost hydro power previously allocated by FERC. The appellants argue further that following the original remands the Commission found that Nantahala and Tapoco constituted one company for rate making purposes and it was error for the Commission to find otherwise after the last remand because this was not required by the opinion of the United States Supreme Court. The appellants argue that even though the Commission may not modify the allocation of low-cost hydro power made by FERC the Commission is not powerless to find that concealed benefits to Alcoa, and concomitant detriments to Nantahala do exist. Such findings would then allow the Commission to affirm its earlier conclusions on Alcoa's total domination of Nantahala so as to apply the roll-in to other areas of cost of service not foreclosed by the opinion of the United States Supreme Court.

The difficulty with the appellants' argument is that the United States Supreme Court has held that the roll-in method which was adopted by the Utilities Commission is preempted by the action of FERC. That roll-in could not have been used by the Commission. Previous opinions by this Court and the Court of Appeals have made it clear that the purpose of the roll-in would be to eliminate any inequities which Nantahala suffered from the NFA and the apportionment agreement. This has now been prohibited by the United States Supreme Court. The Utilities Commission was not required to let the intervenors start again with a new type roll-in.

It was not error for the Commission to use evidence received at previous evidentiary hearings and set rates based on a theory advanced at those hearings rather than starting anew with the parties advancing new theories. The Utilities Commission used a method for setting rates in this case which complies with the statute. We cannot disturb these rates because we might have used a different method. *State ex rel. Utilities Comm. v. Carolina Power and Light Co.*, 320 N.C. 1, 358 S.E. 2d 35 (1987); *Utilities Comm. v. Edmisten*, 291 N.C. 327, 230 S.E. 2d 651 (1976); *Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 189 S.E. 2d 705 (1972).

[2] The appellants contend that this is a general rate case and N.C.G.S. § 62-81(a) provides there must be a trial or hearing in a general rate case. They also say that the refusal by the Utilities Commission to hold an evidentiary hearing deprived them of due process of law under the Fourteenth Amendment to the Constitution of the United States and violated the law of the land clause of the Constitution of North Carolina, Article I, Section 19. The answer to these contentions is that several evidentiary hearings have been held in these dockets. All parties have been allowed to offer evidence and contend for what they consider to be the proper methods for setting rates. The Utilities Commission has set rates based on this evidence.

[3] We take note of a recital in the Commission's Sub. 44 Order to the effect that FERC has found that Nantahala and Tapoco do not constitute a unified system and this finding is binding on the Commission. This finding shows a misapprehension of the law. The Commission was not bound by the FERC order to hold Nantahala and Tapoco do not constitute a unified system. Indeed the United States Supreme Court said at *Nantahala Power and Light v. Thornburg*, 476 U.S. 953, 972, 90 L.Ed. 2d 943, 957 (1986) that

> [t]he validity of [the Commission's] decision to "roll in" the costs of Tapoco and Nantahala is not directly before us. We nonetheless agree . . . that it is at least conceivable that [the Commission] could validly choose to treat Nantahala and Tapoco as a single system for some purposes—for example, with regard to the costs of constructing their facilities.

The Commission's misapprehension of the law, however, does not constitute prejudicial error for two reasons. *See* N.C.G.S. § 62-94(c) (1982 Repl. Vol.). First, the Commission properly concluded that even if they were to find that Nantahala and Tapoco constitute a single unified system this would not affect their conclusion to reject appellants' original roll-in method. Second, and more importantly, the Commission accorded appellants sufficient opportunity to present an alternative roll-in method consistent with the opinion of the United States Supreme Court, yet they failed to do so. In a 25 February 1987 Order Requiring Proposed Orders the Commission said that proposed orders requesting further hearings should set forth the justification for the hearings

and the proposed method for setting rates. The appellants' response to this request stated in relevant part:

> We shall, relying upon the present records, merely make adjustments that respond appropriately to the defects noted in the decision of the United States Supreme Court ("*Thornburg*") and perhaps support different rates of return.

Given such a vague response to the Commission's request, it is neither surprising nor improper that the Commission's Sub. 44 Order concluded: "further hearings to consider other ratemaking concepts, which are not a part of the record in this docket, are neither timely nor appropriate and are not in the public interest." *See Utilities Commission v. Area Development, Inc.*, 257 N.C. 560, 569, 126 S.E. 2d 325, 332 (1962). (The Commission "may enlarge or restrict the inquiry before it unless a party is clearly prejudiced thereby.")

[4] The intervenors also contend that in each of the three dockets the Commission did not properly calculate the rates. In Sub. 29 and Sub. 44 the Commission reinstated the rates it had allowed prior to reversal by the Court of Appeals and by this Court but required in Sub. 29 that the rates be reduced by the amount Nantahala received from Tapoco as a result of the FERC order in regard to the apportionment agreement. It retained jurisdiction to lower the rate in Sub. 44 pending a final decision by FERC in regard to Nantahala's agreement with TVA. The intervenors contend it was error to reinstate these rates without further hearings after they had been reversed by the Court of Appeals and this Court. As we have said, the original orders were reversed because of the Commission's failure to give adequate consideration to a method which has now been found to be unlawful by the United States Supreme Court. We cannot hold it was error for the Utilities Commission to reinstate rates which we did not otherwise find to be in error.

[5] The intervenors' argument as to the Sub. 35 docket is more substantial. In its original filing Nantahala asked for an increase in revenue which would give it a return on rate base of 11.53%. There was evidence and the Commission found in the hearing from which the roll-in method was adopted that Nantahala was entitled to a rate of return of 12.54%. The Commission allowed this rate of return in its final order. This would have had the ef-

fect of giving Nantahala more than it requested in its filing if Nantahala had not been required to reduce its rates by the amount received from Tapoco based on the FERC order. The intervenors argue that Nantahala cannot be granted a rate increase of more than it asked and more than notice was given that it would seek. The fallacy in this argument is that the rate was not more than Nantahala requested. The Utilities Commission ordered a refund based on the compensation Nantahala received from Tapoco. Based on this refund the rate payers did not have to pay as much as they would have paid had the increase in rates been allowed in its entirety. We might not have allowed the rate of return which was allowed by the Utilities Commission but we cannot hold the Commission exceeded its statutory authority by doing so.

[6] The appellants contend it was error for the Commission to show the amount paid by Tapoco to Nantahala as a result of the FERC order as a reduction in the amount of the increase required to produce a 12.54% return. They say that these payments from Tapoco represent a decrease in Nantahala's purchased power expense which means Nantahala's operating revenues, purchased power and gross receipt taxes should be reduced and as reduced should be the starting point for showing the effect of Nantahala's requested rate increase. If the payments from Tapoco to Nantahala had been treated as contended for by the intervenors it would have had the effect of changing other items in the rate structure such as the operating income for return which would have resulted in lower rates. We cannot hold the Commission was in error for not treating this item as a reduction of the purchased power expense. The cost of purchased power remained the same after the FERC order. Tapoco made its payments to Nantahala without affecting the purchase power agreement between Nantahala and TVA. The Commission was not required to treat this item as contended for by the appellants.

[7] Finally, the appellants contend there was not sufficient evidence for the Commission to determine Nantahala's revenue requirement. They base this argument on what they say was testimony at the hearing which was designed to support a roll-in rate. They say that this testimony will not support a rate for Nantahala on a stand alone basis. As we read this testimony the witnesses testified to Nantahala's test year cost of service both as

a stand alone utility and on the basis of a roll-in. This is evidence to support the Commission's findings.

The Utilities Commission has used a method for setting rates which is within the parameters of the statute. We cannot disturb its order. *State ex rel. Utilities Comm. v. Carolina Power and Light Co.*, 320 N.C. 1, 358 S.E. 2d 35.

Affirmed.

STATE OF NORTH CAROLINA v. WILLIAM JAMES YOUNG

No. 153A88

(Filed 8 June 1989)

1. **Homicide § 32.1— first degree murder verdict—premeditation and deliberation—failure to instruct on involuntary manslaughter as harmless error**

Assuming arguendo that the trial court in a first degree murder case erred in failing to instruct the jury to consider a possible verdict of the lesser included offense of involuntary manslaughter, the error was harmless where the trial court gave correct instructions as to possible verdicts on murder in the first and second degrees and the jury found defendant guilty of the greater crime of murder in the first degree upon a theory of premeditation and deliberation. Prior decisions are disavowed to the extent that they state or imply that a verdict of first degree murder in such situations does not render harmless the failure to give instructions on involuntary manslaughter or errors made in giving such instructions.

2. **Criminal Law § 165— expressions of opinion by trial court—failure to object—right of appeal**

The statutory prohibitions against expressions of opinion by the trial court contained in N.C.G.S. §§ 15A-1222 and 15A-1232 are mandatory, and a defendant's failure to object to alleged expressions of opinion in violation of those statutes does not preclude his raising the issue on appeal.

3. **Criminal Law § 114.2— instructions—evidence tending to show defendant confessed to crime charged—no expression of opinion**

The trial court in a first degree murder case did not express an opinion on the evidence by instructing the jury that there was evidence in the case which "tends to show" that defendant "confessed that he committed the crime charged" where evidence had been introduced that defendant made a statement to officers which, if believed by the jury, was sufficient to support a verdict finding that defendant intentionally shot his wife after premeditation and deliberation and was thus guilty of first degree murder.

4. Criminal Law § 114.2— instructions—evidence tending to show defendant confessed to crime charged—no expression of opinion that defendant confessed

The trial court's instruction in a first degree murder case that there was evidence tending to show that defendant confessed to the crime charged did not amount to an expression of opinion that defendant had in fact confessed where further instructions made it clear that the court left it entirely for the jury to determine whether the evidence showed that defendant in fact had confessed.

Justice WEBB concurring.

APPEAL of right pursuant to N.C.G.S. § 7A-27 from judgment entered by *Davis, J.*, in the Superior Court, WILKES County, on 12 November 1987, sentencing the defendant to life imprisonment for murder in the first degree. Heard in the Supreme Court on 13 February 1989.

Lacy H. Thornburg, Attorney General, by John H. Watters, Assistant 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 was tried in a noncapital trial upon a proper indictment charging him with the murder of his wife. The jury was instructed on possible verdicts of first degree murder, second degree murder, or not guilty. The jury found the defendant guilty of first degree murder on the theory that the killing was premeditated and deliberate, the only theory upon which first degree murder was submitted.

On appeal, the defendant contends that the trial court committed prejudicial error when it refused to instruct on involuntary manslaughter and that this error was not cured by the jury's verdict finding him guilty of first degree murder. Further, the defendant contends that the trial court's instruction which referred to evidence tending to show that the defendant had "confessed" to the crime charged was error requiring a new trial, notwithstanding his failure to object. We conclude, however, that the defendant's trial was free of prejudicial error.

The evidence presented at trial tended to show that the defendant began drinking liquor early in the afternoon of 25 July 1987 and drank liquor heavily throughout that afternoon and early evening. After a cookout at his relatives' house, during which the defendant became sick, the defendant and his wife and baby daughter returned to their residence, where the defendant took a brief nap. Upon awakening, the defendant went to his car and finished a fifth of liquor, then re-entered the residence.

The defendant decided that he needed to drive to the store to buy beer. A heated argument ensued with his wife, who refused to give him his car keys because she said he was too drunk to drive. During the argument, the defendant selected a loaded .30-.30 rifle from his gun rack, cocked it and pointed it at his wife's face, demanding his keys. The gun went off, and the defendant's wife was killed instantly as a .30-.30 bullet fired at close range entered her right eye, traveled straight through her brain and exited the back of her skull.

The defendant left the residence with his daughter and went to a neighbor's house. The neighbor gave them a ride to the defendant's father's house, where the defendant left his daughter with his sister and drove away on a moped. Soon thereafter, the defendant turned himself in to authorities.

The defendant contended at trial that the shooting was an accident. He requested jury instructions on the lesser included offenses of voluntary and involuntary manslaughter, which the trial court refused to give. However, the trial court did give an instruction on the defense of accident.

On appeal, the defendant concedes that the evidence would not support a verdict convicting him of voluntary manslaughter. He maintains, however, that the evidence would support a finding that the rifle went off accidentally during the commission of an assault by pointing a gun, which he argues would in turn support a verdict finding him guilty of involuntary manslaughter. He assigns as error the trial court's failure to give an involuntary manslaughter instruction and argues that the error was not cured by the jury's verdict convicting him of first degree murder.

Involuntary manslaughter is a lesser included offense of second degree murder. *State v. Greene*, 314 N.C. 649, 336 S.E. 2d 87

(1985). However, the defendant's assertion that the evidence justified instructing the jury to consider a possible verdict convicting him of the lesser included offense of involuntary manslaughter in the present case is problematic. *See, e.g., State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978) (specific intent to kill not a necessary element of second degree murder, and an intentional act is sufficient to supply the required malice if it reveals recklessness of consequences and a mind devoid of social duty, even though there may be no intent to injure). *See, also, State v. Snyder*, 311 N.C. 391, 317 S.E. 2d 394 (1984) (malice for conviction of second degree murder where deaths resulted from automobile wreck caused by reckless driving of a drunken driver).

[1] We find it unnecessary to decide in the present case whether the trial court's failure to instruct the jury to consider a possible verdict for the lesser included offense of involuntary manslaughter was error. Assuming *arguendo* that the trial court erred in this regard, the error was harmless because the trial court gave correct instructions as to possible verdicts on murder in the first and second degrees and the jury found the defendant guilty of the greater crime of murder in the first degree upon a theory of premeditation and deliberation. *State v. Whitley*, 311 N.C. 656, 667, 319 S.E. 2d 584, 591 (1984). *Cf. State v. Freeman*, 275 N.C. 662, 170 S.E. 2d 461 (1969) (reviewing authorities from other states to the same effect). In so holding, we expressly disavow prior decisions of this Court to the extent that they state or imply that a verdict of first degree murder in such situations does not render the failure to give instructions on involuntary manslaughter, or errors made in giving such instructions, harmless. *E.g., State v. Moore*, 275 N.C. 198, 166 S.E. 2d 652 (1969); *State v. McNeill*, 229 N.C. 377, 49 S.E. 2d 733 (1948); *State v. Childress*, 228 N.C. 208, 45 S.E. 2d 42 (1947); *State v. Burnette*, 213 N.C. 153, 195 S.E. 356 (1938); *State v. Lee*, 206 N.C. 472, 174 S.E. 288 (1934); *State v. Robinson*, 188 N.C. 784, 125 S.E. 617 (1924); *State v. Williams*, 185 N.C. 685, 116 S.E. 736 (1923); *State v. Thomas*, 184 N.C. 757, 114 S.E. 834 (1922); *State v. Merrick*, 171 N.C. 788, 88 S.E. 501 (1916).

The defendant recognizes that this Court has previously held that errors in voluntary manslaughter instructions are deemed harmless when the jury has chosen to convict for first degree murder rather than second degree murder. *E.g., State v. Freeman*, 275 N.C. 662, 667, 170 S.E. 2d 461, 464 (1969). The defendant

argues, however, that the evidence in this case would support a finding that he did not intentionally kill his wife and that the lack of an involuntary manslaughter instruction, therefore, deprived the jury of any opportunity to accept his evidence that the killing was unintentional. We do not agree.

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. *State v. Johnson*, 317 N.C. 193, 344 S.E. 2d 775 (1986); *State v. Judge*, 308 N.C. 658, 303 S.E. 2d 817 (1983); *State v. Bush*, 307 N.C. 152, 297 S.E. 2d 563 (1982). "Premeditation" is defined as thought beforehand, for some length of time, however short. *Id.* "Deliberation" means an intent to kill carried out by the defendant in a cool state of blood. *Id.* A *specific intent to kill* is a necessary constituent of the elements of premeditation and deliberation. *State v. Propst*, 274 N.C. 62, 161 S.E. 2d 560 (1968). Proof of premeditation and deliberation is proof of that intent. *State v. Quesinberry*, 319 N.C. 228, 354 S.E. 2d 446 (1987).

Second degree murder is the unlawful killing of a human being with malice but without premeditation and deliberation. *State v. Snyder*, 311 N.C. 391, 317 S.E. 2d 394 (1984); *State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978). Although second degree murder does not exist absent some intentional *act* sufficient to show malice and which proximately causes death, an intent *to kill* is not a necessary element of that crime. *Id.*

The jury in the present case was instructed that it could not return a verdict finding the defendant guilty of first degree murder unless it found beyond a reasonable doubt that he specifically intended to kill the victim, that he formed the intent for some amount of time beforehand and that he carried out that intent in a cool state of mind. Further, the trial court instructed the jury that it could return a verdict convicting the defendant of second degree murder if it found that the defendant acted without a specific intent to kill, premeditation or deliberation. In reaching its verdict convicting the defendant of first rather than second degree murder, the jury found beyond a reasonable doubt that he had the specific intent to kill his wife and, necessarily, rejected the possibility that the killing was unintentional. *See State v. Bush*, 307 N.C. at 164, 297 S.E. 2d at 571 ("In finding the defendant guilty beyond a reasonable doubt of the willful, deliberate and

premeditated killing of the victim, the jury . . . necessarily rejected *beyond a reasonable doubt* the possibility that the defendant acted in the heat of passion."). Therefore, the jury verdict finding the defendant guilty of first degree murder precludes the possibility that the same jury might have found him guilty of involuntary manslaughter on the ground that the killing was unintentional, even if it had been given an instruction on that lesser included crime. *Cf. State v. Freeman*, 275 N.C. at 668, 170 S.E. 2d at 465 (reviewing authorities from other jurisdictions to the same effect). This assignment of error is without merit and is rejected.

By his other assignment of error, the defendant contends that the trial court committed reversible error by expressing an opinion on the evidence during its instructions to the jury. The defendant argues that this error requires a new trial, notwithstanding his failure to object. The State argues, on the other hand, that due to the failure of the defendant to object, appellate review of this assignment is limited under *State v. Loftin*, 322 N.C. 375, 368 S.E. 2d 613 (1988) and *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983) to the issue of whether the trial court committed "plain error."

[2] The statutory prohibitions against expressions of opinion by the trial court contained in N.C.G.S. § 15A-1222 and N.C.G.S. § 15A-1232 are mandatory. A defendant's failure to object to alleged expressions of opinion by the trial court in violation of those statutes does not preclude his raising the issue on appeal. *See State v. Ashe*, 314 N.C. 28, 331 S.E. 2d 652 (1985); *State v. Bryant*, 189 N.C. 112, 126 S.E. 107 (1925) (decided under former N.C.G.S. § 1-180). As a result, we turn to a consideration of the issue presented by this assignment of error.

During its charge to the jury, the trial court gave the following instructions, taken from the North Carolina Pattern Jury Instructions.

> There is evidence in this case which tends to show that the defendant confessed that he committed the crime charged in this case. Now, if you find that the defendant made that confession, then you should consider all the circumstances under which it was made in determining whether it was a truthful confession and the weight which you will give to it.

See N.C.P.I.—Crim. 104.70 (1970). Thereafter, the trial court gave instructions concerning the credibility of witnesses, the possible effect of intoxication on intent, and the defense of accident. The trial court next stated, "Now, the defendant in this case, members of the jury, has been accused of first degree murder." The trial court then instructed on the elements of first and second degree murder.

[3] The defendant, relying upon *State v. Bray*, 37 N.C. App. 43, 245 S.E. 2d 190, *disc. rev. denied*, 295 N.C. 553, 248 S.E. 2d 730 (1978), contends that the trial court's instructions concerning evidence "tending to show" that he had "confessed" to the crime charged, together with its subsequent statement that he was accused of first degree murder, amounted to an expression of opinion on the evidence in violation of the statutes. We disagree.

The use of the words "tending to show" or "tends to show" in reviewing the evidence does not constitute an expression of the trial court's opinion on the evidence. *State v. Allen*, 301 N.C. 489, 272 S.E. 2d 116 (1980); *State v. Huggins*, 269 N.C. 752, 153 S.E. 2d 475 (1967). Nor did the trial court's statement that the evidence tended to show that the defendant had "confessed" that he "committed the crime charged" amount to an expression of opinion by the trial court, *because* evidence had been introduced which in fact tended to show that the defendant had confessed and to the *crime charged*, first degree murder.

In the present case, evidence was introduced tending to show that the defendant was interviewed for two and one-half hours by officers of the Wilkes County Sheriff's Department, during which time he made a statement to the effect that he had been drinking heavily since about 1:00 p.m. on the date of the killing. The defendant had finished a fifth of liquor at approximately 3:00 p.m. when Barry Blankenship and his wife, Linda, came to the defendant's home. The defendant and Blankenship left at about 4:00 p.m. and got another fifth of liquor. They picked up their wives and other family members and then went to Barry Blankenship's house for a cookout. The defendant became ill at the cookout, and he and his wife and small child went home between 6:00 p.m. and 7:00 p.m.

In his statement to the officers, the defendant described the events occurring thereafter and leading up to the killing of his wife as follows:

> I laid down and took a nap. I got back up about fifteen to thirty minutes later. I went to the car and finished the other fifth off. . . . Then I went back inside the house.
>
> No one was there except myself, wife, Sarah and daughter, one year old, Linda. I told my wife, Sarah, "I want my damn keys." She told me, "You ain't getting your damn keys. You're too drunk." Then I told her she was a hussy, and "I want my damn keys right now." She said, "You're too drunk. You're ain't getting your damn keys, you son-of-a-bitch." Then she went into the bedroom and I hollered at her again and told her, "I want my damn keys and I want them now." Then she said, "You're too drunk and you ain't getting your keys."
>
> [T]hen I reached up and got the 30-30 rifle out of the gun rack. There were two other guns in the rack, a shot gun and a .22 rifle but I knew that they weren't loaded and I knowed that the 30-30 was loaded. At first, I had the gun pointed at the T.V. and cocked it with my thumb. Then I turned around and pointed the gun in her face and said, "I want my damn keys now."
>
> I was about five feet from her. The barrel of the gun was about two feet from her, that is, when the gun went off. We were arguing about the keys because I wanted to go get some beer . . . because I knew the liquor store was closed by now.
>
> Then I put the gun back in the rack, looked at my wife; turned off the T.V., got the baby and ran to my neighbor's house. I don't know his name. I told him that the baby was sick and asked him to take me to my daddy's house, and I would get my daddy to take the baby on to the doctor. I did not call the ambulance or sheriff or anyone else for help. I thought she was dead, but I wasn't sure.

We conclude that the foregoing statement by the defendant, if believed by the jury, was sufficient to support a verdict convicting him of first degree murder. If the jury believed the defend-

ant's statement, it would have been justified in finding, as he clearly admitted, that he shot his wife. Further, his statement would support a jury finding that he did so with the specific intent to kill her and with premeditation and deliberation.

We have often stated that premeditation and deliberation refer to processes of the mind and, therefore, must almost always be proved, if at all, by circumstantial evidence. *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). Included among the circumstances to be considered in determining whether a killing was done with premeditation and deliberation are the conduct and statements of the defendant before and after the killing, threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased, and ill-will or previous difficulty between the parties. *State v. Gladden*, 315 N.C. 398, 340 S.E. 2d 673, *cert. denied*, 479 U.S. 871, 93 L.Ed. 2d 166 (1986).

If the jury believed the defendant's statement, it reasonably could find that he intentionally selected a loaded high-powered rifle from his gun rack, rather than one of two unloaded firearms, because he "knew they weren't loaded and . . . that the 30-30 was loaded." While arguing with his wife because she would not give him his keys so that he could go to buy more alcoholic beverages, the defendant intentionally cocked the rifle with his thumb, pointed it at his wife's head at close range and shot her. He thought his wife was dead but he was not sure. Nevertheless, he made no attempt to determine whether she was dead or seek any assistance for her. Instead, he turned off his television and left the house taking his child with him.

The defendant's statement to the officers, taken in light of that part indicating that "the gun went off," would support a finding that, after the defendant intentionally selected and cocked the loaded rifle during the argument and intentionally pointed it at his wife's head at close range, it was discharged accidentally. The defendant's statement would, however, support an equally reasonable finding that the defendant intentionally shot his wife after premeditation and deliberation. Therefore, the defendant's statement to the officers was sufficient to support his conviction for first degree murder, and the trial court did not err in stating that

there was evidence "tending to show" that he had "confessed that he committed the crime charged in this case."

[4] Further, we conclude that the trial court's instructions in this case did not amount to an expression of opinion that the defendant had *in fact* "confessed." In *Bray*, our Court of Appeals expressed the view that by using the terms "confessed" and "confession," the trial court had inadvertently conveyed an impression to the jury that the court was of the opinion that the evidence showed the defendant in fact "had 'confessed,' that he had admitted the truth of the charge against him." 37 N.C. App. at 46, 245 S.E. 2d at 192. We conclude, however, that those terms as used in the context of the instructions given in the present case did not amount to an expression of opinion by the trial court that the defendant in fact had confessed. The trial court's statement that there was evidence tending to show that the defendant had confessed was followed immediately in this case by the trial court's instruction: "Now, *if you find* that the defendant made that confession, *then* you should consider all the circumstances under which it was made in determining whether it was a truthful confession and the weight which you will give to it." (Emphasis added.) This instruction made it clear that, although there was evidence tending to show that the defendant had confessed, the trial court left it entirely for the jury to determine whether the evidence showed that the defendant in fact had confessed.

The pattern jury instruction concerning confessions, given by the trial court in this case, should be used with great caution. The instruction should not be given in cases in which the defendant has made a statement which is only of a generally inculpatory nature. When evidence is introduced which would support a finding that the defendant in fact has made a statement admitting his guilt of the crime charged, however, the instruction is properly given. For the foregoing reasons, we conclude that this was such a case and that the trial court did not err in instructing the jury in this regard.

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

No error.

Justice WEBB concurring.

I concur in the result. I continue to adhere, however, to the reasoning of my concurring opinion in *State v. Lane*, 77 N.C. App. 741, 746, 336 S.E. 2d 410, 412 (1985). For that reason I do not believe involuntary manslaughter is a lesser included offense of first degree murder and it was not error not to charge the jury on involuntary manslaughter.

PIEDMONT FORD TRUCK SALE, INC., LAMB DISTRIBUTING COMPANY, LIMITORQUE COMPANY, TRIAD FREIGHTLINER OF GREENSBORO, INC., GEORGE H. SHARP, RUDOLPH C. AND GERALDINE S. NUNN, MARY C. BYRD, J. V. DAVENPORT, MARGARET L. NEEDHAM, FRANCES L. DEVER, HALLIE K. BURGESS, DOROTHY MARIANI, MARIE F. HANCOCK, JAMES S. AND HARRIET W. WILSON, DONALD D. HILL, LINDA K. JONES, EVA THOMPSON, OLLIE F. JOHNSON, DAVEY L. KENNEDY II, TERESA O. KENNEDY, JOHN D. AND LOUISE M. LEWIS, H. AUSTIN AND HELEN D. PHILLIPS, AND F. STUART KENNEDY v. CITY OF GREENSBORO

No. 394PA88

(Filed 8 June 1989)

1. **Constitutional Law § 20; Municipal Corporations § 2— annexation—other property similarly situated not annexed—no equal protection violation**

The Fourteenth Amendment to the United States Constitution and Art. I, Sec. 19 of the N. C. Constitution were not violated in the annexation of plaintiffs' property where property similarly situated was not also annexed.

2. **Statutes § 2.5— annexation—solid waste collection—not a local act**

The Court of Appeals erroneously reversed superior court dismissal of plaintiffs' challenge to annexation by defendant on the ground that Session Laws 1986, Chapter 818, Sec. 3 violates Article II, Sec. 24 of the Constitution of North Carolina as a local act relating to sanitation by requiring that municipal services be rendered to annexed territory in accordance with N.C.G.S. § 160A-49.3. That statute provides that, under certain conditions, if a solid waste collection firm has been providing services to the residents of the newly annexed area, the city must contract with the firm to continue providing services or pay damages to the firm. It does not subject the annexed area to different treatment than it would have faced if the city had annexed the area under the general annexation law, but assures that it will receive the same treatment.

APPEAL by defendant pursuant to N.C.G.S. § 7A-31 from, and on discretionary review of, the decision of the Court of Appeals

reported at 90 N.C. App. 692, 370 S.E. 2d 262 (1988), affirming in part and reversing in part the judgment of dismissal entered by *Rousseau, J.*, at the 16 November 1987 Session of Superior Court, GUILFORD County. Heard in the Supreme Court 15 February 1989.

This case grew from an annexation statute adopted by the General Assembly in 1986 entitled S.L. 1986, Chapter 818. The statute provides that certain land contiguous to the City of Greensboro on its western boundary be annexed to the City. The act also provides that "municipal services shall be rendered to such territory in accordance with the requirements of G.S. 160A-47; and the provisions of G.S. 160A-49.1 governing contracts with rural fire departments and the provisions of G.S. 160A-49.3 governing contracts with private solid waste collection firms shall be applicable to such territory."

The plaintiffs, who are property owners of a part of the annexed property, brought this action seeking declaratory relief and an injunction. The plaintiffs alleged the new city boundary omits property similarly situated and like the plaintiffs' property. The plaintiffs alleged that the omitted property has "the same or similar zoning, with the same or similar degree of development, with the same or similar uses, and with similar tax valuation as the property of Plaintiffs." The plaintiffs alleged further that Chapter 818 is without a rational basis and is arbitrary and capricious and that Chapter 818 violates the Fourteenth Amendment to the Constitution of the United States and Article I, Sec. 19 of the Constitution of North Carolina.

In another claim the plaintiffs alleged that Chapter 818 violated Article II, Sec. 24 of the Constitution of North Carolina because it is a local act regarding water, sewer and sanitation services to the annexed area.

In a third claim the plaintiffs alleged that Chapter 818 violates Article XIV, Sec. 3 of the Constitution of North Carolina because it "is a local act incorporating by reference provisions that are exclusively the subject matter of general law." In a fourth claim the plaintiffs alleged that Chapter 818 violates the Fourteenth Amendment to the United States Constitution and Article I, Sec. 19 of the Constitution of North Carolina because it "results in the imposition of burdens on Plaintiffs, including without limitation, increased taxes, increased license fees, increased

assessments, and increased regulation concerning water, sewer, sanitation and safety procedures" which make the benefits to the plaintiffs outweighed by the burdens.

The superior court dismissed the action pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6). The Court of Appeals in *Piedmont Ford Truck Sales v. City of Greensboro*, 90 N.C. App. 692, 370 S.E. 2d 262 (1988), held that the section of the statute in regard to solid waste collection violates Article II, Section 24 of the Constitution of North Carolina but it is severable from the rest of the statute. The Court of Appeals reversed the dismissal of the claim that the plaintiffs have been deprived of equal protection of the law on the ground that similarly situated property had not been annexed. The Court of Appeals remanded the case to the superior court to determine this constitutional question using a lower tier analysis.

The defendant appealed and we allowed discretionary review on 3 November 1988.

Patton, Boggs & Blow, by C. Allen Foster, Robert G. McIver and Ralph W. Gorrell, for plaintiff appellees.

Linda A. Miles and Becky Jo Peterson-Buie for defendant appellant.

Lacy H. Thornburg, Attorney General, by Charles J. Murray, Special Deputy Attorney General, for the State intervenor.

WEBB, Justice.

[1] We deal first with the plaintiffs' claim that the Fourteenth Amendment to the Constitution of the United States and Article I, Section 19 of the Constitution of North Carolina have been violated because their property has been annexed to the City of Greensboro while similar property adjacent to their property has not been annexed. Article VII, Sec. 1 of the Constitution of North Carolina provides that the General Assembly shall fix the boundaries of the cities of this state. The General Assembly has by N.C.G.S. § 160A, Article 4A provided by statute of general application a method for extending the boundaries of cities but all parties to this action agree that the General Assembly may by special act set the boundaries.

The extension of boundaries of cities has been held to be a political decision which is not protected by the United States Constitution or the Constitution of North Carolina. *Hunter v. Pittsburgh*, 207 U.S. 161, 52 L.Ed. 151 (1907); *Lutterloh v. Fayetteville*, 149 N.C. 65, 62 S.E. 758 (1908). In *Gomillion v. Lightfoot*, 364 U.S. 339, 5 L.Ed. 2d 110 (1960), the United States Supreme Court held that a change in the boundaries of Tuskegee, Alabama, by the legislature of that state violated the Fifteenth Amendment to the Constitution of the United States because it deprived virtually all the black citizens of Tuskegee of the right to vote in municipal elections.

The constitutionality of the extension of city boundaries has been before this Court and the Court of Appeals in several cases. In *Texfi Industries v. City of Fayetteville*, 301 N.C. 1, 269 S.E. 2d 142 (1980), we upheld an annexation statute against a due process and equal protection challenge based on what the plaintiffs contended was inadequate notice of the annexation proceedings and the prohibition of the plaintiff property owner from voting on the annexation because it was a corporation. In *Abbott v. Town of Highlands*, 52 N.C. App. 69, 277 S.E. 2d 820, *disc. rev. denied*, 303 N.C. 710, 283 S.E. 2d 136 (1981), the Court of Appeals upheld a local act of the General Assembly which annexed land to the Town of Highlands. In that case the plaintiffs contended they had been deprived of the equal protection of the law under the Fourteenth Amendment to the Constitution of the United States and Article I, Sec. 19 of the Constitution of North Carolina. The plaintiffs attacked the act on two grounds, that it did not provide them with sewer services and that a golf course which was surrounded by the town was not annexed. The Court of Appeals said that there was not a denial of equal protection because not all the original residents of the town had sewer services and the failure to annex the golf course did not affect the property owners in the annexed area differently from other property owners in the town. In *Forsyth Citizens v. City of Winston-Salem*, 67 N.C. App. 164, 312 S.E. 2d 517, *disc. rev. denied*, 310 N.C. 743, 315 S.E. 2d 701 (1984), the Court of Appeals, relying on *In re Annexation Ordinance*, 303 N.C. 220, 278 S.E. 2d 224 (1981), and other cases held that the annexation statute does not violate the due process clause of the Fourteenth Amendment. The Court recognized in that case that annexations are subject to judicial review if the

challenge is based on allegations that the annexation results in racial discrimination or is an infringement on voting rights.

We believe our cases and the federal cases hold that annexation is a legislative decision with which the courts may not interfere unless the complaining party is deprived by the annexation of some constitutional right. In *Texfi*, *Abbott*, and *Forsyth Citizens*, the courts examined the claims of the plaintiffs and determined they did not allege a constitutional right had been violated. In *Texfi* and *Abbott* the courts used a lower tier analysis which is appropriate when neither an allegation of a violation of a fundamental right nor a classification upon some suspect basis was alleged to have been made. In *Forsyth Citizens* there was not an allegation of the violation of a constitutional right other than that the annexation statute, N.C.G.S. Chapter 160A, Art. 4A, part 3 violates the United States Constitution for not affording property owners due process of law because under the statute the courts could not pass on the reasonableness of an annexation. The Court of Appeals held that this did not deprive the plaintiffs of due process of law. The Court of Appeals in *Forsyth Citizens* was not called upon to pass upon any other constitutional question and there was no need for it to apply the tests which were used in *Texfi* and *Abbott*. It did acknowledge that the annexation would have been subject to constitutional review if the challenge to the annexation had been based on allegations of racial discrimination or the infringement of voting rights. We do not believe, read in this light that, as the Court of Appeals said, *Abbott* and *Forsyth Citizens* are inconsistent.

In this case the plaintiffs' only claim to the deprivation of a constitutional right is that they were denied the equal protection of the law because Chapter 818 does not annex other "property similarly situated . . . with the same or similar zoning, with the same or similar degree of development, with the same or similar uses, and with similar tax valuation as the property of Plaintiffs." The plaintiffs have cited no authority and we can find none that holds that the equal protection clause of the federal or state constitution requires that other similar land be annexed when municipal boundaries are extended. It would be inconsistent with Article VII, Sec. 1 of the Constitution of North Carolina which provides that the General Assembly shall fix the boundaries of cities if we were to so hold. It would also be inconsistent with

Hunter v. Pittsburgh, 207 U.S. 161, 52 L.Ed. 151 and *Lutterloh v. Fayetteville*, 149 N.C. 65, 62 S.E. 758. We hold it is not a denial of the equal protection of the law for a city to annex land without annexing other land similarly situated. It was error for the Court of Appeals to remand the case for a hearing on this question.

[2] The plaintiffs also contend that Sec. 3 of Chapter 818 violates Article II, Sec. 24(1)(a) of the Constitution of North Carolina. Sec. 3 of Chapter 818 provides in part:

> [M]unicipal services shall be rendered to such territory in accordance with the requirements of G.S. 160A-47; and the provisions of G.S. 160A-49.1 governing contracts with rural fire departments and the provisions of G.S. 160A-49.3 governing contracts with private solid waste collection firms shall be applicable to such territory.

Article II, Sec. 24 of the Constitution of North Carolina provides:

> (1) *Prohibited subjects.* The General Assembly shall not enact any local, private, or special act or resolution:
>
> (a) Relating to health, sanitation, and the abatement of nuisances. . . .

The plaintiffs contend Chapter 818 violates Article II, Sec. 24(1)(a) of the Constitution of North Carolina because the provision regarding solid waste collection mandates the use of specific methods and procedures for implementing health and sanitation services. We begin our discussion of this question by quoting from *Matthews v. Blowing Rock*, 207 N.C. 450, 177 S.E. 429 (1934). In that case the plaintiffs alleged that a local act of the General Assembly which extended the boundaries of Blowing Rock violated the provision of our state constitution which proscribed the General Assembly from adopting local acts "authorizing the laying out, opening, altering, maintaining, or discontinuing of highways, streets or alleys." In that case the local act said that streets within the annexed area should "be kept up and maintained by said town, ..." This Court held that the plaintiff did not have standing to sue but said:

> We would not have it understood, however, that we intimate that if the complaint had contained sufficient allegations to the effect that taxes had been levied against his

> property to lay out and maintain highways and streets, that the plaintiff could maintain this action, as the unlimited power in the General Assembly to provide by statute for the creation and extension of corporate limits of municipal corporations, would seem to include the right to vest in such municipal corporations the authority to levy taxes to lay out and maintain highways and streets within such limits, since they are essential to the existence of such corporations.

Id. at 452, 177 S.E. at 430.

N.C.G.S. §§ 160A-47, 160A-49.1 and 160A-49.3 are a part of Article 4A of Chapter 160 of the General Statutes of North Carolina and provide for the extension of municipal services to newly annexed areas of cities when the annexation occurs under the provision of the general law providing for annexation. The General Assembly has made these provisions applicable to this annexation by local act. N.C.G.S. § 160A-49.3 provides for the providing of solid waste collection in the annexed areas and it is this part of Chapter 818 which the plaintiffs contend is a local act relating to sanitation in violation of our state constitution.

N.C.G.S. § 160A-49.3 provides that under certain conditions if a solid waste collection firm has been providing services to the residents of the newly annexed area a city must contract with the firm to continue providing services or pay damages to the firm. The effect of Chapter 818 is to make a statute of statewide application applicable to the City of Greensboro in an annexation by local act. It does not subject the annexed area to a different treatment than it would have faced if the City had annexed the area under the general annexation law but assures that it will receive the same treatment. The purpose of Article II, Sec. 24 of the Constitution of North Carolina is to free the General Assembly of petty detail in adopting laws and to require uniform application of the law. *Idol v. Street*, 233 N.C. 730, 65 S.E. 2d 313 (1951); *Board of Health v. Comrs. of Nash*, 220 N.C. 140, 16 S.E. 2d 677 (1941).

Gaskill v. Costlow, 270 N.C. 686, 155 S.E. 2d 148 (1967), upon which the plaintiffs rely, is not helpful to them. In that case we held the petitioners were barred from attacking a local act which allowed the Town of Beaufort to extend its limits without providing sewer services otherwise required under the general annexation law. The sole purpose of the local act in *Gaskill* was to

exempt the Town of Beaufort from the application of a statewide law. The provision of Chapter 818 regarding solid waste collection is a small part of the chapter and it provides that Greensboro shall comply with the general law in regard to annexations.

We hold it was error for the Court of Appeals to reverse the superior court on the ground that Chapter 818, Sec. 3 violates Article II, Sec. 24 of the Constitution of North Carolina.

The Court of Appeals affirmed the dismissal of the third and fourth claims. The plaintiff did not appeal from this part of the opinion of the Court of Appeals and the propriety of the dismissal of these claims by the superior court is not before us. N.C.R. App. P. 10.

We reverse and remand for remand to the Superior Court of Guilford County for the reinstatement of the judgment dismissing the action.

Reversed and remanded.

STATE OF NORTH CAROLINA v. KENNETH RAY HYLEMAN

No. 209A88

(Filed 8 June 1989)

1. Searches and Seizures § 26— search warrant—insufficient affidavit—exclusion of seized evidence

An officer's affidavit was insufficient under N.C.G.S. § 15A-244(3) to establish probable cause for a search warrant, and the trial court erred in denying defendant's motion to suppress evidence seized from defendant's residence pursuant to a search under the warrant, where the affidavit stated that the officer purchased cocaine using bills with specified serial numbers and that, based on information received during the purchase and after the purchase from confidential informants, he had reason to believe that the money and other controlled substances were at defendant's residence, but the affiant failed to state what information he received from the informants during and after the purchase of cocaine, and the affidavit failed to disclose any facts that would lead the affiant or the magistrate reasonably to believe that the identified currency and contraband were at defendant's residence. N.C.G.S. § 15A-947(2) (1988).

2. **Criminal Law § 84; Searches and Seizures § 4— exclusionary rule—federal constitutional grounds—good faith exception**

The good faith exception to the exclusionary rule arises only upon the exclusion of evidence based upon federal constitutional grounds.

3. **Criminal Law § 89.4— denial of prior statement—testimony of substance of statement improper impeachment**

It was improper for the State to impeach a witness who denied making a prior statement to an officer that he had bought cocaine from defendant by the use of the officer's testimony relating the substance of that prior statement.

Justice WEBB dissenting.

Justices MEYER and MITCHELL join in this dissenting opinion.

APPEAL by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 89 N.C. App. 424, 366 S.E. 2d 530 (1988), which found no error in the trial and convictions of defendant before *Ferrell, J.*, at the 23 February 1987 session of Superior Court, GASTON County. Heard in the Supreme Court 14 September 1988.

Lacy H. Thornburg, Attorney General, by G. Patrick Murphy, Assistant Attorney General, for the state.

Gray and Hodnett, by James C. Gray, for the defendant-appellant.

MARTIN, Justice.

Defendant was tried on three counts of trafficking cocaine by possessing, delivering, and selling, and on one count of possession of drug paraphernalia. We hold that defendant is entitled to a new trial because the trial judge erred in denying defendant's motion to suppress.

The state's evidence showed that on 25 July 1986, Detective William Durst of the Gaston County Police Department participated in a cocaine sale organized by a confidential informant. At approximately 7:00 p.m., the informant and Detective Durst met with Gene Orendorff and Jeff Manning. Durst delivered $1,650 in previously photocopied currency to Orendorff and Manning. Durst was to make a final payment in the same amount upon receipt of two ounces of cocaine.

Police surveillance units observed Orendorff and Manning driving into a trailer park from which they departed with a third

man, Kenneth Wood, at approximately 8:15 p.m. Police then lost track of the three until they were again spotted at 10:25 p.m. At approximately 10:50 p.m. the three men returned to the site of their earlier meeting with Durst and delivered the cocaine to him. At completion of the deal, Durst signaled nearby officers and the three men were arrested.

Later that night, Kenneth Wood identified defendant from a photographic lineup as the person from whom he had acquired the cocaine. Based on this information and on similar statements made by Orendorff to another officer, Detective Durst prepared an affidavit for a warrant to search defendant's residence. The magistrate found probable cause to issue the search warrant based upon the warrant application. The resulting search yielded drug paraphernalia and two hundred and fifty dollars, of which thirty-six bills matched previously-made photocopies.

Defendant was convicted of the sale of cocaine, for which he received a sentence of ten years, and of possession of drug paraphernalia, for which he received a twelve-month sentence. The Court of Appeals found no error in defendant's trial.

[1] Defendant first assigns error to the denial of his motion to suppress evidence. Defendant argues that the affidavit for the search warrant under which the evidence was seized fails to establish probable cause. The affidavit prepared by Detective Durst for the search warrant application reads as follows:

> THE APPLICANT (W.C. DURST) IS A DETECTIVE WITH THE GASTON COUNTY POLICE DEPARTMENT, ASSIGNED TO THE SPECIAL INVESTIGATION UNIT (SIU). THE APPLICANT HAS BEEN A POLICE OFFICER FOR 14 YEARS, 5 YEARS OF WHICH, ASSIGN TO CONDUCT DRUG INVESTIGATIONS.
>
> THE APPLICANT STATES THAT ON JULY THE 25th, 1986 THAT HE PURCHASED TWO OUNCES OF COCAINE, WHICH IS INCLUDED IN SCHEDULE II OF THE N.C. CONTROLLED SUBSTANCES ACT. THAT THE TWO OUNCES OF COCAINE WERE DELIVERED TO THE APPLICANT BY THREE PERSONS (GENE ORENDORFF, JR., JEFF MANNING, KENNY WOODS) WHO ARRESTED AT THE TIME OF DELIVER. THAT THE THREE PERSONS WERE ARRESTED FOR TRAFFICKING IN COCAINE AND CONSPIRACY TO TRAFFICK IN COCAINE.

THE APPLICANT STATES, FURTHER, THAT HE PAID $1650.00 IN U.S. CURRENCY FOR THE ABOVE COCAINE. THE BILLS AND SERIAL NUMBERS USED IN THE PURCHASE WERE AS FOLLOWS:

. . . .

THE APPLICANT STATES, FURTHER, THAT DURING THE TIME SPENT ON THE PURCHASE, FROM ABOUT 7:15pm 07-25-86 until 10:50pm 07-25-86 THAT DET. DURST AND THE SUSPECTS WERE KEPT UNDER SURVEILLANCE BY OTHER MEMBERS OF THE GASTON COUNTY POLICE DEPT. S.I.U. AND THE N.C. S.B.I.

THE APPLICANT STATES, THAT FROM THE MOVEMENT OF THE SUSPECTS DURING, AND BEFORE THE PURCHASE, AND INFORMATION RECEIVED DURING THE PURCHASE, AND INFORMATION FROM TWO CONFIDENTIAL SOURCES OF INFORMATION AFTER THE PURCHASE THAT THE APPLICANT HAS REASON TO BELIEVE THAT THE U.S. CURRENCY LISTED ABOVE TO PURCHASE THE TWO OUNCES OF COCAINE, AND OTHER CONTROLLED SUBSTANCES ARE AT THIS TIME LOCATED IN THE ABOVE DESCRIBED LOCATION AND REQUEST RESPECTFULLY THAT A SEARCH WARRANT BE ISSUED.

The validity of this warrant is governed by N.C.G.S. § 15A-244(3):

> Allegations of fact supporting the statement. The statements must be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched; . . .

This Court has held that probable cause cannot be shown by conclusory affidavits stating only the belief of the affiant or an informer that probable cause exists to issue the warrant. *State v. Campbell*, 282 N.C. 125, 191 S.E. 2d 752 (1972). Recital of some of the circumstances underlying this belief is essential. *Id.* When hearsay information is a part of the foundation of the affiant's belief, such information must be sufficiently detailed in order to form a substantial basis for the magistrate's finding of probable cause. *State v. Arrington*, 311 N.C. 633, 319 S.E. 2d 254 (1984). Furthermore, the affidavit must implicate the premises to be searched. *Campbell*, 282 N.C. 125, 191 S.E. 2d 752.

Here, the application for a search warrant fails to comply with the statute in several respects. The affiant fails to state

what information he received from the informants during and after the purchase of cocaine. The affidavit fails to disclose any facts that would lead Durst or a magistrate to reasonably believe that the identified currency and contraband were at the defendant's residence. The inadequacies of the affidavit resulted in the magistrate being confronted with an insufficient, "bare bones" application for a search warrant. Under the totality of circumstances analysis, the affidavit did not comply with N.C.G.S. § 15A-244(3).

The failure of the affidavit to comply with N.C.G.S. § 15A-244(3) constituted a substantial violation. Manifestly, the evidence was seized as a result of the inadequate affidavit upon which the warrant was issued. *See State v. Hunter*, 305 N.C. 106, 286 S.E. 2d 535 (1982). The interest of a defendant to be free from unlawful searches and seizures is, of course, a fundamental constitutional and statutory right in North Carolina. The "bare bones" conclusory affidavit was totally inadequate to support a finding of probable cause under the totality of circumstances analysis. Additionally, there was evidence of willfulness on the part of the affiant demonstrated by the statement in the affidavit that the suspects were under surveillance by the officers from 7:15 p.m. to 10:50 p.m. The evidence disclosed that the suspects disappeared from the view of the officers from 8:15 p.m. to 10:25 p.m. and that the affiant was aware of this break in the surveillance. The exclusion of illegally seized evidence is the greatest deterrent to similar violations in the future. *See State v. Carter*, 322 N.C. 709, 370 S.E. 2d 553 (1988). The trial court erred in denying defendant's motion to suppress the evidence seized in the search. Defendant is therefore entitled to a new trial. N.C.G.S. § 15A-974(2) (1988).

[2] Having decided upon statutory grounds that defendant's motion to suppress should have been allowed, this Court will not decide the same issue on constitutional grounds. *State v. Creason*, 313 N.C. 122, 326 S.E. 2d 24 (1985); *State v. Blackwell*, 246 N.C. 642, 99 S.E. 2d 867 (1957); *State v. Jones*, 242 N.C. 563, 89 S.E. 2d 129 (1955). It follows that the good faith exception to the exclusionary rule is not applicable. The good faith exception to the exclusionary rule arises upon the exclusion of evidence based upon federal constitutional grounds. *See, e.g., United States v. Leon*, 468 U.S. 897, 82 L.Ed. 2d 677 (1984); *State v. Welch*, 316 N.C. 578,

342 S.E. 2d 789 (1986). The Court of Appeals erred in relying upon the federal "good faith" exception doctrine.

[3] We discuss the defendant's second assignment of error because the question it raises may recur at a new trial. This issue involves the state's use of Detective Durst's testimony to impeach the testimony of the state's witness Kenneth Wood. Wood denied making a statement to Detective Durst identifying defendant as the person from whom he obtained the cocaine. The state thereafter recalled Durst, who testified that Wood said he had bought the cocaine from defendant.

This Court recently analyzed this issue in *State v. Hunt*, 324 N.C. 343, 378 S.E. 2d 754 (1989), holding that it is improper to impeach a witness who has denied making a prior statement by the use of testimony relating the substance of that prior statement.

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

Reversed and remanded.

Justice WEBB dissenting.

I dissent. Conceding for purposes of argument that the search warrant does not comply with N.C.G.S. § 15A-244(3) I do not believe that N.C.G.S. § 15A-974(2) requires that evidence seized during the search should be suppressed. N.C.G.S. § 15A-974 provides in part:

> Upon timely motion, evidence must be suppressed if:
>
> . . . .
>
> (2) It is obtained as a result of a substantial violation of the provisions of this Chapter. In determining whether a violation is substantial, the court must consider all the circumstances, including:
>
> (a) The importance of the particular interest violated;
>
> (b) The extent of the deviation from lawful conduct;
>
> (c) The extent to which the violation was willful;

(d) The extent to which exclusion will tend to deter future violations of this Chapter.

Considering the matters which the statute says we must consider I do not believe the violation was substantial.

Certainly the right to be free from an unlawful search is an important interest. The deviation from lawful conduct, however, was slight. Mr. Durst applied for a search warrant but, according to the majority, he did not comply with all the requirements in the language he used. I would hold this is not a major deviation from lawful conduct. There is no showing at all that the deviation was willful and the exclusion of this evidence will not tend to deter future violations of the chapter. There is no evidence Mr. Durst did not make a good faith effort to prepare a proper affidavit for a search warrant. That is all we can expect from officers in the future. Considering these statutory factors I believe we should hold the violation was not substantial and evidence seized during the search should be admissible.

I realize that in *State v. Carter*, 322 N.C. 709, 370 S.E. 2d 553 (1988) we held that there is not a good faith exception under our state Constitution which allows the admission of evidence seized in contravention to our Constitution. This might prevent the admission of the evidence although it should not have been excluded pursuant to N.C.G.S. § 15A-974(2). Suffice it to say I joined in the dissent in *Carter* and I believe *Carter* should be overruled.

I vote to affirm the Court of Appeals.

Justices MEYER and MITCHELL join in this dissenting opinion.

ARTHUR BENNETT MANNING AND WIFE, LUGENE MANNING v. CLARENCE ERNEST FLETCHER, JR. AND NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY

No. 492PA88

(Filed 8 June 1989)

Insurance § 69— business auto insurance—underinsured motorist coverage—reduction for workers' compensation payments

N.C.G.S. § 20-279.21(e) permits an insurance carrier to reduce the underinsured motorist coverage liability in a business auto insurance policy by amounts paid to the insured as workers' compensation benefits.

ON discretionary review of a decision of the Court of Appeals, reported at 91 N.C. App. 393, 371 S.E. 2d 770 (1988), affirming the judgment entered by *Brown (Frank R.), J.*, at the 26 August 1987 Session of Superior Court, NASH County. Heard in the Supreme Court 10 April 1989.

Ralph G. Willey, P.A., by Ralph G. Willey, III, for plaintiff-appellees.

Poyner & Spruill, by Ernie K. Murray, for defendant-appellant North Carolina Farm Bureau Mutual Insurance Company.

MEYER, Justice.

In this case, we decide whether an insurance company's underinsured motorist coverage obligation can be reduced by payments made to the injured insured pursuant to the Workers' Compensation Act. We conclude that it can be so reduced.

On 13 March 1985 plaintiff Arthur Manning was injured in an automobile accident during the course and scope of his employment. Plaintiff and his wife, Lugene Manning, brought suit against defendant Clarence Fletcher. At the time of the accident, Fletcher had liability insurance with State Farm Insurance Company in the amount of $25,000, and plaintiff's employer had a business auto policy with defendant North Carolina Farm Bureau Mutual Insurance Company ("Farm Bureau") which insured against liability in the amount of $100,000 per person. In addition to providing liability coverage to plaintiff as an employee, the business auto policy also provided uninsured and underinsured

motorist coverages. The underinsured motorist coverage was in the face amount of $100,000. Plaintiff's employer maintained separate workers' compensation insurance on his employees, including plaintiff, also with North Carolina Farm Bureau Mutual Insurance Company ("Farm Bureau Workers' Compensation"). Plaintiff received $59,000 in workers' compensation benefits from Farm Bureau Workers' Compensation.

On 22 July 1987 an Order on Final Pretrial Conference added Farm Bureau as a party defendant, stipulated to Fletcher's liability and release and to plaintiff's damages as "not less than $100,000.00," and converted the action to one for declaratory judgment to determine the extent of Farm Bureau's liability under the underinsured motorist coverage. The trial court refused to allow Farm Bureau to reduce its underinsured motorist obligation by the $59,000 that Farm Bureau Workers' Compensation paid to plaintiff in workers' compensation benefits, and on 26 August 1987 judgment was entered for plaintiff in the amount of $75,000, representing Farm Bureau's $100,000 underinsured motorist coverage as specified in the business auto policy reduced only by Fletcher's liability coverage of $25,000. The trial court also ordered that plaintiff was to have $41,000 of the $75,000 paid by Farm Bureau free and clear of any lien and that he was to retain the $34,000 balance until a future hearing, at which time the court would distribute that amount between plaintiff and Farm Bureau Workers' Compensation. Farm Bureau appealed.

The Court of Appeals determined that no statutory provision or court decision allows "an additional reduction in the amount of underinsured coverage by deducting workers' compensation benefits paid to the employee." *Manning v. Fletcher*, 91 N.C. App. at 398, 371 S.E. 2d at 773. The Court of Appeals affirmed the trial court. On 8 December 1988 this Court allowed Farm Bureau's petition for discretionary review. We now reverse.

Initially, we note that, for the purposes of this case, Farm Bureau Workers' Compensation and Farm Bureau should be treated as separate entities. Farm Bureau Workers' Compensation was aligned in interest with plaintiff against Farm Bureau because it was seeking to recover for workers' compensation payments by subrogation. *See Montedoro v. City of Asbury Park*, 174 N.J. Super. 305, 416 A. 2d 433 (1980). Since the two entities had

separate and adverse interests, they were represented by separate counsel. By stipulation, Farm Bureau was added as a party defendant in the pretrial order. Furthermore, the interests of Farm Bureau Workers' Compensation are not at issue in this appeal.

The version of N.C.G.S. § 20-279.21(b)(4) in effect at the time of plaintiff's accident required insurers to provide underinsured motorist coverage to the extent that "the limit of payment is only the difference between the limits of the liability insurance that is applicable and the limits of the underinsured motorist coverage as specified in the owner's policy." N.C.G.S. § 20-279.21(b)(4) (1983). The payment to plaintiff was therefore limited to the difference between Fletcher's liability coverage of $25,000 and the $100,000 limit of Farm Bureau's underinsured motorist coverage as specified in the policy. Plaintiff and Farm Bureau agree that the maximum amount of Farm Bureau's liability under N.C.G.S. § 20-279.21(b)(4) is $75,000.

Farm Bureau argues that, under the limit of liability provision in its underinsured motorist coverage policy with plaintiff's employer, the $75,000 may be further reduced by the $59,000 paid to plaintiff as workers' compensation benefits, for a total payment to plaintiff of $16,000. The pertinent policy language reads as follows:

> OUR LIMIT OF LIABILITY
>
> . . . .
>
> 2. Any amount payable under this insurance shall be reduced by:
>
> a. All sums paid or payable under any workers' compensation, disability benefits or similar law exclusive of non-occupational disability benefits . . . .

Farm Bureau contends that this policy language is specifically authorized by N.C.G.S. § 20-279.21(e), which provides:

> (e) Such motor vehicle liability policy need not insure against loss from any liability *for which benefits are in whole or in part either payable or required to be provided under any workmen's compensation law* nor any liability for dam-

age to property owned by, rented to, in charge of or transported by the insured.

N.C.G.S. § 20-279.21(e) (1983) (emphasis added).

N.C.G.S. § 20-279.21 sets forth mandatory coverages in motor vehicle liability policies. N.C.G.S. § 20-279.21 (1983 and Cum. Supp. 1988). The statute mandates that a policy of liability insurance shall insure against (1) loss to the insured due to the liability of the insured to another person, N.C.G.S. § 20-279.21(b)(2); (2) loss to the insured due to the liability of an uninsured motorist to the insured, N.C.G.S. § 20-279.21(b)(3); and (3) loss to the insured due to the liability of an underinsured motorist to the insured, N.C.G.S. § 20-279.21(b)(4), where the policy limit exceeds the limits prescribed by N.C.G.S. § 20-279.21(b)(2) and (3). Unless the uninsured and underinsured coverages are specifically rejected, a liability insurance policy must contain all three types of coverage. N.C.G.S. § 20-279.21(b)(3), (4) (1983 and Cum. Supp. 1988).

N.C.G.S. § 20-279.21(e) provides that a motor vehicle liability policy need not afford coverage to an employee receiving benefits under the workers' compensation law. N.C.G.S. § 20-279.21(e) (1983). Plaintiff contends that section (e) authorizes the exclusion of an employee from the employer's liability coverage to the extent that the employee is covered under the workers' compensation law, but that it does not permit exclusion from the underinsured motorist coverage. We disagree.

The current version of N.C.G.S. § 20-279.21 is the result of numerous revisions to North Carolina's Financial Responsibility Act. As originally written, section (e) applied only to liability coverage because the original Act did not mandate uninsured and underinsured coverage in motor vehicle liability policies. *See* 1953 N.C. Sess. Laws ch. 1300, § 21(e). However, the present version of section (e) was enacted after the addition of the uninsured coverage requirement to the Financial Responsibility Act. *See* 1967 N.C. Sess. Laws ch. 854, § 1. The revision of section (e) indicates a legislative intent to broaden the scope of exclusion to include not only the situation in which the injured party might otherwise receive both workers' compensation payments and liability payments on behalf of the insured, but also the situation in which the injured party, as an insured under the uninsured coverage of

a liability policy, might otherwise receive workers' compensation benefits as well as uninsured coverage payments for the same injury.

The underinsured coverage requirement was added to the Financial Responsibility Act in 1979, *see* 1979 N.C. Sess. Laws ch. 675, and has since been amended several times, *see* 1983 N.C. Sess. Laws ch. 777; 1985 N.C. Sess. Laws ch. 666, § 74; 1985 N.C. Sess. Laws (Reg. Sess. 1986) ch. 1027. Section (e) has not been amended. Uninsured and underinsured coverages are similar in concept. N.C.G.S. § 20-279.21(b)(4) specifically provides that "[a]n 'uninsured motor vehicle,' as described in [N.C.G.S. § 20-279.21(b)(3)], includes an 'underinsured highway vehicle.'" N.C.G.S. § 20-279.21(b)(4) (1983 and Cum. Supp. 1988). Logic dictates that the exclusion provided by N.C.G.S. § 20-279.21(e) must also apply to underinsured motorist coverage.

Moreover, had the legislature intended to limit the exclusion permitted by N.C.G.S. § 20-279.21(e) solely to the liability coverage afforded by a liability policy, as plaintiff argues, it could have either so stated specifically in section (e) or it could have inserted specific exclusionary language in N.C.G.S. § 20-279.21(b)(2), the section dealing solely with liability coverage. The legislature did neither. Instead, the provision allowing a reduction in payment commensurate with workers' compensation payments is contained in a separate section, N.C.G.S. § 20-279.21(e), which follows N.C.G.S. § 20-279.21(b) in its entirety and is separated from it by two intervening sections. By reason of its location in the statute and its reference to a "motor vehicle liability policy," we deduce a legislative intent that the exclusion permitted by section (e) be applicable to all subsections of N.C.G.S. § 20-279.21(b), including the uninsured and underinsured coverages defined therein.

Two public policies are inherent in N.C.G.S. § 20-279.21(e). First, the section relieves the employer of the burden of paying double premiums (one to its workers' compensation carrier and one to its automobile liability policy carrier), and second, the section denies the windfall of a double recovery to the employee. *See South Carolina Ins. Co. v. Smith*, 67 N.C. App. 632, 313 S.E. 2d 856, *disc. rev. denied*, 311 N.C. 306, 317 S.E. 2d 682 (1984).

In the case sub judice, plaintiff's employer purchased the liability insurance policy. Because the statute permits the employ-

er to reject underinsured motorist coverage, the employer had no obligation to provide that coverage for his employees. Farm Bureau maintains that the employer was able to purchase such coverage at modest cost because the underinsured motorist coverage was specifically limited to its face amount of $100,000 reduced by the aggregate of liability coverage payments received by the employee from the tort-feasor and workers' compensation benefits received from the employer. Whatever the cost of the additional voluntary coverage purchased here, we can perceive no conflict between the limit of liability provision in Farm Bureau's liability policy with plaintiff's employer and N.C.G.S. § 20-279.21(e).

We hold that N.C.G.S. § 20-279.21(e) permits an insurance carrier to reduce the underinsured motorist coverage liability in a business auto insurance policy by amounts paid to the insured as workers' compensation benefits. The decision of the Court of Appeals is therefore reversed, and the case is remanded to that court for further remand to the Superior Court, Nash County, for further proceedings consistent with this opinion.

Reversed and remanded.

DOUGLAS P. DETTOR AND WIFE, ELIZABETH K. DETTOR v. BHI PROPERTY COMPANY NO. 101, A LIMITED PARTNERSHIP; AND BORUM AND ASSOCIATES, INC., AND MARVIN L. BORUM

No. 420A88

(Filed 8 June 1989)

Reformation of Instruments § 7— intent of parties as to acreage in deed—mutual mistake—summary judgment improper

In an action seeking reformation of a deed to reflect the true acreage of the tract conveyed and specific performance of the buyer's contractual obligation to pay for the excess acreage, a genuine issue of material fact was presented as to the intention of the parties where the contract of sale described the property as being approximately 12 acres, designated the purchase price as "$225,000.00 ($18,750.00 per acre)," and provided for an adjustment in purchase price of $18,750.00 per acre using the difference between actual acreage and 12 acres; a surveyor hired by the sellers certified the property to contain 12.365 acres when it actually contained 17.147 acres; the deed stated that the parcel contained "12.365 acres, more or less," and the purchase price was adjusted to account for the extra .365 acre; plaintiff sellers presented

evidence that the parties understood the transaction to be a per acre sale of all of plaintiffs' property south of a 10-acre tract already owned by defendant buyer and north of a creek; and defendant buyer presented evidence that the parties intended to contract for approximately 12 acres and never anticipated that the tract might contain substantially more than 12 acres, that the provision for an adjustment in the purchase price using the difference between the actual acreage and 12 acres was intended merely to cover any minor deviations in acreage, and that there was never an agreement to purchase all of the land without regard to the final acreage. Therefore, the trial court erred in entering partial summary judgment for defendant buyer and ordering a reconveyance of a portion of the land to plaintiff sellers.

Justice WEBB dissenting.

APPEAL by plaintiffs pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 91 N.C. App. 93, 370 S.E. 2d 435 (1988), which affirmed partial summary judgment in favor of defendant BHI Property Company No. 101, filed 21 November 1986, and confirmation order, filed 21 October 1987, by *Mills, J.*, in Superior Court, GUILFORD County. Heard in the Supreme Court 10 April 1989.

Smith, Patterson, Follin, Curtis, James & Harkavy, by Norman B. Smith and John A. Dusenbury, Jr., for plaintiff-appellants.

Perry, Patrick, Farmer & Michaux, P.A., by Roy H. Michaux, Jr., for BHI Property Company No. 101, defendant-appellee.

MARTIN, Justice.

The sole issue for consideration in this land dispute is whether the trial court erred in granting partial summary judgment for defendant BHI Property Company No. 101 (BHI) and ordering reconveyance of a portion of the real estate to plaintiffs. Because we find there to be a genuine issue of material fact as to the intention of the parties, we hold that summary judgment was inappropriate. Accordingly, we reverse the Court of Appeals.

The record reveals that in the fall of 1985 plaintiffs and defendant BHI entered into a contract for the sale of a certain portion of plaintiffs' land located in the Triad Industrial Park area of western Guilford County. The contract described the property as "± 12 acres and highlighted in yellow on Exhibit A attached hereto, and more particularly described on Exhibit B attached

hereto." Exhibit A, a contour map, showed property adjoining a ten-acre parcel previously purchased by BHI from Richardson Corporation and descending to a creek just south of a sewer line. Exhibit B identified the property as "a tract of land containing approximately 12 acres, and bounded on the North by the lands of Richardson Corporation, Lot Number 51, on the West by the lands of Crown Bedding and Furniture Company and Richardson Corporation, et als., and on the East by Triad Industrial Park, Section 13, Lot 13, Plat Book 12, Page 109, et als., and on the South by a creek."

The contract designated the purchase price as "$225,000.00 ($18,750 per acre)," and further provided that "[t]he purchase price of the 12 acre tract is to be adjusted by Eighteen Thousand, Seven Hundred Fifty ($18,750.00) Dollars per acre, up or down, using the difference in actual acreage and 12 acres, and the balance of said purchase price is to be paid to the Sellers at closing." The contract also stated that "[t]he property shall be surveyed by a North Carolina Registered Surveyor at the expense of the Sellers and a copy of the current survey is to be provided by the Sellers to Buyer at least ten days prior to closing. Property is to have approximately 12 acres as shown on 'Exhibit A' attached hereto."

Plaintiffs hired defendant Borum and Associates, Inc. (Borum) to perform the required survey. This survey certified that the property contained 12.365 acres. The sale closed in November of 1985 and title passed to BHI by a deed stating that the parcel contained "12.365 acres, more or less." The purchase price was adjusted to $231,843.75 to account for the extra .365 acre.

After the closing, Borum discovered a mistake in its calculations of the acreage and determined that the tract in question actually contained 17.147 acres.[1] BHI was notified of the error and plaintiffs subsequently filed this action seeking (1) reformation of the deed to reflect the true acreage of the tract, and (2) specific performance of BHI's contractual obligation to pay for the excess acreage, in the amount of $89,662.50. BHI asserted multiple coun-

1. Plaintiffs asserted claims for negligence and breach of contract against Borum and Associates, Inc., and Marvin L. Borum individually. These claims are not at issue on this appeal.

terclaims, including a claim for rescission. Both parties moved for summary judgment.

The trial court entered an order denominated "Partial Summary Judgment" wherein it concluded that the contract was consummated under a mutual mistake of fact and that the parties' requested remedies of reformation, specific performance, and rescission were all inequitable. The trial court then fashioned a unique remedy, appointing a triumvirate of commissioners to designate 4.782 acres to be carved out of the disputed tract and reconveyed to plaintiffs. Plaintiffs refused BHI's tender of a deed for the 4.782-acre parcel and appealed the decision of the trial court.

A divided panel of the Court of Appeals affirmed. The majority described the trial court's action as a reformation "in effect," and concluded that the reiteration of a twelve-acre figure throughout negotiations and in the contract and deed documents demonstrated, by clear and convincing evidence, the parties' intent to convey approximately that amount of land. Judge Phillips dissented, noting that the parcel contracted for was specifically described and identified on the map as all the land between BHI's ten-acre tract on the north and a creek on the south. He concluded that the trial court had no authority to modify the agreement because of the parties' misconception as to the size of this specifically identified tract and that plaintiffs were entitled to summary judgment.

We decline to adopt either viewpoint. The North Carolina Rules of Civil Procedure 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). 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). All inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the opposing party. *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972).

Plaintiffs insist that both parties understood the transaction to be a per-acre sale of all the plaintiffs' property south of BHI's

ten-acre tract and north of the creek. Fred Preyer, BHI's real estate agent, testified that he regarded the creek as a natural southern boundary and that all of his pre-contract negotiations with plaintiffs concerned acquisition of the entire tract north of the creek. These negotiations were in terms of a per-acre sale of all the property and neither party ever mentioned a gross price for the entire tract. Plaintiffs also point out that Exhibit A, the map included as an attachment to the contract, identified the creek as a southern boundary of the property to be conveyed, as did the description contained in Exhibit B and the metes and bounds description in the deed itself. All of this evidence confirms the parties' mutual understanding that the creek would provide the southern boundary.

Defendant BHI, on the other hand, maintains that the parties intended to contract for approximately twelve acres and never anticipated that the tract in question might contain substantially more than twelve acres. As proof of this intent, BHI points to Fred Preyer's testimony that the parties consistently discussed a figure of twelve acres throughout pre-contract negotiations. Furthermore, the contract and accompanying documents repeatedly refer to the land as "the 12 acre tract," and paragraph 3 of the contractual conditions explicitly states that the "[p]roperty is to have approximately 12 acres." Although paragraph 5 of the conditions provides for an adjustment in the purchase price using the difference between the actual acreage and twelve acres, this clause was intended merely to cover any *minor* deviation in acreage and not to be controlling of the entire transaction in the event of a major discrepancy. In fact, a minor deviation was taken into account when the purchase price was adjusted from $225,000.00 to $231,843.75 to cover an additional .365 acre disclosed by Borum's survey. BHI further contends that there was never an agreement to purchase all of the land, without regard to the final acreage.

Having reviewed the entire record and carefully considered the contentions of the parties detailed above, we cannot say as a matter of law that either side is entitled to summary judgment. Each has brought forth at least some plausible evidence tending to support its interpretation of the transaction. However, reasonable minds might easily differ as to the import of the conflicting evidence. At best the contradictions raise a material question of

fact as to the parties' intentions where the acreage of the property substantially exceeded twelve acres. This question must be resolved by the fact finder. Upon the record presented, therefore, summary judgment was inappropriate.

The decision of the Court of Appeals is reversed and the cause remanded to that court for further remand to the Superior Court, Guilford County, for proceedings not inconsistent with this opinion.

Reversed and remanded.

Justice WEBB dissenting.

I dissent. I agree with the analysis of the case as written by Judge Wells for the Court of Appeals. It is clear to me that all parties thought the plaintiffs were conveying to the defendants a tract of land of approximately twelve acres. The contract provided for a variation in price based on a slight variance in the size of the tract. The parties made the contract under a mutual mistake of fact because there were more than seventeen acres in the tract.

It is within the jurisdiction of the superior court to fashion a decree that is equitable to all parties. I believe that in exercising its power as a court of equity the superior court entered a decree which we cannot disturb.

I vote to affirm the Court of Appeals.

WHITTAKER GENERAL MEDICAL CORPORATION v. CONNIE DANIEL AND DR. T. C. SMITH COMPANY

No. 6PA88

(Filed 8 June 1989)

Master and Servant § 11— covenant not to compete—calling on former employer's customers—enforceable

The trial court erred by entering a judgment notwithstanding the verdict for defendants in an action to enforce a covenant not to compete where defendant Daniel began working for plaintiff in 1971 as a clerical worker, later becoming a full-time secretary and part-time salesperson; she became a full-

time salesperson in 1976 with an increase in salary and an automobile allowance, signing a non-competition agreement at that time; all of plaintiff's sales personnel were put on a commission basis in 1982 without a salary or automobile allowance and without a new non-competition agreement; defendant resigned from plaintiff in 1985 and began to work for defendant Dr. T. C. Smith Company, a competitor of plaintiff; defendant Daniel was successful in getting many of the customers of plaintiff to move to defendant Smith; and the jury returned a verdict against Daniel for breach of contract and Smith for tortious interference with the contract. The covenant not to compete was enforceable under *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643; the second contract was not a novation even though it changed the method of compensation and the sales territory because the second contract did not mention the rest of the first contract and the two may be enforced consistently; there was consideration for the covenant not to compete in the promotion to full-time salesperson and the substantial rise in salary; and an allegedly overbroad provision in the non-competition agreement forbidding defendant Daniel from employment in any capacity with a manufacturer of any product plaintiff sold, rented or distributed was not enforced by plaintiff and was not before the court. The appeal regarding the Dr. T. C. Smith Company was abandoned.

ON discretionary review of a decision of the Court of Appeals, 87 N.C. App. 659, 362 S.E. 2d 302 (1987), affirming a judgment of the Superior Court of WAKE County entered 6 October 1986. Heard in the Supreme Court 10 October 1988.

In this action the plaintiff seeks damages against defendant Connie Daniel for the breach of an employee's covenant not to compete and against defendant Dr. T. C. Smith Company for tortious interference with a contract. The defendant Connie Daniel was employed as a salesperson for the plaintiff. She left that employment in 1985 and began working for the defendant Dr. T. C. Smith Company as a salesperson. The plaintiff obtained a temporary restraining order on 21 August 1985 restraining Connie Daniel from competing with the plaintiff. The restraining order was dissolved and the court denied a motion for a preliminary injunction.

The case was tried during the 8 September 1986 session of superior court. The evidence showed that Connie Daniel began working for General Medical Corporation, the plaintiff's predecessor, in 1971 as a clerical worker. She then became a part-time secretary and part-time salesperson. In March 1976 she became a full-time salesperson. Her salary was raised and she received an automobile allowance. At that time she signed a contract in which it was recognized that customers of plaintiff were "assets and

good will of" the plaintiff. She agreed further that for two years after the termination of her employment she would not "call upon, solicit or interfere with or divert in any way any customers served by" plaintiff in the territory which was assigned to her at the time of the termination. On 26 February 1982 the plaintiff put all its sales personnel, including Connie Daniel, on a commission basis. From that time Connie Daniel no longer received a salary or automobile allowance. A new non-competition agreement was not executed. Connie Daniel's income increased substantially under this arrangement.

Connie Daniel resigned from the plaintiff on 28 June 1985 and began to work for the defendant Dr. T. C. Smith Company on 1 July 1985. Smith was a competitor of the plaintiff. Connie Daniel was successful in getting many of the customers of plaintiff to move to the defendant Smith.

The jury returned a verdict of $93,551.00 against Connie Daniel for breach of contract and for the same amount against Smith for tortious interference with a contract. The jury returned a verdict for $12,898.00 in punitive damages against Dr. T. C. Smith Company. The court entered a judgment notwithstanding the verdict for the defendants. The Court of Appeals affirmed and we allowed discretionary review.

Hunton & Williams, by Julius A. Rousseau, III, for plaintiff appellant.

Morris, Phillips and Cloninger, by William C. Frue, Jr., and William C. Morris, Jr., for defendant appellees.

WEBB, Justice.

We deal first with the claim against Connie Daniel. This claim brings to the Court a question as to whether damages may be awarded in an action on a covenant not to compete contained in an employment contract. Such covenants are enforceable in this state 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 territory, and (5) not against public policy. *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 370 S.E. 2d 375 (1988).

The Court of Appeals, relying on *United Laboratories, Inc. v. Kuykendall*, 87 N.C. App. 296, 361 S.E. 2d 292 (1987), held that the customers developed by the defendant Connie Daniel for the plaintiff did not constitute a legitimate business interest of the plaintiff and it is against public policy for the law to protect this interest. The court's holding was based in part on the fact that no confidential information or trade secrets were used by Connie Daniel in developing the customers. In *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 370 S.E. 2d 375, we reversed the Court of Appeals and held that customers developed by a salesperson are the property of the employer and may be protected by a contract under which the salesperson is forbidden from soliciting those customers for a reasonable time after leaving his or her employment. We are bound by *Kuykendall*, as decided by this Court, to reverse the Court of Appeals.

The defendants contend that in February 1982 a new contract was executed between Whittaker and Connie Daniel which superseded the contract under which Connie Daniel had been working. They say that this constituted a novation and under the new contract there was no provision Connie Daniel would not compete with the plaintiff after she left its employment.

A novation occurs when the parties to a contract substitute a new agreement for the old one. The intent of the parties governs in determining whether there is a novation. If the parties do not say whether a new contract is being made, the courts will look to the words of the contracts, and the surrounding circumstances, if the words do not make it clear, to determine whether the second contract supersedes the first. If the second contract deals with the subject matter of the first so comprehensively as to be complete within itself or if the two contracts are so inconsistent that the two cannot stand together a novation occurs. *See Wilson v. McClenny*, 262 N.C. 121, 136 S.E. 2d 569 (1964); *Tomberlin v. Long*, 250 N.C. 640, 109 S.E. 2d 365 (1959); *Turner v. Turner*, 242 N.C. 533, 89 S.E. 2d 245 (1955); *Bank v. Supply Co.*, 226 N.C. 416, 38 S.E. 2d 503 (1946).

In February 1982 the plaintiff stopped paying salaries to its salespersons including Connie Daniel. In addition Connie Daniel lost her automobile allowance of $155.00 per month, her reimbursement for business and entertainment expenses, and her of-

fice. She was also assigned Warren, Granville, Franklin and Vance Counties as her territory in addition to Wake County. The question posed by this appeal is whether the new contract was so inconsistent with the first contract that we must hold as a matter of law that a novation occurred. We cannot so hold. It is true that the second contract changed the method of compensation and the territory of Connie Daniel but it did not mention the rest of the first contract. The two contracts may be enforced consistently. The jury could have found it was not the intent of the parties to abrogate the first contract except to the extent set forth in the second.

Paper Co. v. McAllister, 253 N.C. 529, 117 S.E. 2d 431 (1960), upon which the defendants rely, is not helpful to them. In that case the employee who had signed an agreement not to compete signed a new contract in which he was assigned a different job. The new contract did not contain a covenant not to compete. Among other reasons for affirming the superior court's judgment denying an injunction, this Court said the superior court could have found the parties intended to make a new contract. In this case the evidence was submitted to the jury and the jury held the parties did not intend to substitute a new contract for the first one.

The defendants also argue that the agreement not to compete was not supported by consideration. When the relationship of employer and employee is established before the covenant not to compete is signed there must be consideration for the covenant such as a raise in pay or a new job assignment. *Chemical Corp. v. Freeman*, 261 N.C. 780, 136 S.E. 2d 118 (1964); *Greene Co. v. Kelley*, 261 N.C. 166, 134 S.E. 2d 166 (1964); *Kadis v. Britt*, 224 N.C. 154, 29 S.E. 2d 543 (1944). In this case the plaintiff's evidence showed that prior to 4 March 1976 Connie Daniel had been employed as a part-time secretary and part-time salesperson. On that day she was promoted to full-time salesperson and received a substantial raise in salary. This supports a finding by the jury that the parties entered into a new contract supported by adequate consideration with an ancillary covenant by the employee not to compete.

The defendants rely on *Collier Cobb and Assoc. v. Leak*, 61 N.C. App. 249, 300 S.E. 2d 583 (1983), *disc. rev. denied*, 308 N.C.

543, 304 S.E. 2d 236 (1983); *Mastrom, Inc. v. Warren*, 18 N.C. App. 199, 196 S.E. 2d 528 (1973); and *Wilmar, Inc. v. Liles*, 13 N.C. App. 71, 185 S.E. 2d 278 (1971), *cert. denied*, 280 N.C. 305, 186 S.E. 2d 178 (1972), to argue that there was no consideration for the covenant in this case. Each of those cases is distinguishable from this case. In each of them the employee had been working for some time before the noncompetition covenant was signed. In none of them was the job of the employee changed at the time the agreement not to compete was signed. In *Collier Cobb* there was not an increase in compensation and in the other two cases the Court held the promises of additional compensation were so illusory that they were not consideration which would support a promise.

The last contention of the defendants is that the contract is too broad. The paragraph of the contract which provides Connie Daniel will not solicit, interfere, or divert the plaintiff's customers contains a separate provision which provides that Connie Daniel will not engage in the "business of manufacturing, selling, renting or distributing any goods manufactured, sold, rented or distributed by Employer during the term of his employment, either for himself or for any individual, firm or corporation in the business of manufacturing, selling, renting or distributing any of said items."

The defendants argue that although the plaintiff was not a manufacturer it sought to prohibit Connie Daniel from employment in any capacity with a manufacturer of any product plaintiff sold, rented or distributed and this is an unnecessarily broad prohibition. If a contract by an employee in restraint of competition is too broad to be a reasonable protection to the employer's business it will not be enforced. The courts will not rewrite a contract if it is too broad but will simply not enforce it. *Paper Co. v. McAllister*, 253 N.C. 529, 117 S.E. 2d 431; *Noe v. McDevitt*, 228 N.C. 242, 45 S.E. 2d 121 (1947). If the contract is separable, however, and one part is reasonable, the courts will enforce the reasonable provision. *Welcome Wagon, Inc. v. Pender*, 255 N.C. 244, 120 S.E. 2d 739 (1961). In this case the plaintiff has not attempted to enforce the provision of the contract which forbids Connie Daniel from engaging in manufacturing. That provision is not before us. We hold that the part which is before us is separable and may be enforced by the award of damages.

In regard to the claim against Dr. T. C. Smith Company for tortious interference with a contract the plaintiff did not present any argument in its brief to the Court of Appeals or to this Court. The appeal as to this claim is deemed abandoned. N.C.R. App. P. 28(a). *State v. Wilson*, 289 N.C. 531, 223 S.E. 2d 311 (1976). We do not disturb the entry of the judgment in favor of Dr. T. C. Smith Company.

We hold that the Court of Appeals erred in affirming the judgment notwithstanding the verdict entered in superior court as to compensatory damages against Connie Daniel. Because the question is not before us, we leave undisturbed that portion of the Court of Appeals' opinion affirming judgment notwithstanding the verdict by the superior court in favor of Dr. T. C. Smith Company. We remand to the Court of Appeals for further remand to the superior court for entry of judgment on the jury verdict against Connie Daniel for breach of contract.

Reversed in part and remanded.

STATE OF NORTH CAROLINA v. S. C. LILES

No. 619A87

(Filed 8 June 1989)

1. **Witnesses § 1.1— murder—codefendant as witness—mental capacity—competent**

The trial court did not err in a prosecution for first degree murder by concluding that a codefendant was competent to testify against defendant because he was competent to assist counsel in his own defense where the trial judge's decision was based on his observation of the witness, his consideration of a psychiatric report from Dorothea Dix Hospital, and the lack of evidence and support of defendant's assertion that the witness was incompetent. N.C.G.S. § 8C-1, Rule 601.

2. **Criminal Law § 89.7— murder—motion to compel witness to submit to independent psychiatric exam denied—no error**

The trial court did not err in a murder prosecution by denying defendant's motion to compel a witness to submit to an independent psychiatric exam. Trial judges do not have discretionary power to compel an unwilling witness to submit to a psychiatric exam.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment for first de-

gree murder entered by *Preston, J.*, at the 13 July 1987 Criminal Session of Superior Court, RICHMOND County. Defendant's motion to bypass the Court of Appeals on his appeal from concurrent sentences of six years imprisonment for felonious breaking or entering and the merged convictions of felonious larceny and possession of stolen property was allowed by the Supreme Court on 21 October 1988. Heard in the Supreme Court 10 April 1989.

Lacy H. Thornburg, Attorney General, by Doris J. Holton, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, and M. Patricia Devine, Assistant Appellate Defender, for defendant.

FRYE, Justice.

Defendant was tried by a jury and convicted of murder in the first degree in violation of N.C.G.S. § 14-17; felonious breaking or entering in violation of N.C.G.S. § 14-54(a); felonious larceny in violation of N.C.G.S. § 14-72(b)(2); and felonious possession of stolen goods in violation of N.C.G.S. § 14-72(c). After a sentencing hearing held pursuant to N.C.G.S. § 15A-2000, the jury recommended a life sentence on defendant's conviction for murder in the first degree after failing to find any aggravating circumstances. The trial judge then entered a life sentence on the murder conviction and a sentence of a term of years on the remaining offenses. On appeal to this Court, defendant contends that the trial court erred by denying both defendant's motion to preclude the State's witness, Floyd Ingram, from testifying, and defendant's motion for an independent psychiatric examination of the same witness. We find no error in the judge's rulings.

Evidence for the State tended to show the following: On 8 January 1987, two hunters discovered the body of a man, later identified as Isiah Sweeney, hanging across a tree in the Pee Dee River near Cheraw, South Carolina. The victim's hands were tied behind his back and the body was in the water from the knees down to the feet.

Floyd Ingram, a codefendant, testified at trial for the State. Ingram stated that in the afternoon of 17 December 1986, defendant and the victim were together at the victim's mother's house. Ingram followed them to the victim's house where they drank liq-

uor. After several drinks, the three men left together in defendant's car to drive to the Pee Dee River. They stopped at a boarded-up, one-room house, twenty or thirty feet from the river. Defendant told Ingram to get a lug wrench and a screwdriver out of the car. Ingram complied with defendant's request and subsequently removed two boards from the back of the house while defendant and the victim took the lock off the door and entered the house. Ingram also entered the house and heard defendant tell the victim that the victim owed him money. Ingram further testified that at defendant's direction, he removed from the house the linen from a bed, a heater and some beer and placed the items in defendant's automobile. Ingram and defendant then tied the victim's hands with string and with the victim's belt. Defendant then led the victim, who was intoxicated, out of the house and down to the river. Ingram further testified that he saw defendant hit the victim "right up across the head" with a stick while they were in the house and again when they reached the river. At the river, defendant took the victim down a little slope, laid him in the water, and "put his foot on him."

Cheryl Thorne, an expert in the field of forensic pathology, testified that the cause of the victim's death was drowning. The testimony of other witnesses for the State tended to corroborate the testimony of Ingram.

Defendant testified in his own behalf and stated that he knew nothing about the death of Isiah Sweeney. Ola Mae Liles, Bun Liles, Willie Mae Liles, Tara Liles, Richard Allen and Charles McNeil each testified that defendant and Ingram were together on the day in question and that both men were drinking alcohol. Sally Hennighan, Ingram's former girlfriend, testified that Ingram had beat her on one occasion. Juanita Collins and Shirley Little testified regarding separate incidents in which Ingram had attempted to have sexual relations with them and threatened them with a butcher knife.

Defendant made two motions at trial, a motion to preclude Floyd Ingram from testifying and a motion for an independent psychiatric examination of Ingram. The trial judge orally denied both motions and subsequently entered the following order:

> Now comes the Defendant being present in open court with his attorneys . . . with a motion upon a paperwriting en-

titled, DEFENDANT'S MOTION FOR PSYCHIATRIC EXAMINATION OF STATE'S WITNESS FLOYD INGRAM and MOTION TO PROCLUDE [sic] FLOYD INGRAM FROM TESTIFYING AGAINST S. C. LILES IN THE ABOVE ENCAPTIONED ACTIONS, the Court makes the following findings of fact:

. . . .

2. The Court considered a REPORT OF PSYCHIATRIC EXAMINATION OF FLOYD INGRAM BY DOROTHEA DIX HOSPITAL which is contained in file number 87 CrS 212, State vs. Floyd Ingram.

3. The defendant has had access to and reviewed such report.

. . . .

5. Other than the psychiatric report on Floyd Ingram and oral arguments by counsel, the defendant has presented no other evidence.

Based upon the foregoing findings of fact, the Court makes the following conclusions of law:

1. That the Defendant has failed to establish grounds for disqualification of Floyd Ingram as a witness in this matter.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED: That the relief sought be and is hereby denied.

[1] In his first assignment of error, defendant contends that the trial court erred in denying the motion to preclude Floyd Ingram from testifying. After the trial judge made findings of fact and conclusions of law regarding the motions, the defendant objected to the judge's conclusion that Ingram was competent to testify because he was competent to assist counsel in his own defense. The trial judge responded to the objection in the following manner:

COURT: I understand that, but what I was simply saying in that was that if he is competent to assist counsel in his defense on a first degree murder charge, he ought to be competent to testify, given those problems that you have raised, some of which are mentioned in this report.

Defendant asserts that the order of the trial court denying both motions was erroneous as an arbitrary finding of competency to testify based on an incorrect standard of competency to stand trial, i.e., that the witness could assist counsel in his own defense at trial. We find no error in the ruling of the trial court.

The competency of a witness to testify is governed by N.C.G.S. § 8C-1, Rule 601, which provides in pertinent 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.

N.C.G.S. § 8C-1, Rule 601 (1988). To test the competency of a witness, the trial judge must assess the capacity of the proposed witness to understand and to relate under oath the facts which will assist the jury in determining the truth with respect to the ultimate facts. *State v. Cooke*, 278 N.C. 288, 290, 179 S.E. 2d 365, 367 (1971).

The trial judge's decision was based on his observation of the witness, his consideration of the psychiatric report from Dorothea Dix Hospital and the lack of evidence in support of defendant's assertion that the witness was incompetent. The judge, by his own statement made in open court, explained his personal observation of the witness's ability to communicate with counsel. The judge's observation supported the determination that the witness was capable of expressing himself on the witness stand concerning the matter so as to be understood as required by N.C.G.S. § 8C-1, Rule 601. There was nothing arbitrary in the judge's actions.

Nevertheless, defendant challenges the competency of Floyd Ingram based on Ingram's past history of mental illness. However, it is well established that unsoundness of mind does not automatically render a witness incompetent to testify. *State v. Benton*, 276 N.C. 641, 650, 174 S.E. 2d 793, 799 (1970). The trial judge considered the psychiatric report from Dorothea Dix which stated that the witness had the capacity to proceed and deter-

mined that, in light of the fact that defendant presented no other evidence and based on his own observation of the witness, the witness was competent to testify. We find that the denial of the motion to preclude the witness from testifying was not error.

[2] By his next assignment of error, defendant contends that the trial court erred by denying his motion to compel Ingram to submit to an independent psychiatric examination. The trial judge denied defendant's motion for a psychiatric examination of the witness simultaneously with the motion to preclude the witness from testifying.

This Court has previously held that trial judges do not have discretionary power to compel an unwilling witness to submit to a psychiatric examination. *State v. Wilson*, 322 N.C. 117, 125, 367 S.E. 2d 589, 594 (1988); *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). *See, also, State v. Fletcher*, 322 N.C. 415, 368 S.E. 2d 633 (1988) (not error to refuse request to have child victim-witness examined by clinical psychologist).

State v. Looney, 294 N.C. 1, 240 S.E. 2d 612, is closely analogous to the instant case. In *Looney*, a pre-trial psychiatric examination by Dorothea Dix Hospital of the State's main witness, Matthews, determined that the witness was not insane. The defendant made a motion to require Matthews to undergo a psychiatric examination by a psychiatrist chosen by the defendant at the defendant's expense. The trial judge denied the motion. This Court, in a lengthy discussion of the issue, stated:

> To hold that a trial court in this State may require a witness, against his will, to subject himself to a psychiatric examination, as a condition to his or her being permitted to testify, is also a serious handicap to the State in the prosecution of criminal offenses . . . . In many instances, a material witness for the State is none too eager to testify under any circumstances. To permit the defendant to obtain a court order, directing him or her to submit to a psychiatric examination as a condition precedent to testifying, may well further chill his or her enthusiasm for taking the stand or at least give him a way out of doing so.
>
> . . . .

> We think that so drastic a change in the criminal trial procedure of this State, if needed, should be brought about . . . by a carefully considered and drafted statute, not by our pronouncement leaving the matter to the unguided discretion of the trial judge.

Id. at 28, 240 S.E. 2d at 627. The instant case does not present a situation calling for a departure from the rationale of *Looney* and its progeny. Therefore, we hold that the trial judge did not err by denying the motion for a psychiatric examination because such an order, under the facts of this case, would exceed the authority of the judge.

Defendant cites *State v. Moore*, 321 N.C. 327, 364 S.E. 2d 648 (1988), in support of his position. However, *Moore* does not control the instant case. In *Moore*, this Court held that the trial court erred by denying the defendant's motion for a court-appointed psychiatrist. The Court reasoned that the evidence was sufficient to show that the defendant had a particularized need for the assistance of a psychiatrist in the preparation of his case and that the appointment of a psychiatrist to determine the defendant's competency to stand trial did not satisfy that obligation. Here, defendant is not seeking the appointment of a psychiatrist to assist in the preparation of his case but is seeking to have a witness examined by a psychiatrist to determine the witness's competence. *Moore* is not applicable to the instant case.

In defendant's trial we find

No error.

STATE OF NORTH CAROLINA v. ROBERT EDWARD REED, SR.

No. 130A88

(Filed 8 June 1989)

Homicide § 19— murder—self-defense—testimony that defendant feared for his life excluded—error

The trial court erred in a prosecution for first degree murder by refusing to allow defendant to testify that he feared for his life and the life of his family as the victim rushed toward him, and that the victim was violent when drunk.

Defendant was prevented from testifying to an essential element of his defense and, even though the State argued that the jury could have inferred from all the evidence that defendant feared for his life, defendant should have been allowed to testify explicitly to this matter which went to the heart of his case.

APPEAL as of right by the defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a life sentence entered by *Davis (James C.), J.*, at the 2 November 1987 Criminal Session of Superior Court, CAMDEN County. Heard in the Supreme Court 11 May 1989.

The defendant was tried for first degree murder. The State's evidence showed the defendant, the defendant's wife, the defendant's stepson, and Bobby Pearce were riding in an automobile from Durham to Moyock. The automobile was stopped in Camden County in order for Bobby Pearce to relieve himself. Approximately two minutes after Bobby Pearce left the automobile he called the defendant, who left the automobile. A few seconds later the stepson heard the sound of gunshots. The defendant then entered the automobile and proceeded with his wife and stepson to Moyock. They returned to Durham later in the day. The stepson testified that a pistol was thrown from the automobile before they reached Moyock.

Bobby Pearce's body was found two days later lying next to a ditch approximately ten feet from the road. He had been shot three times.

The defendant testified that when he left the automobile and walked toward Bobby Pearce, he saw that Pearce was holding a beer bottle in his left hand and a gun in his right hand. Pearce said to the defendant "you're first," and the two men struggled for the gun. The defendant testified that Bobby Pearce hit him in the head with the bottle and the gun fell from Pearce's hand. The two men rolled into the ditch. The defendant then ran up the embankment and picked up the gun. The defendant testified further that Bobby Pearce ran toward the defendant with his head down "like a bull," and the defendant shot him.

The defendant was convicted of first degree murder. The State conceded there were no aggravating circumstances and the defendant was sentenced to life in prison. He appealed.

Lacy H. Thornburg, Attorney General, by G. Lawrence Reeves, Jr., Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Staples Hughes, Assistant Appellate Defender, for the defendant appellant.

WEBB, Justice.

The defendant has brought forward six assignments of error. We shall discuss one of them. While the defendant was testifying on direct examination the following colloquy occurred:

Q: What happened, after you and Mr. Pearce rolled into the ditch?

A: I shook him loose; I got loose from him. I ran up from the embankment. I seen the gun and grabbed the gun. Bobby turned around and he was running at me with his head down. I knew he was going to hurt me. I picked up the gun and shot him.

Q: How many times did you shoot him?

A: As many times as the gun will click. I pulled the trigger on the gun as many times as it will click.

Q: Why do you say he was going to hurt you?

OBJECTION SUSTAINED

Q: How did you feel as Mr. Pearce was coming towards you?

OBJECTION SUSTAINED

The defendant made an offer of proof as to what his testimony would have been if the objections had not been sustained. It is as follows:

Q: Mr. Reed, how did you feel when you saw Bobby Pearce coming towards you behind the car?

A: I felt fearful of my life and the life of my family.

Q: Why did you fear for your life and the life of your family?

A: Bobby is a dangerous person. When he gets that drunk he's really violent.

In order to establish self-defense the jury must be satisfied that the defendant believed it was necessary to kill the deceased in order to save himself from death or great bodily harm. *State v. Bush*, 307 N.C. 152, 297 S.E. 2d 563 (1982). The defendant was prevented from testifying to an essential element of his defense, his fear for his life. This was error. We recently granted a new trial for a similar error in *State v. Webster*, 324 N.C. 385, 378 S.E. 2d 748 (1989).

The State contends that this was harmless error. It says that the defendant was allowed to testify, "I knew he was going to hurt me," and it would have been repetitious to allow the defendant to testify how he felt when Bobby Pearce was advancing toward him. The State says the jury could infer from all the evidence of the defendant that he feared for his life and he was not harmed by the exclusion of this testimony. We believe the defendant should have been allowed to testify explicitly to this matter which went to the heart of his case. The State also contends that the evidence against the defendant was strong and the physical evidence was inconsistent with the defendant's testimony. For these reasons the State says it would not have changed the outcome of the trial if the objection to the question had not been sustained. It is true that much of the evidence pointed to the guilt of the defendant. We believe, however, that if the defendant had been allowed to testify to a matter so crucial to his defense there is a reasonable possibility a different result would have been reached at the trial. *See* N.C.G.S. § 15A-1443(a) and *State v. Turner*, 268 N.C. 225, 150 S.E. 2d 406 (1966). This entitles defendant to a new trial.

We do not pass on the defendant's other assignments of error because the questions they raise may not recur at a new trial.

New trial.

STATE OF NORTH CAROLINA v. IRVIN BARNES

No. 574PA88

(Filed 8 June 1989)

1. **Criminal Law § 72; Rape and Allied Offenses § 5— statutory rape—age of defendant—observation by jury—burden of proof—constitutional issue not presented**

No constitutional issue as to burden of proof was presented concerning the practice of permitting jurors in a statutory rape case to determine defendant's age based on their observations of the defendant where the State presented adequate circumstantial evidence from which the jury could determine defendant's age.

2. **Criminal Law § 171.2— concurrent sentences—error in charge relating to one count—statements in prior cases disavowed**

Statements in prior decisions of the Supreme Court and the Court of Appeals that "where concurrent sentences of equal length are imposed, any error in the charge relating to one count only is harmless" are disavowed because of the Supreme Court's concern that separate *convictions* in such cases may give rise to adverse collateral consequences, and those prior decisions are overruled to that extent only.

ON writ of certiorari to review a unanimous decision of the Court of Appeals reported at 91 N.C. App. 484, 372 S.E. 2d 352 (1988), finding no error in defendant's trial and conviction of one count of first-degree burglary, one count of statutory rape, one count of robbery with a dangerous weapon, and two counts of assault with a deadly weapon inflicting serious injury, upon which judgment was entered by *Stevens (Henry L., III), J.*, at the 11 September 1987 Session of Superior Court, WILSON County. Heard in the Supreme Court 9 May 1989.

Lacy H. Thornburg, Attorney General, by Isham B. Hudson, Jr., Senior Deputy Attorney General, for the State.

W. Earl Taylor, Jr., for defendant-appellant.

PER CURIAM.

[1] With regard to the statutory rape conviction, defendant points out that one of the elements of statutory rape is that the defendant must be at least twelve years old and at least four years older than the victim. N.C.G.S. § 14-27.2(a)(1) (1986). Since the State has the burden of proving all elements of the crime,

State v. Mize, 315 N.C. 285, 337 S.E. 2d 562 (1985), defendant questions the constitutionality of decisions from this Court permitting jurors to determine a defendant's age based on their observations of the defendant. *State v. Evans*, 298 N.C. 263, 258 S.E. 2d 354 (1979); *State v. Gray*, 292 N.C. 270, 233 S.E. 2d 905 (1977); *State v. McNair*, 93 N.C. 628 (1885). We conclude that no constitutional issue is presented inasmuch as there is no shifting the burden of proof on the age element to defendant, as defendant argues, because the State presented adequate circumstantial evidence from which the jury could determine defendant's age.

[2] In declining to address defendant's constitutional argument, the Court of Appeals relied on *State v. Evans*, 298 N.C. 263, 267, 258 S.E. 2d 354, 357, wherein this Court stated:

> It is well settled that where concurrent sentences of equal length are imposed, any error in the charge relating to one count only is harmless.

Because of our concern that separate *convictions* in such circumstances may give rise to adverse collateral consequences, *Ball v. United States*, 470 U.S. 856, 84 L.Ed. 2d 740 (1985); *State v. Etheridge*, 319 N.C. 34, 352 S.E. 2d 673 (1987), we expressly disavow the language from *Evans* quoted above, and to that extent only, the case is hereby overruled. We likewise expressly disavow language of similar import in all other cases from this Court and the Court of Appeals, and to that extent only, those cases are overruled, including *State v. Gilley*, 306 N.C. 125, 291 S.E. 2d 645 (1982); *State v. Summrell*, 282 N.C. 157, 192 S.E. 2d 569 (1972); *State v. Miller*, 271 N.C. 611, 157 S.E. 2d 211 (1967); *State v. Hollingsworth*, 263 N.C. 158, 139 S.E. 2d 235 (1964); *State v. Vines*, 262 N.C. 747, 138 S.E. 2d 630 (1964); *State v. Walker*, 251 N.C. 465, 112 S.E. 2d 61, *cert. denied*, 364 U.S. 832, 5 L.Ed. 2d 58 (1960); *State v. Booker*, 250 N.C. 272, 108 S.E. 2d 426 (1959); *State v. Troutman*, 249 N.C. 398, 106 S.E. 2d 572 (1959); *State v. Riddler*, 244 N.C. 78, 92 S.E. 2d 435 (1956); *State v. Thomas*, 244 N.C. 212, 93 S.E. 2d 63 (1956); *State v. Cephus*, 241 N.C. 562, 86 S.E. 2d 70 (1955); *State v. Bovender*, 233 N.C. 683, 65 S.E. 2d 323 (1951); *State v. Agudelo*, 89 N.C. App. 640, 366 S.E. 2d 921, *appeal dismissed, disc. rev. denied*, 323 N.C. 176, 373 S.E. 2d 115 (1988); *State v. Barnes*, 91 N.C. App. 484, 372 S.E. 2d 352 (1988); *State v. Smith*, 24 N.C. App. 498, 211 S.E. 2d 539 (1975); *State v. Black-*

shear, 10 N.C. App. 237, 178 S.E. 2d 105 (1970); *State v. Garnett*, 4 N.C. App. 367, 167 S.E. 2d 63 (1969); *State v. Perry*, 3 N.C. App. 356, 164 S.E. 2d 629 (1968).

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

Modified and affirmed.

BILLY MATTHEWS, JACK MATTHEWS, LEONARD MATTHEWS, JOSEPHINE BRIDGERS, ELIZABETH BRADLEY, BARTHOLOMEW KIMBALL, MARGARET JONES FOUNTAIN, HUGH SHERROD, ROM SHERROD, NELL ANDERSON, DAPHNE LILES, MILDRED RODGERS, AND ELIZABETH MARSHBURN, PETITIONERS v. WILLIAM T. WATKINS, EXECUTOR OF THE ESTATE OF ANNIE MAE S. DAVIS, RESPONDENT

No. 559A88

(Filed 8 June 1989)

APPEAL by petitioners pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 91 N.C. App. 640, 373 S.E. 2d 133 (1988), affirming an order of *Judge Robert H. Hobgood*, entered 2 July 1987 in the Superior Court, GRANVILLE County, which denied petitioners' petition to revoke certain Letters Testamentary previously issued to respondent. Heard in the Supreme Court 11 May 1989.

Parker and Parker, by Rom B. Parker, Jr., for petitioner appellants.

Adams, McCullough & Beard, by J. Allen Adams and Heman R. Clark, for respondent appellee.

PER CURIAM.

For the reasons stated in the opinion of Judge Parker and the concurring opinion of Judge Wells, the decision of the Court of Appeals is

Affirmed.

STATE OF NORTH CAROLINA v. LEWIS M. SCARBOROUGH, JR.

No. 55A89

(Filed 8 June 1989)

APPEAL of right by the State from a decision of a divided panel of the Court of Appeals, 92 N.C. App. 422, 374 S.E. 2d 620 (1988), which reversed judgments entered by *Freeman, J.*, on 17 September 1987 in Superior Court, DARE County, upon defendant's convictions of second degree rape and taking indecent liberties with a minor, and awarded a new trial. Heard in the Supreme Court 10 May 1989.

Lacy H. Thornburg, Attorney General, by Robin Perkins Pendergraft, Associate Attorney General, for the State, appellant.

John W. Halstead, Jr. for defendant-appellee.

PER CURIAM.

For the reasons stated in the dissenting opinion of Greene, J., the decision of the Court of Appeals awarding defendant a new trial is reversed. The cause is remanded to the Court of Appeals for further remand to the Superior Court, Dare County, for reinstatement of the judgments of imprisonment.

Reversed and remanded.

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

BATCH v. TOWN OF CHAPEL HILL

No. 121PA89.

Case below: 92 N.C. App. 601.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 8 June 1989.

BRUCE v. MEMORIAL MISSION HOSPITAL

No. 136PA89.

Case below: 92 N.C. App. 755.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 8 June 1989.

CRIST v. MOFFATT

No. 69PA89.

Case below: 92 N.C. App. 520.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 8 June 1989.

CRUMP v. BD. OF EDUCATION

No. 171A89.

Case below: 93 N.C. App. 168.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues denied 8 June 1989.

CRUMPLER v. THORNBURG

No. 135P89.

Case below: 92 N.C. App. 719.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 June 1989.

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

IN RE HARRISON

No. 148P89.

Case below: 93 N.C. App. 166.

Petition by respondent for discretionary review pursuant to G.S. 7A-31 denied 8 June 1989.

STATE v. ALLEN

No. 169P89.

Case below: 92 N.C. App. 168.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 8 June 1989.

STATE v. BRITT

No. 158P89.

Case below: 93 N.C. App. 126.

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 8 June 1989. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 June 1989. Petition by the Attorney General for writ of certiorari to the North Carolina Court of Appeals denied 8 June 1989.

STATE v. BROWN

No. 183P89.

Case below: 89 N.C. App. 723.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 8 June 1989.

STATE v. SHUMATE

No. 129P89.

Case below: 92 N.C. App. 757.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 June 1989.

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

STILLEY & ASSOC. v. EASTERN ENGINEERING

No. 142P89.

Case below: 93 N.C. App. 166.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 8 June 1989.

TIMBERLYNE ASSOCIATES v.
AETNA CASUALTY & SURETY

No. 98P89.

Case below: 92 N.C. App. 597.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 June 1989.

LEO TABORN v. CLEVELAND HAMMONDS, AS SUPERINTENDENT OF THE DURHAM CITY SCHOOLS AND DURHAM CITY BOARD OF EDUCATION

No. 487A88

(Filed 27 June 1989)

Schools § 13.2— reduction in funding—reduction in force—rational basis

The Durham City Board of Education was justified in reducing the number of teaching positions for its Exceptional Children Program, including plaintiff's position, after the Durham City Schools lost a substantial portion of the state and federal funds for that program because there was a rational basis for the decision to reduce teaching positions. When faced with funding reductions in a particular program, it was justifiable for the Board to fashion a remedy that was program specific, and a board of education is not required to look across its entire budget to provide the salary for teaching positions when money originally available becomes unavailable due to a reduction in funds for an external grant program. When N.C.G.S. § 115C-325(e)(1)l (1983) is read *in pari materia* with other relevant provisions of N.C.G.S. § 115C-325, it is apparent that the legislature intended to grant local school boards wide discretion in deciding whether to reduce personnel in response to decreased funding. The legislature intended that N.C.G.S. § 115C-142 benefit special education students by preventing funds appropriated for special education to be used for other purposes, and did not intend to provide special education teachers with greater protection against dismissal due to a reduction in force than that provided other career teachers. A career teacher is entitled to relief in such cases only upon showing that the board's action was personal, political, discriminatory, without a rational basis or simply a subterfuge to avoid the protections extended the teacher by law due to his or her status as a career teacher.

Am Jur 2d, Schools §§ 75, 161, 184.

ON appeal by the defendants pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 91 N.C. App. 302, 371 S.E. 2d 736 (1988), reversing and remanding the judgment of *Stephens, J.*, entered in Superior Court, DURHAM County, on 31 July 1987. Heard in the Supreme Court on 15 March 1989.

Glenn, Bentley and Fisher, P.A., by Stewart W. Fisher, for the plaintiff appellee.

Spears, Barnes, Baker, Hoof & Wainio, by Marshall T. Spears, Jr. and Gary M. Whaley, for the defendant appellants.

Tharrington, Smith & Hargrove, by George T. Rogister, Jr., Ann L. Majestic and Jonathan A. Blumberg, for the North Carolina School Boards Association, amicus curiae.

MITCHELL, Justice.

The issue before this Court is whether the Durham City Board of Education (hereinafter "the Board") was justified in reducing the number of teaching positions for its Exceptional Children Program, when the Durham City Schools had lost a substantial portion of the state and federal funds for that program. We conclude that the Board's findings and conclusions resulting in the adoption of its superintendent's recommendation to terminate teaching positions were supported by substantial evidence in light of the entire record submitted. Accordingly, we reverse the decision of the Court of Appeals which held to the contrary.

This case is on appeal for the second time. In *Taborn v. Hammonds*, 83 N.C. App. 461, 350 S.E. 2d 880 (1986) (hereinafter "*Taborn I*"), the Court of Appeals vacated a judgment of the Superior Court affirming a decision by the Board to discharge the plaintiff, Leo Taborn, a teacher of an emotionally handicapped class, during the middle of the school year. The Court of Appeals concluded that the Board's findings and conclusions did not support its decision to terminate the plaintiff's employment and remanded the case for a new hearing by the Board.

Thereafter, pursuant to the decision of the Court of Appeals in *Taborn I* remanding the case, the defendant Cleveland Hammonds, Superintendent of Durham City Schools, sent a letter to the plaintiff explaining Hammonds' reasons for recommending the plaintiff's dismissal. That letter included the following:

> As a result of a teacher audit by the North Carolina Department of Public Instruction in 1984, the Durham City Schools were not funded for the 1984-85 school year for the number of positions which were previously filled in our system for the Exceptional Children program. In order to adjust to this decrease in funding, it was necessary to take various actions. Insofar as these actions were to affect teachers within the system, I followed the Durham City Schools' policy regarding Reduction in Instructional Personnel. A copy of this policy is attached to this letter and incorporated herein for your reference.
>
> At my direction a committee received [sic] all available records of the teachers in the Exceptional Children program

against the responsibility of the system to provide a meaningful educational program to our pupils. After determining that the system was retaining teachers properly certified and qualified in the areas to be served, significant factors in the selection for dismissal were the extent of educational credentials and teaching experience in the North Carolina Public Schools. In reviewing your credentials it was determined that you had the lowest certification level, A, and the least amount of previous teaching experience in the North Carolina Public Schools. I also determined that a qualified and experienced teacher was available to transfer into the position which you were teaching. For these reasons your name was included among those whom I recommended to the Board for dismissal no sooner than the end of the first semester of that school year.

On 25 February 1987, the Board held a second administrative hearing in accord with the decision of the Court of Appeals in *Taborn I* and entered a written decision in which it found facts including, *inter alia*, the following:

3. That as a result of the head count audit of the Exceptional Children Program of the Durham City Schools performed by the staff of the North Carolina Department of Public Instruction . . . the Durham City Schools were notified . . . that for the 1984-85 school year the previously indicated initial allotment of 970 students for the federally funded EHA, Title VI-B program was being reduced to 726 students and the previously indicated initial allotment of 924 students weighted within caps for State Aid fund was being reduced to 748 students weighted within caps.

4. That the above mentioned reduced head count resulted in the initial proposed allotment for EHA, Title VI-B program being reduced by $58,560.00 and the State Aid Exceptional Children initial proposed allotment being reduced by $211,150.72.

5. That because of the aforementioned loss of funds, the Exceptional Children Program, which had been staffed in reliance upon the initial proposed allotments, did not have sufficient funds for personnel expenses to pay all the professional

and para-professional persons who had originally been assigned to said program for the 1984-85 school year.

6. That if the budget shortfall were not addressed during the 1984-85 school year, the deficit would grow and would have to be suffered in later school years.

7. That the superintendent determined that the budget deficit needed to be addressed during 1984-85 school year rather than extending the deficit into later school years.

8. That at the request of the Superintendent and in accordance with Board policy, the Director of Exceptional Children and the Director of Instruction reviewed and made recommendations for consolidation and elimination of positions to serve the 1984-85 Exceptional Children Program enrollment within the State guidelines without detriment to the system's obligation to provide the most meaningful educational program to its students in accordance with its policy on Reduction in Instructional Personnel.

9. That is what was recommended and approved that six aide positions be eliminated in non-self contained classes, that one teaching position be eliminated from the Speech Language Therapy Service, that two teaching positions be eliminated from the Academically Gifted, that one EMH teaching position be eliminated from Burton Elementary, that one EMH position be eliminated from Holton Middle, and that one EMH resource services position be consolidated for the Fayetteville Street and Y. E. Smith Elementary Schools.

Based on the foregoing findings and additional findings relating to the selection of the plaintiff as one of the professional personnel to be terminated, the Board made written conclusions as follows:

1. That the decrease in funding for the Exceptional Children Program . . . was based on a corrected head count . . . [according to State and Federal funding guidelines].

2. That this constituted a justifiable decrease in funding; and a reduction in professional staff was an appropriate response to this decrease.

3. The Board policy regarding Reduction in Instructional Personnel and State law were followed in making the selection of which members of the professional staff were to be recommended for dismissal.

4. That the recommendation of the Superintendent that Leo Taborn be dismissed is substantiated by the preponderance of evidence, and his termination . . . pursuant to the notification given to him by the Superintendent is hereby ratified.

The plaintiff gave notice of appeal pursuant to N.C.G.S. § 115C-325(n) to the Superior Court, Durham County. After a hearing, judgment was entered in Superior Court on 31 July 1987 as follows:

Upon review and consideration of the whole record and the contentions of the parties, in light of the remand from the North Carolina Court of Appeals . . ., the Court is of the opinion that the Superintendent and his staff have sufficiently explained the basis upon which Leo Taborn was terminated from employment; that the Board policy was followed; that the Superintendent's decision has a rational basis as reflected in the record; and that the findings of fact and the conclusions of the Durham City Board of Education in regards to Leo Taborn should be sustained; and it is hereby Ordered that the appeal of Leo Taborn in this action be dismissed.

The plaintiff again appealed to the Court of Appeals. A divided panel of the Court of Appeals entered a decision in which the majority reversed the judgment of the Superior Court which had sustained the Board's action in dismissing the plaintiff. *Taborn v. Hammonds*, 91 N.C. App. 302, 371 S.E. 2d 736 (1988) (hereinafter "*Taborn II*"). The majority in the Court of Appeals accepted the finding—from uncontested evidence—that there had in fact been a decrease in funding for the Exceptional Children Program. The majority concluded that the Board's method of selecting the plaintiff Taborn as one of the teachers to be terminated was without error. The majority also concluded, however, that the Superior Court had erred in sustaining the action of the Board in dismissing Taborn, because the findings and conclusions of the Board did not sufficiently support its decision to terminate *any* teaching

positions in the Exceptional Children Program. Therefore, the majority reversed the judgment of the Superior Court and remanded this case for another hearing on this issue by the Board.

In his dissenting opinion in the Court of Appeals, Judge Wells dissented only from that part of the majority opinion which concluded that the Board's findings and conclusions did not support the decision to reduce the *number* of teaching positions in the Exceptional Children Program. Therefore, our review upon the defendant's appeal of right by reason of Judge Wells' dissent is limited to a consideration of issues arising from that decision by the Board. App. R. 16(b). On 4 January 1989, we denied the plaintiff's petition for a writ of certiorari to consider additional issues.

Although our statutes provide no specific standard for judicial review of an appeal of a decision of a school board, we have held that the standards for judicial review now set forth in N.C.G.S. § 150B-51(b) are to be applied. *Overton v. Board of Education*, 304 N.C. 312, 316-17, 283 S.E. 2d 495, 498 (1981) (applying former N.C.G.S. § 150A-51, rewritten in 1985 N.C. Sess. Laws ch. 746, § 1 and recodified as N.C.G.S. § 150B-51). Therefore, a school board's decision must be reviewed under the "whole record" test. *Id.; Faulkner v. New Bern-Craven Board of Education*, 311 N.C. 42, 316 S.E. 2d 281 (1984). Under that test the reviewing court may not replace the board's judgment with its own, even though the court could justifiably reach a different result if the matter were before it *de novo*. Instead, the reviewing court must consider, *inter alia*, whether the board's findings and conclusions are supported by substantial evidence in view of the entire record as submitted. *Id.* In determining the substantiality of the evidence supporting the board's decision, the court must take into account all of the evidence, including that which fairly detracts from the board's findings, conclusions and ultimate decision. *Id.*

Turning to an examination of the entire record in the present case, it is apparent that three major events led to the plaintiff's dismissal. First, there was a substantial reduction in funding for the Exceptional Children Program. Second, the Board made the administrative decision to reduce professional personnel in response to the decrease in funding. Third, the Board approved the Superintendent's recommendation that the defendant be included

among the employees dismissed. As we have indicated, the issues before us as a result of the defendant's appeal to this Court arise only from the second event—the Board's decision to reduce the *number* of teaching positions in the Exceptional Children Program in response to the decrease in funding for that program.

The defendants argue that the Court of Appeals' decision in *Taborn II* in effect required the Board to show that it had exhausted all available or potential sources for reduction in expenses in the entire school system in order to justify a reduction in the number of teaching positions due to decreased funding. They contend that this result is contrary to basic rules of statutory interpretation, relevant case law and established principles of judicial restraint.

In response, the plaintiff argues that a review of the entire record shows that the Board failed to establish that decreased funding for the Exceptional Children Program justified the decision to eliminate teaching positions in that program. He contends that a review of the entire record shows that the Board automatically decided to eliminate teaching positions when confronted with the decrease in funding. He also maintains that the Court of Appeals was correct in finding that N.C.G.S. § 115C-325(e)(1)l prohibits an automatic decision to reduce teaching positions as a response to a funding cut.

The statute states in pertinent part that no career teacher shall be dismissed or demoted except for, among other specifically listed reasons, a "justifiable decrease in the number of positions due to . . . decreased funding . . . ." N.C.G.S. § 115C-325(e)(1)l (1983). Further, N.C.G.S. § 115C-325(m)(1) extends the same protection to probationary teachers, such as the plaintiff, when they are to be dismissed during the school year.

The Court of Appeals concluded that the Board's reduction in teaching staff was automatic and not "justifiable" under N.C.G.S. § 115C-325(e)(1), in part because the Board did not explain why, in light of evidence that there was a surplus in the overall budget for the school system, the funding reduction was not absorbed within the entire budget or spread throughout the whole school system. *Taborn II*, 91 N.C. App. at 308, 371 S.E. 2d 739-40. In reaching this conclusion the Court of Appeals also observed that

the Board had not explained why it had not sought additional funds from the County Commissioners.

We conclude that when faced with funding reductions in a particular program, it was "justifiable" for the Board to fashion a remedy that was program specific. A board of education is not required to look across its entire budget to provide the salary for teaching positions when money originally available becomes unavailable due to a reduction of funds for an external grant program.

In construing other provisions of N.C.G.S. § 115C-325, we have stated the central principles of statutory construction to be applied as follows:

> " 'In the exposition of a statute the intention of the lawmaker will prevail over the literal sense of the terms, and its reason and intention will prevail over the strict letter. When the words are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt and the remedy in view, and the intention is to be taken or presumed according to what is consonant with reason and good discretion.' "

Faulkner v. New Bern-Craven County Board of Education, 311 N.C. 42, 58, 316 S.E. 2d 281, 290-91 (1984) (quoting *State v. Humphries*, 210 N.C. 406, 410, 186 S.E. 473, 476 (1936) (quoting I Kent Comm., 461)). We further stated in *Faulkner*: "[A]ll statutes relating to the same subject matter shall be construed *in pari materia* and harmonized if this end can be attained by any reasonable interpretation." *Id.* at 58, 316 S.E. 2d at 291 (1984).

In deriving the meaning of subsection (e)(1)l, we must examine it in the general context of North Carolina's public school laws, paying particular attention to the other provisions of N.C.G.S. § 115C-325. When subsection (e)(1)l is read *in pari materia* with other relevant provisions of N.C.G.S. § 115C-325, it is apparent that the legislature intended to grant local school boards wide discretion in deciding whether to reduce personnel in response to decreased funding.

First, the legislature has explicitly excluded professional review panels from reviewing recommendations for teacher dismissal due to decreased funding. N.C.G.S. § 115C-325(e)(2) (1983).

Subsection (e) of N.C.G.S. § 115C-325 lists fourteen grounds upon which a board of education may dismiss a career teacher. In regard to thirteen of these grounds, when a superintendent recommends a career teacher's dismissal, the teacher may ask that the recommendation be reviewed by a panel of the Professional Review Committee. Therefore, of the fourteen grounds for dismissal, the only one for which a career teacher is not given the option of review by a panel of the Professional Review Committee is dismissal due to a reduction in the system's work force under N.C.G.S. § 115C-325(e)(1)l—the provision at issue here.

The exclusion of reduction-in-force decisions from review by the Professional Review Committee clearly was a deliberate legislative act. An amendment enacted in 1983 and entitled "An Act to Clarify the Provisions of the Fair Employment and Dismissal Act" specifically provides in part that:

> Provisions of this section which permit appointment of, and investigation and review by, a panel of the Professional Review Committee shall not apply to a dismissal or demotion recommended pursuant to G.S. § 115C-325(e)(1)l.

N.C. Sess. Laws, ch. 770 (1983) (codified as N.C.G.S. § 115C-325(e)(2)). This amendment buttresses our conclusion that the legislature intended that reduction-in-force decisions remain within the discretion and authority of the board of education.

As noted in *Goodwin v. Goldsboro Bd. of Educ.*, 67 N.C. App. 243, 247, 312 S.E. 2d 892, 895 (1984), a reduction-in-force decision pursuant to N.C.G.S. § 115C-325(e)(1)l is an administrative decision. Such decisions do not necessarily involve evaluation of a teacher's performance; instead, they require the balancing of the needs and resources of the school system and an administrative decision as to what action is appropriate. In such situations, courts must not allow their preferences to replace those of the elected boards of education.

Perhaps reduction-in-force decisions have not been made subject to review by a panel of the Professional Review Committee because local boards of education are in the best position to make such decisions and, also, because dismissal due to a reduction-in-force does not impugn the professional reputation of affected teachers, as performance-based dismissal does. In any event, the

legislature quite clearly has chosen to provide reduced procedural protections for teachers discharged due to a reduction in the number of teaching positions.

In contrast to a performance-based dismissal, a dismissal due to a reduction-in-force should not carry negative implications as to the qualifications of the discharged teachers. In fact, the legislature has granted priority reemployment rights to career teachers dismissed under N.C.G.S. § 115C-325(e)(1)l due to a reduction-in-force. N.C.G.S. § 115C-325(e)(2) prescribes these reemployment rights as follows:

> When a career teacher is dismissed pursuant to G.S. 115C-325(e)(1)l . . . his name shall be placed on a list of available teachers to be maintained by the board. Career teachers whose names are placed on such a list shall have a priority on all positions for which they are qualified which become available in that system for the three consecutive years succeeding their dismissal.

These priority rights of career teachers dismissed under the reduction-in-force subsection reflect the legislature's recognition of fundamental differences between a performance-based dismissal and a dismissal under N.C.G.S. § 115C-325(e)(1)l due to a reduction in teaching positions. North Carolina's reduced procedural and increased reemployment protections for teachers dismissed due to a reduction-in-force are consistent with the prevailing practice in other states. *See, e.g.*, Ariz. Rev. Stat. Ann. § 15-544(C) (1988); Ky. Rev. Stat. §§ 161.790 and 161.800 (1988); Mich. Comp. Laws Ann. §§ 38.101, sec. 1 and 38.105, sec. 5 (1988); R.I. Gen. Laws §§ 16-13-3 and 16-13-6 (1988).

Next, in deriving the meaning of N.C.G.S. § 115C-325(e)(1)l, we turn to examine N.C.G.S. § 115C-142 which provides as follows:

> Notwithstanding any of the other provisions of this Article, it is the intent of the General Assembly that *funds* appropriated by it for the operation of programs of special education and related services by local school administrative units *not be reduced*; rather, that adequate funding be made available to meet the special educational and related services *needs of children* with special needs, without regard to which

> State or local department, agency, or unit has the child in its care, custody, control, or program.

N.C.G.S. § 115C-142 (1987) (emphasis added). In *Taborn I*, the Court of Appeals construed this nonreduction provision as entitling special education teachers to special protection in situations of decreased funding. 83 N.C. App. at 466, 350 S.E. 2d at 883. We conclude, however, that the Court of Appeals misinterpreted this statute.

We do not believe that the General Assembly intended this statute to provide special education teachers with greater protection against dismissal due to a reduction-in-force than that provided other career teachers. Instead, the legislature intended that N.C.G.S. § 115C-142 benefit special education *students*. The statute was intended to prevent funds appropriated for special education being used for other purposes. It was not designed to provide enhanced job protection for special education teachers.

Next, we examine the overall purpose of N.C.G.S. § 115C-325 in determining the legislative intent expressed in the subsection involved in this case. The purpose of the statute is "to provide teachers of proven ability for the children of this State by protecting such teachers from dismissal for political, personal, arbitrary or discriminatory reasons." *Taylor v. Crisp*, 286 N.C. 488, 496, 212 S.E. 2d 381, 386 (1975) (construing former N.C.G.S. § 115-142 (Cum. Supp. 1971)). This overall purpose provides the focus for interpreting the requirement of subsection (e)(1)l that any decrease in the number of teaching positions due to a decrease in funding be "justifiable." This basic requirement mandates that the board's action be based upon a rational decision that reducing teaching positions is *one* appropriate response to the decrease in funds. If the teacher can show, however, that there is no rational basis for the decision or that it is based on personal, political or discriminatory motives or is a subterfuge to avoid rights arising from a teacher's status as a career teacher, then such action by the board is not "justifiable."

This interpretation protects the rights of career teachers while not unreasonably restricting school boards exercising their most basic administrative functions. It also incorporates the deference to school board decisions mandated by statute: "In all actions brought in any court against a local board of education, the

order or action of the board shall be presumed to be correct. . . ." N.C.G.S. § 115C-44(b) (1988).

The Court of Appeals concluded here that the Board had not justified the reduction-in-force because it had not explained adequately how it reached its decision. In fact, the Board stated the basis for its decision; the remaining funds were inadequate to meet the salaries of existing personnel, and program quality could be maintained with a smaller instructional staff. This is a rational basis for the Board's decision, and no more is required under N.C.G.S. § 115C-325(e)(1)l—the reduction-in-force subsection of the statute.

Although not controlling here, we note that our decision finds support in the decisions of the courts of other jurisdictions. These courts generally have held that local boards of education retain discretion to reduce teaching positions due to decreased funding unless it is shown that the decision to do so is irrational, arbitrary, capricious or a subterfuge to avoid tenure laws. *See, e.g., Pocahontas Community School Dist. v. Levene*, 409 N.W. 2d 698, 700 (Iowa App. 1987); *Laird v. Independent School Dist. No. 317*, 346 N.W. 2d 153, 156 (Minn. 1984); *Sells v. Unified School Dist. No. 429*, 231 Kan. 247, 249, 644 P. 2d 379, 381 (1982); *Paradis v. School Administrative Dist.*, 446 A. 2d 46, 50-51 (Me. 1982); *Williams v. Seattle School Dist.*, 97 Wash. 2d 215, 224, 643 P. 2d 426, 432 (1982).

In *May v. Alabama State Tenure Comm.*, 477 So. 2d 438 (Ala. App. 1985), for example, a tenured social studies teacher dismissed due to declining enrollments claimed that the board could not dismiss her "if any combination, change or alteration in the system could be made to accommodate" her. *Id.* at 439. Specifically, she contended that because she was able to teach other subjects, the board was required to shift personnel to accommodate her tenured status. The Alabama Tenure Law, like the North Carolina statute, N.C.G.S. § 115C-325(e)(1)l, allows dismissals for a "justifiable decrease in the number of teaching positions." Ala. Code § 16-24-8 (1988). In applying this provision, the Alabama court recognized that when faced with the possibility of reducing positions, "much must be left to the 'enlightened discretion' of the Board after considering the entire situation." *Id.* at 440, quoting

Woods v. Bd. of Educ., 259 Ala. 559, 67 So. 2d 840 (1953). The court refused to set aside the decision of the board.

Our Court of Appeals' decision under review here requires that boards of education facing a reduction in funding show that they have considered and rejected other budget options before reducing teaching staff. This requirement infringes on the discretion of local boards to allocate funds according to their views of the best interests of their students. Moreover, the decision of our Court of Appeals would result in courts interjecting their views into matters legislatively delegated to duly elected local boards of education for the exercise of their expertise and discretion. This Court has repeatedly warned against such usurpation of the authority given elected local boards of education by the legislature. *See, e.g., Faulkner v. New Bern-Craven County Bd. of Educ.*, 311 N.C. 42, 316 S.E. 2d 281 (1984) (reviewing court should not substitute its views for those of board).

Courts in other jurisdictions also have held that a school board need not exhaust other available options before dismissing tenured staff. In *California School Employees Ass'n v. Pasadena Unified School Dist.*, 71 Cal. App. 3d 318, 139 Cal. Rptr. 633 (1977), a school board had ordered a layoff of employees because of a lack of funds. In challenging the layoffs, the employees argued that the board did not have to do so because it had "undistributed reserves sufficient . . . to maintain all . . . employees in their former positions." 71 Cal. App. 3d at 320, 139 Cal. Rptr. at 634. The court responded:

> Plaintiff's basic argument is that there cannot be a 'lack of funds' so long as a reserve account is in existence. Essentially the argument means that there cannot be a lack of funds unless the school district is bankrupt. This contention is obviously without merit.

Id. at 321, 139 Cal. Rptr. at 634. The court went on to state that the "determination of the amount needed for reserves is committed to the discretion of the board . . . [and] that determination could not be set aside by a court unless it was 'fraudulent or so palpably unreasonable and arbitrary as to indicate an abuse of discretion as a matter of law.' " 71 Cal. App. 3d at 322, 139 Cal. Rptr. at 635.

The relevant cases from this and other jurisdictions, as well as the language of N.C.G.S. § 115C-325 and related statutes, support our conclusion that the issue to be resolved by our courts in reviewing a teacher dismissal under N.C.G.S. § 115C-325(e)(1)l is whether the board's decision to reduce teaching positions is supported by a rational basis. Given the presumption in favor of the board's decision under N.C.G.S. § 115C-44(b), a career teacher is entitled to relief in such cases only upon showing that the board's action was personal, political, discriminatory, without a rational basis or simply a subterfuge to avoid the protections extended the teacher by law due to his or her status as a career teacher. The role of the reviewing court is to assure the proper application of this standard, not to substitute its preferences for those of the board.

Applying this standard, we conclude that the Board in the present case justifiably reduced the teaching staff in a program for which funds had been significantly decreased, the major use of such funds had been for staff salaries, and program quality could be maintained with fewer teachers. We should not be understood as endorsing the Board's action of dismissing a teacher of emotionally handicapped students in the middle of a school year in order to save the relatively small sum of $7,840.00, half of the teacher's annual salary. That is not our proper function. Nor may we decide whether this was the wisest option for the Board to choose when it might result in disturbing a stable situation for students whose emotional balance was, at best, fragile. Furthermore, we do not decide whether this was the fairest course of action when the reason for the plaintiff's dismissal was not his performance but a financial exigency created by an inaccurate count of students in the Exceptional Children Program by an administrator who did not lose her job as a result of the mistake. We hold only that, based upon the entire record, there was a rational basis for the Board's decision to reduce teaching positions in response to the reduction of funds in the present case and that the judgment of the Superior Court sustaining that decision was, therefore, correct. Accordingly, we must reverse the decision of the Court of Appeals.

Reversed.

SELECTIVE INSURANCE COMPANY OF THE SOUTHEAST, PLAINTIFF v. NCNB NATIONAL BANK OF NORTH CAROLINA AND THE STATE OF NORTH CAROLINA, DEFENDANTS, AND NCNB NATIONAL BANK OF NORTH CAROLINA, THIRD-PARTY PLAINTIFF v. AIRBORNE FREIGHT CORPORATION D/B/A AIRBORNE EXPRESS, THIRD-PARTY DEFENDANT

No. 544A88

(Filed 27 June 1989)

State § 4— crossclaim against State—contribution and indemnification—erroneously dismissed

NCNB's crossclaim against the State for contribution and indemnification should not have been dismissed where Selective Insurance Company deposited bearer bonds with a par value of $500,000 with the Department of Insurance as a condition of conducting business in North Carolina; NCNB was custodian of the bonds for Selective; NCNB hired third-party defendant Airborne Freight Corporation to deliver the bonds to the Department; the Department advised NCNB that it had received the Airborne package but that the package had been lost; Selective sought relief from the State and from NCNB; NCNB asserted a crossclaim against the State for contribution and indemnity; the State successfully moved to dismiss the complaint and the crossclaim; and the complaint was reinstated by the Court of Appeals. The State may be held liable as a coparty under N.C.G.S. § 1A-1, Rule 13(g) for purposes of contribution and indemnification to the same extent that the State may be held liable as a third-party defendant under N.C.G.S. § 1A-1, Rule 14(c). Whether a claim against the State for contribution and indemnification is asserted as a crossclaim or a third-party action depends upon whether the State had been made a defendant in the original action; there is no substantive difference between the claims, and allowing claims against the State for contribution and indemnification to be asserted as crossclaims accomplishes the legislative purposes behind Rule 13(g) and avoids absurd or bizarre consequences by preventing the necessity of a second action before the Industrial Commission to settle claims between the coparties. N.C.G.S. § 1B-1(h).

Am Jur 2d, Municipal, County, School and State Tort Liability § 658.

Justice MITCHELL dissenting.

Justice MEYER joins in this dissenting opinion.

APPEAL by defendant-appellant NCNB National Bank of North Carolina against defendant-appellee State of North Carolina pursuant to N.C.G.S. § 7A-30(2), from a divided panel of the Court of Appeals, 91 N.C. App. 597, 372 S.E. 2d 876 (1988), which affirmed in part, reversed in part and remanded the order of *Herring, J.*, entered 15 December 1986 in Superior Court, WAKE County, which granted defendant-appellee's motions to dismiss. Heard in the Supreme Court 11 April 1989.

Lacy H. Thornburg, Attorney General, by Thomas D. Zweigart, Assistant Attorney General, for defendant-appellee State of North Carolina.

Smith Helms Mullis & Moore, by E. Osborne Ayscue, Jr., Benne C. Hutson and Irving M. Brenner, for defendant-appellant NCNB National Bank of North Carolina.

FRYE, Justice.

The issue before this Court, one of first impression, is whether a crossclaim for contribution and indemnification may be asserted against the State in our trial courts. We answer in the affirmative.

This appeal had its genesis in a cause of action instituted by Selective Insurance Company of the Southeast (hereinafter Selective) against both NCNB National Bank of North Carolina (hereinafter NCNB) and the State of North Carolina (hereinafter State) arising out of the loss or theft of bearer bonds with a par value of $500,000. The bonds were deposited by Selective with the North Carolina Department of Insurance (hereinafter Department) as a condition for conducting insurance business in North Carolina. NCNB was the custodian of the bonds for Selective which instructed NCNB to deposit the bonds with the Department. NCNB hired third-party defendant Airborne Freight Corporation to deliver the bonds to the Department, which it did on or about 15 January 1985. In February 1985, the Department advised NCNB that it had received the Airborne package but that the package had been lost. The package has yet to be found.

In its complaint Selective asks for declaratory relief and damages for breach of trust against the State, that a surety bond it executed as a condition for reissuance of those bonds be declared void, and that Selective be relieved of any liabilities or obligations under that surety bond. As against NCNB, Selective seeks a declaratory judgment that, because of NCNB's alleged negligence and breach of a custodianship agreement under which it had held the bonds, NCNB is liable to Selective for any and all liabilities incurred by or asserted against Selective with respect to the bearer bonds. Selective also seeks monetary damages caused by NCNB's alleged negligence.

NCNB filed an answer and asserted a crossclaim against the State for contribution and indemnity. The State moved to dismiss Selective's complaint and NCNB's crossclaim. The motions were granted and both Selective and NCNB appealed to the Court of Appeals. The Court of Appeals reversed the trial court's dismissal of Selective's claim against the State on the grounds that an actual controversy existed and the complaint presented a basis for declaratory relief. The Court of Appeals, however, affirmed the trial court's dismissal of NCNB's crossclaim against the State on the ground that the trial court had no subject matter jurisdiction over NCNB's crossclaim. The Court of Appeals held that NCNB's crossclaim is a tort claim against the State and must be heard by the Industrial Commission pursuant to the State Tort Claims Act. Judge Wells dissented from that part of the majority opinion which held that the trial court properly dismissed NCNB's crossclaim against the State. NCNB brought this appeal contesting the dismissal of its crossclaim against the State.

In its crossclaim, NCNB asserts two claims against the State. The first is for contribution. NCNB contends that if it was negligent, then "the State of North Carolina, through the Department, was [also] negligent in losing the package containing the Bearer Bonds and that such negligence on the part of the State of North Carolina joined and concurred with the negligence of NCNB, if any, and NCNB is entitled to recover contribution from the State of North Carolina . . . ."

NCNB's second claim against the State is for indemnification. NCNB contends that if it was negligent in any way, "the State of North Carolina, through the Department, was negligent in losing the package containing the Bearer Bonds and that such negligence of the State of North Carolina was the primary, active and proximate cause of Southeastern's damages . . . and therefore, NCNB is entitled to be indemnified by the State of North Carolina . . . ."

NCNB properly asserted these claims as crossclaims pursuant to N.C.G.S. § 1A-1, Rule 13(g), because the State was a co-defendant in the original action brought by Selective against both NCNB and the State. Rule 13(g) provides:

> (g) *Crossclaim against coparty.*—A pleading may state as a crossclaim any claim by one party against a coparty arising

> out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such crossclaim may include a claim that the party against whom it is asserted is or may be liable to the crossclaimant for all or part of a claim asserted in the action against the crossclaimant.

N.C.G.S. § 1A-1, Rule 13(g) (1983).

In the instant case, the Court of Appeals affirmed the trial court's finding that it lacked jurisdiction over NCNB's crossclaim on the grounds that there is no express provision in Rule 13(g), comparable to Rule 14(c), which allows a crossclaim to be asserted against the State. The Court of Appeals noted that "[t]he Legislature has simply not similarly excepted crossclaims against the State from the Tort Claims Act as it has for third-party claims." *Selective Ins. Co. v. NCNB*, 91 N.C. App. 597, 602, 372 S.E. 2d 876, 880 (1988). Accordingly, the Court of Appeals held that NCNB's crossclaim against the State is a tort-based action which pursuant to the State Tort Claims Act must be heard by the Industrial Commission rather than in state court.

The State Tort Claims Act provides in pertinent part as follows:

> The North Carolina Industrial Commission is hereby constituted a court for the purpose of hearing and passing upon tort claims against the State Board of Education, the Board of Transportation, and all other departments, institutions and agencies of the State.

N.C.G.S. § 143-291 (1987 & Cum. Supp. 1988).

Both the Court of Appeals and the State rely upon *Guthrie v. State Ports Authority*, 307 N.C. 522, 299 S.E. 2d 618 (1983), in asserting that by enacting the State Tort Claims Act, and N.C.G.S. § 1A-1, Rule 14(c), the legislature expressly waived the State's sovereign immunity under specifically limited circumstances and that such statutes waiving sovereign immunity must be strictly construed. While each of those propositions is true, *Guthrie* is not applicable to the instant case.[1] Sovereign immunity

1. *Guthrie* involved an attempt to make the State Ports Authority, a state agency, an original party defendant in a tort action. This Court held that the State had not waived its sovereign immunity to this extent.

for claims against the State for contribution has been waived by N.C.G.S. § 1B-1(h) which allows the State to be sued for contribution as a joint tort-feasor.[2] "The right to indemnification arises out of a tort claim, the State's immunity to which was abrogated by the Tort Claims Act." *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 332, 293 S.E. 2d 182, 186-87.

N.C.G.S. § 1B-1(h) and the State Tort Claims Act operate to waive sovereign immunity for claims against the State for contribution and indemnification. The State correctly points out that statutes waiving sovereign immunity must be strictly construed. *Guthrie v. State Ports Authority*, 307 N.C. 522, 538, 299 S.E. 2d 618, 627. However, Rule 13(g) does not address the immunity of the State from crossclaims against the State for contribution and indemnification, but rather presents the question of whether state courts are the proper forum—as opposed to the Industrial Commission—for such claims.

In the instant case, the State has already been made a party to the action in state court. The Court of Appeals has held that the complaint against NCNB and the State should not have been dismissed for failure to state a claim, and that question is not before us. Thus, we are presented with the question of whether the State, properly a party defendant, may be subject to a crossclaim for contribution and indemnification asserted by a codefendant in the same action. Stated differently, is the State a "coparty" within the meaning of Rule 13(g) so that a party may state as a crossclaim against it a claim for contribution and indemnification arising out of the transaction or occurrence that is the subject matter of the action? Since it is clear that the State is not immune from such claims substantively, and since the State is already properly before the court as a party defendant, there is no reason to exclude the State from the definition of a coparty

2. The Uniform Contribution Among Tort-Feasors Act provides:

> (h) The provisions of this Article shall apply to tort claims against the State. However, in such cases, the same rules governing liability and the limits of liability shall apply to the State and its agencies as in cases heard before the Industrial Commission. The State's share in such cases shall not exceed the pro rata share based upon the maximum amount of liability under the Tort Claims Act.

N.C.G.S. § 1B-1(h) (1983).

under Rule 13(g).[3] We hold that the State may be held liable as a coparty under Rule 13(g) for purposes of contribution and indemnification to the same extent that the State may be held liable as a third-party defendant under Rule 14(c).

The only difference between crossclaims for contribution and indemnification brought pursuant to Rule 13(g) and third-party actions brought under Rule 14 is that crossclaims are asserted against coparties whereas third-party actions are asserted against non-parties. Whether a claim against the State for contribution and indemnification is asserted as a crossclaim or a third-party action depends upon whether the State has been made a defendant in the original action; there is no substantive difference between the claims.

Rule 13(g) and Rule 14 both address claims for contribution and indemnification in almost identical language. Rule 13(g) provides that crossclaims may "include a claim that the party against whom it is asserted is or may be liable to the crossclaimant for all or part of" the claim asserted against the crossclaimant. Similarly, Rule 14 allows a defendant, as a third-party plaintiff, to serve a summons and complaint on any non-party "who is or may be liable to him for all or part of the plaintiff's claim against him."

Beyond nearly identical language, Rule 13(g) and Rule 14 also share an identical purpose, namely, that all related claims be settled, whenever possible, in one action. *See* Shuford, *North Carolina Civil Practice and Procedure*, §§ 13-3 and 14-3 (3d ed. 1988). Crossclaims are allowed in order "to avoid multiple suits and to encourage the determination of the entire controversy among the parties before the court with a minimum of procedural steps." C. Wright & A. Miller, *Federal Practice and Procedure* § 1431 at 161 (1971) (commenting on Rule 13(g) of the Federal Rules of Civil Procedure which is identical to the North Carolina rule).

Similarly, the general purpose of Rule 14 is "to avoid two actions which should be tried together to save the time and cost of a reduplication of evidence, to obtain consistent results from iden-

3. Since crossclaims can only be asserted against *coparties*, it was unnecessary for the legislature to say expressly that the State may be *made* a party under Rule 13(g) as it did in Rule 14 which provides for bringing in new parties.

tical or similar evidence. [sic] and to do away with the serious handicap to a defendant of a time difference between judgment against him, and a judgment in his favor against the third-party defendant." 3 Moore's Federal Practice § 14.04 at 26 (2d ed. 1988) (commenting on Rule 14 of the Federal Rules of Civil Procedure which is substantially similar to the North Carolina rule).

Allowing claims against the State for contribution and indemnification to be asserted as crossclaims accomplishes the legislative purpose behind Rule 13(g)[4] and avoids absurd or bizarre consequences, by preventing the necessity of a second action before the Industrial Commission to settle claims between the coparties. An absurd result would be reached by allowing the State to be made a third-party defendant on a claim for contribution or indemnification while prohibiting an identical claim to be made by a coparty in an action in which the State is already a party. We do not believe that the legislature intended an absurd result.

We therefore reverse the Court of Appeals on this question and remand the case to that court for further remand to the trial court for reinstatement of NCNB's crossclaim against the State for contribution and indemnification.

Reversed in part and remanded.

Justice MITCHELL dissenting.

The Court of Appeals correctly noted that the General Assembly simply has not excepted crossclaims against the State from the requirements of the Tort Claims Act, while it has clearly excepted third-party claims from those requirements. Although the Court of Appeals recognized that it would be logical to also except crossclaims from the requirements of the Act, it declined to judicially create such an exception where the General Assembly had so clearly *chosen* not to provide an exception. I agree with the view apparently held by the Court of Appeals that the rules of construction applied by the majority of this Court in the present case have no application in situations such as this, where

4. The Comment to Rule 13(g) provides: "Certainly the most common bases for crossclaims are those for contribution or indemnification in respect of the crossclaimant's alleged liability, and the last sentence [of] Rule 13(g) specifically authorizes these bases."

the General Assembly has spoken clearly but, according to the majority of this Court, reached an "absurd" result.

It is for the General Assembly, and not for this Court, to waive the State's sovereign immunity and to determine the forum in which claims against the State will be heard when it waives sovereign immunity. Therefore, for the reasons stated by Judge Cozort in his opinion for the majority in the Court of Appeals, I dissent.

Justice MEYER joins in this dissenting opinion.

DOUGLAS WAYNE WILLIAMS, AN INCOMPETENT, BY C. D. HEIDGERD, GUARDIAN AD LITEM v. INTERNATIONAL PAPER CO., RICHMOND GRAVURE, INC., CHESTER LITTLE, D/B/A CUSTOM PAVERS AND COATING CO., INC., AND CORPOREX CONSTRUCTORS, INC.

No. 257PA88

(Filed 27 June 1989)

1. **Master and Servant § 79— tort action by employee against third parties—allegation that employer liable—employer entitled to jury trial**

An employer was entitled to a jury trial on the issue of joint and concurrent negligence where plaintiff was an employee who was injured when he stepped through a loose roofing panel; plaintiff was paid workers' compensation benefits; plaintiff filed a separate action against third parties; the third parties alleged the joint and concurring negligence of plaintiff's employer; and, following an out-of-court settlement between plaintiff and both defendants, the defendants applied for a hearing pursuant to N.C.G.S. § 97-10.2(j) to determine the amount of settlement proceeds required to be paid to the employer/compensation carrier. N.C.G.S. § 97-10.2(e) (1985) clearly grants an employer a right to have a jury determine the issue of the employer's joint and concurrent negligence, and the settlement between plaintiff and defendants, to which the employer was not a party, neither extinguished the employer's right to a jury trial nor settled the issue of the employer's negligence.

Am Jur 2d, Jury § 39; Negligence § 22.

2. **Master and Servant § 69.3— workers' compensation—settlement between plaintiff and third parties—no consent by employer—settlement void**

A settlement between plaintiff and defendants in an action arising from plaintiff's fall through a roof which was entered into without the written consent of plaintiff's employer, which had paid plaintiff workers' compensation benefits, was void under N.C.G.S. § 97-10.2(h) (1985).

Am Jur 2d, Compromise and Settlement § 21.

ON discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 89 N.C. App. 256, 365 S.E. 2d 724 (1988), reversing and remanding a judgment entered by *Farmer, J.*, on 29 December 1986, in Superior Court, WAKE County. Heard in the Supreme Court 15 March 1989.

Johnny S. Gaskins for plaintiff-appellant.

Young, Moore, Henderson & Alvis, P.A., by Walter E. Brock, Jr., for defendant-appellant Corporex Constructors, Inc.

John E. Aldridge, Jr., for defendant-appellant Custom Pavers and Coating Co., Inc.

Rodney Dean for St. Paul Fire and Marine Insurance Company.

FRYE, Justice.

This case is before this Court upon grant of a petition by plaintiff Douglas Wayne Williams and defendants Corporex Constructors, Inc. (hereinafter Corporex), and Chester Little, d/b/a Custom Pavers and Coating Company, Inc. (hereinafter Little), for discretionary review of a decision of the Court of Appeals reversing a judgment of the superior court determining the amount to be paid to plaintiff from the proceeds of a settlement upon which the employer/compensation carrier claimed a lien under the North Carolina Workers' Compensation Act, N.C.G.S. § 97-10.2.

The issue before this Court, based on the Court of Appeals' decision, is whether an employer is entitled to a jury trial on the issue of employer negligence under N.C.G.S. § 97-10.2(e) in a tort action brought by an injured employee against third parties who allege that the employer is jointly and concurrently liable for the employee's injuries. The answer is yes. We find it necessary, however, to examine the additional issue of whether a settlement was reached between the parties under subsection (j) of N.C.G.S. § 97-10.2 prior to the pretrial conference. The answer is no. The parties have raised other questions which are not necessary to decide in this case.

Plaintiff Williams was an employee of Midwestern Commercial Roofers, Inc. (hereinafter Midwestern), a subcontractor replacing the roof of a building in Raleigh. On 12 October 1983,

Midwestern stopped work to wait for the replacement of damaged roofing panels. Corporex, the general contractor, and Little, a subcontractor, were responsible for the repair of the damaged roof. Corporex's superintendent assured Midwestern's foreman that the repairs would be completed in time for Midwestern's crew to return the following morning. Little had replaced the damaged panels but Corporex failed to weld them in place due to an inoperative welding machine.

Midwestern's crew arrived early on the morning of 13 October 1983. After Midwestern's foreman and other members of the crew examined the panels, the crew began work and placed styrofoam over the roof. While plaintiff was carrying a hoist across the roof, he stepped on one of the unwelded panels which collapsed under him and caused him to fall thirty feet through the roof onto the concrete floor of the building. Plaintiff suffered extensive and permanent injuries as a result of the fall.

Midwestern's workers' compensation carrier, St. Paul Fire and Marine Insurance Company (hereinafter St. Paul), paid in excess of $520,000 in workers' compensation benefits. Plaintiff filed a separate civil suit against Corporex, Little, International Paper Company and Richmond Gravure, Inc., alleging joint and several liability for negligence. International Paper Company and Richmond Gravure, Inc., were later dismissed from the action. Defendants Corporex and Little filed answers, which were duly served upon Midwestern, alleging that the joint and concurring negligence of Midwestern was a *pro tanto* bar to the employer/carrier's compensation lien on the proceeds of the civil suit. Following an out-of-court settlement between plaintiff and both defendants, the defendants applied for a hearing pursuant to N.C.G.S. § 97-10.2(j) requesting a determination by the trial court of the amount of settlement proceeds required to be paid to the employer/compensation carrier.

During the hearing, the trial court determined that pursuant to N.C.G.S. § 97-10.2(j) it was authorized to hear the matter and to determine the issue of Midwestern's alleged negligence in causing the accident. The trial court, without a jury, determined that Midwestern was jointly and concurrently negligent in causing plaintiff's injury and that the employer/compensation carrier was not entitled to recover any amount from the settlement. The trial

court concluded that N.C.G.S. § 97-10.2(j) superseded § 97-10.2(h). From the decision of the trial court, the employer/compensation carrier appealed to the Court of Appeals.

The Court of Appeals reversed and remanded the action to the trial court. The Court of Appeals held that the lower court erroneously decided the issue of employer negligence without a jury since subsection (e) rather than subsection (j) of N.C.G.S. § 97-10.2 controlled and, under subsection (e), the employer was entitled to have a jury decide the issue. Plaintiff and defendants Corporex and Little petitioned this Court for discretionary review which was allowed 7 September 1988.

[1] We agree with the Court of Appeals that in a tort action brought by an injured employee against third parties who allege that the employer is jointly and concurrently liable for the employee's injuries, the employer is entitled to a jury trial on the issue of employer negligence under N.C.G.S. § 97-10.2(e). N.C.G.S. § 97-10.2(e) provides:

> If the third party defending such proceeding, by answer duly served on the employer, sufficiently alleges that actionable negligence of the employer joined and concurred with the negligence of the third party in producing the injury or death, then an issue shall be submitted to the jury in such case as to whether actionable negligence of [the] employer joined and concurred with the negligence of the third party in producing the injury or death. The employer shall have the right to appear, to be represented, to introduce evidence, to cross-examine adverse witnesses, and to argue to the jury as to this issue as fully as though he were a party although not named or joined as a party to the proceeding. Such issue shall be the last of the issues submitted to the jury.

N.C.G.S. § 97-10.2(e) (1985). Subsection (e) clearly grants an employer a right to have a jury determine the issue of the employer's joint and concurrent negligence. This subsection grants the employer a right to appear and argue before a jury in defense of an allegation of joint and concurring negligence even though the employer is not named as a party to the action.

Plaintiff filed a civil action against defendants—third-party tortfeasors. Defendants filed individual answers alleging joint and

concurring negligence on the part of plaintiff's employer, Midwestern, as a *pro tanto* bar to St. Paul's workers' compensation lien. Plaintiff, in his complaint, defendant Little, by his answer, and defendant Corporex, by an amended answer, requested a jury trial on the issue of employer negligence. Prior to the pretrial conference, plaintiff and defendants Corporex and Little entered into a settlement of plaintiff's civil claim. The employer/carrier was not a party to the settlement. Subsequently, defendants requested a hearing pursuant to N.C.G.S. § 97-10.2(j) for the trial court to determine the amount of the settlement proceeds to be received by the employer/carrier.

Notwithstanding the failure of counsel for St. Paul to argue the issue of the right to a jury trial during the pretrial conference or to request a jury trial during the settlement hearing, the Court of Appeals correctly held that subsection (e) rather than subsection (j) controls the instant case. Once the third-party defendant duly serves upon the employer a sufficient allegation of employer negligence joining and concurring with that of the third party in producing the injury, "an issue shall be submitted to the jury . . . ." N.C.G.S. § 97-10.2(e) (1985). There has been no showing that the employer consented to a waiver or withdrawal of the initial demand by defendants and plaintiff for a jury trial. The settlement between the plaintiff and defendants, to which the employer was not a party, neither extinguished the employer's right to trial by jury nor did it settle the issue of the employer's negligence. For these reasons, we agree with the Court of Appeals that, in accordance with N.C.G.S. § 97-10.2(e), the employer/carrier is entitled to a jury trial on the issue of joint and concurring negligence.

[2] We also find it necessary to address an issue not decided by the Court of Appeals, i.e., whether the settlement entered into by plaintiff and the defendants is valid under N.C.G.S. § 97-10.2.

The trial court concluded that it had the authority under N.C.G.S. § 97-10.2(j) to determine the division of the settlement proceeds and concluded that the employer was not entitled to any of the settlement proceeds. However, the trial court incorrectly concluded that subsection (j) superseded subsection (h) which requires the written consent of both the employee and the employer before a settlement may be reached. *Pollard v. Smith*, 324 N.C.

424, 378 S.E. 2d 771 (1989). N.C.G.S. § 97-10.2(h) details the proper procedure for the settlement of a claim against a third party:

> In any proceeding against or settlement with the third party, every party to the claim for compensation shall have a lien to the extent of his interest . . . upon any payment made by the third party by reason of such injury or death . . . . Neither the employee or his personal representative nor the employer shall make any settlement with or accept any payment from the third party without the *written consent of the other* and no release to or agreement with the third party shall be valid or enforceable for any purpose unless both employer and employee or his personal representative join therein . . . .

N.C.G.S. § 97-10.2(h) (1985) (emphasis added). This statute, by its terms, makes it clear that neither the employer nor the employee may make a valid settlement without the written consent of the other. Midwestern, plaintiff's employer, did not give its written consent to the settlement between plaintiff employee and the third parties Corporex and Little. Therefore, the settlement was not in compliance with N.C.G.S. § 97-10.2(h). N.C.G.S. § 97-10.2(j) does not supersede § 97-10.2(h) and subsection (j) should be read *in pari materia* with the other provisions of the statute. *Pollard v. Smith*, 324 N.C. 424, 378 S.E. 2d 771 (1989). We hold that the settlement reached by plaintiff and defendants Corporex and Little without the written consent of Midwestern is void. *Id.*

For these reasons, we affirm the decision of the Court of Appeals to the extent of its holding that the trial court erroneously decided the issue of employer negligence without a jury and that the employer/carrier was entitled to have a jury pass on the issue pursuant to N.C.G.S. § 97-10.2(e). We also hold that the trial judge erred by approving the settlement reached by the parties without the consent of the employer pursuant to N.C.G.S. § 97-10.2(h). The decision of the Court of Appeals is therefore modified and affirmed.

Modified and affirmed.

STATE OF NORTH CAROLINA v. CHARLIE THOMAS RIVERS

No. 562A88

(Filed 27 June 1989)

Criminal Law § 173— murder—threats by defendant—invited error

The trial court did not err in a prosecution for first degree murder by failing to strike *ex mero motu* an answer given by a witness during cross-examination by defendant tending to show that defendant threatened to kill the victim prior to the actual killing where counsel for the defendant was attempting to show that the defendant had begged the victim not to sell any more drugs to the defendant's son. It is clear that the testimony of which defendant now complains was elicited by defense counsel during cross-examination and that he did not object to the testimony in any way or move to have it stricken at trial; any error was invited and defendant cannot complain of such error on appeal. N.C.G.S. § 15A-1443(c) (1988).

Am Jur 2d, Homicide §§ 316, 440, 536; Witnesses §§ 471, 492.

APPEAL of right pursuant to N.C.G.S. § 7A-27 from judgment entered by *Stephens, J.*, in the Superior Court, ALAMANCE County, on 7 July 1988, sentencing the defendant to life imprisonment for murder in the first degree. Heard in the Supreme Court on 10 May 1989.

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

Malcolm Ray Hunter, Jr., Appellate Defender, by M. Patricia Devine, Assistant Appellate Defender, for the defendant-appellant.

MITCHELL, Justice.

The defendant was tried in a noncapital trial upon a proper indictment charging him with murder. The jury found the defendant guilty of first degree murder, and the trial court entered judgment sentencing him to imprisonment for life.

On appeal, the defendant contends that the trial court committed plain error requiring a new trial by failing to strike *ex mero motu* an answer given by a witness, during cross-examination by the defendant, tending to show that the defendant had made a threat to kill the victim sometime prior to the actual killing in this case. We do not agree.

The State's evidence tended to show that the victim Lee Mabe was shooting pool in a business called "Pedro's" in Alamance County shortly before midnight on 23 December 1987. Lisa Mulé who had lived with the victim for approximately one year was present. Mike Rivers, the defendant's adult son, was also present, as were others.

Sometime after 11:30 p.m., the defendant walked up to Lee Mabe and pointed a pistol at his head. Mabe retreated while asking the defendant to "calm down" and saying, "Bo, what are you doing?" The defendant then held the pistol close to Mabe's chest and shot him once in the heart causing his death.

Evidence for the defendant tended to show that in April of 1987 he had become aware that his son had a cocaine problem, when his son was hospitalized for hepatitis. The defendant had sought to have his son treated for drug addiction. On one occasion, the defendant caused his son to be picked up by law enforcement officers and placed in a treatment program.

On the night of 23 December 1987, the defendant went into Pedro's because he saw his son's car parked outside. After entering Pedro's at approximately 9:15 p.m., the defendant had approximately three beers. During the evening, the defendant saw his son and the victim Lee Mabe go into the bathroom. When they returned, the defendant saw Lee Mabe hand the defendant's son a packet containing a white substance. The defendant believed it to be cocaine. The defendant testified that at that time, "I knowed he had done sold him them drugs and that he was going to go off and do them, you know, and I just went all to pieces, lost my mind, you see. . . ." The defendant testified that he did not remember whether he had ever intended to reach for a weapon, nor did he recall saying anything to anyone. The defendant testified that he did not form a plan to kill anyone and expressed regret for what had happened.

The defendant assigns as error the trial court's failure to exclude *ex mero motu* testimony of a witness introduced during cross-examination by the defendant, which the defendant contends was impermissible hearsay. The testimony in question occurred during the defendant's cross-examination of Lisa Mulé concerning a telephone conversation between the defendant and

the victim before the night the victim was killed. During cross-examination for the defendant, the following exchange occurred:

> Q. A short time later there was a telephone call and it was Charlie Rivers, wasn't it?
>
> A. Correct.
>
> Q. He talked to Lee Mabe, not to you, isn't that correct?
>
> A. Correct.
>
> Q. You know that he begged him not to provide cocaine to Mike, didn't you?
>
> A. Yes. In fact, he said he would kill him if he knew Mike was over there doing drugs, that he would kill Lee.
>
> Q. Is that what he said to you?
>
> A. *No, that's what Lee told me that he said to him,* but Lee didn't worry about it because he wasn't selling drugs to him.
>
> Q. So you don't know what—in the conversation what all was said, do you?
>
> A. No, not for sure, I wasn't on the phone.

(emphasis added).

The defendant, relying upon cases such as *State v. Loftin*, 322 N.C. 375, 368 S.E. 2d 613 (1988) and *State v. Odom*, 316 N.C. 306, 341 S.E. 2d 332 (1986), contends that the admission of this testimony constituted plain error entitling him to a new trial. We find it unnecessary, however, to engage in plain error analysis on the facts of the present case.

It appears that, during cross-examination of the witness, counsel for the defendant was attempting to show that the defendant had begged the victim not to sell any more drugs to the defendant's son. It further appears that this was part of an understandable trial strategy to arouse sympathy for the defendant with the jury by showing through various witnesses the extreme efforts the defendant had made to prevent the victim and others from selling drugs to his son. It is clear, in any event, that the testimony of which the defendant now complains was elicited by counsel for the defendant during his cross-examination of the

witness and that he did not object to the testimony in any way or move to have it stricken at trial. "Any error thus was invited and defendant cannot complain of such error on appeal. N.C.G.S. § 15A-1443(c) (1988)." *State v. Greene*, 324 N.C. 1, 12, 376 S.E. 2d 430, 438 (1988). " 'Defendant cannot invalidate a trial by . . . eliciting evidence on cross-examination which he might have rightfully excluded if the same evidence had been offered by the State. . . . Neither is invited error ground for a new trial.' " *State v. Chatman*, 308 N.C. 169, 177, 301 S.E. 2d 71, 76 (1983) (quoting *State v. Waddell*, 289 N.C. 19, 25, 220 S.E. 2d 293, 298 (1975), *death sentence vacated*, 428 U.S. 904, 49 L.Ed. 2d 1210 (1976) (citations omitted)). *See also State v. Burton*, 256 N.C. 464, 124 S.E. 2d 108 (1962) (*per curiam*). The defendant's assignment of error is without merit and is overruled.

No error.

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

CAMPOS v. FLAHERTY

No. 173P89.

Case below: 93 N.C. App. 219.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 June 1989.

DAVIDSON v. KNAUFF INS. AGENCY

No. 146P89.

Case below: 93 N.C. App. 20.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 June 1989.

DAVIS v. HIATT

No. 155PA89.

Case below: 92 N.C. App. 748.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 27 June 1989.

FOWLER v. N.C. DEPT. OF CRIME CONTROL & PUBLIC SAFETY

No. 114P89.

Case below: 92 N.C. App. 733.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 27 June 1989.

IRVING v. IRVING

No. 182P89.

Case below: 93 N.C. App. 344.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 27 June 1989.

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

LEAKE v. SUNBELT LTD. OF RALEIGH

No. 172P89.

Case below: 93 N.C. App. 199.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 27 June 1989.

NOWICKI v. NOWICKI

No. 132P89.

Case below: 92 N.C. App. 755.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 June 1989.

STATE v. CLAYTON

No. 163P89.

Case below: 92 N.C. App. 599.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 27 June 1989.

STATE v. ENSLEY

No. 273P89.

Case below: 94 N.C. App. 390.

Petition by defendants for writ of supersedeas and temporary stay denied 11 July 1989.

STATE v. FARRIS

No. 225PA89.

Case below: 93 N.C. App. 757.

Petitions by the Attorney General for discretionary review pursuant to G.S. 7A-31 and writ of supersedeas allowed 27 June 1989.

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

STATE v. HALL

No. 170P89.

Case below: 93 N.C. App. 236.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 June 1989.

STATE v. HARTNESS

No. 258P89.

Case below: 94 N.C. App. 224.

Petition by the Attorney General for temporary stay allowed 26 June 1989 pending receipt and determination of the petition for discretionary review.

STATE v. KINSER

No. 181P89.

Case below: 93 N.C. App. 344.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 27 June 1989. Motion by the Attorney General to dismiss appeal by Cammy L. Kinser for lack of substantial constitutional question allowed 27 June 1989.

STATE v. KITE

No. 198P89.

Case below: 93 N.C. App. 561.

Petition by defendants for writ of supersedeas and temporary stay denied 18 May 1989. Second petition by defendants for writ of supersedeas and temporary stay denied 27 June 1989. Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 27 June 1989. Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 27 June 1989.

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

STATE v. KLOMSER

No. 131P89.

Case below: 92 N.C. App. 757.

Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 27 June 1989. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 June 1989.

STATE v. McCARTY

No. 266P89.

Case below: 94 N.C. App. 390.

Petition by the Attorney General for temporary stay allowed 7 July 1989 pending determination of the petition for discretionary review.

STATE v. REED

No. 152P89.

Case below: 93 N.C. App. 119.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 June 1989.

STATE v. SIMMONS

No. 176P89.

Case below: 93 N.C. App. 514.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 29 June 1989.

STATE v. THORPE

No. 267A89.

Case below: 94 N.C. App. 270.

Petition by the Attorney General for writ of supersedeas and temporary stay allowed 7 July 1989.

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

STATE EX REL. UTILITIES COMM. v. SOUTHERN BELL

No. 195PA89.

Case below: 93 N.C. App. 260.

Petition by the Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 27 June 1989. Petition by Utilities Commission for discretionary review pursuant to G.S. 7A-31 allowed 27 June 1989.

STILLEY & ASSOC. v. EASTERN ENGINEERING

No. 142P89.

Case below: 93 N.C. App. 166.

Motion by defendant for reconsideration of petition to review the decision of the Court of Appeals dismissed 27 June 1989.

YATES v. DOWLESS

No. 233PA89.

Case below: 93 N.C. App. 787.

Petition by plaintiff for writ of supersedeas allowed 16 June 1989. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 16 June 1989.

APPENDIX

AMENDMENTS TO RULES OF
APPELLATE PROCEDURE

RULES OF APPELLATE PROCEDURE

ORDER ADOPTING
AMENDMENTS TO RULES OF APPELLATE PROCEDURE

Rules 3, 7, 9, 13, 14, 15, 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 as follows:

Rules 3, 7, and 9: effective for all judgments of the trial tribunal entered on or after 1 July 1989;

Rules 13, 14, 15, and 28: 1 September 1989;

Appendixes A through F: 1 July 1989.

The amendments to Rule 4(a), adopted 8 December 1988 to become effective 1 July 1989, are hereby rescinded. Rule 4 shall continue in effect without change.

Adopted by the Court in Conference this 8th day of June, 1989. These amendments shall be promulgated by publication in the Advance sheets of the Supreme Court and the Court of Appeals. The Appellate Court Reporter shall publish the North Carolina Rules of Appellate Procedure, in their entirety as amended through this action, at the earliest practicable time.

WHICHARD, J.
For the Court

Rule 3

APPEAL IN CIVIL CASES—HOW AND WHEN TAKEN

(a) *Filing the Notice of Appeal.* Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subdivision (c) of this rule.

(b) *Special Provisions.* Appeals in the following types of cases shall be taken in the time and manner set out in the General Statutes section noted.

(1) Termination of Parental Rights, G.S. 7A-289.34.

(2) Juvenile matters, G.S. 7A-666.

(c) *Time for Taking Appeal.* Appeal from a judgment or order in a civil action or special proceeding must be taken within 30 days after its entry. The running of the time for filing and serving a notice of appeal in a civil action or special proceeding is tolled as to all parties by a timely motion filed by any party pursuant to the Rules of Civil Procedure enumerated in this subdivision, and the full time for appeal commences to run and is to be computed from the entry of an order upon any of the following motions:

(1) a motion under Rule 50(b) for judgment *n.o.v.* whether or not with conditional grant or denial of new trial;

(2) a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted;

(3) a motion under Rule 59 to alter or amend a judgment;

(4) a motion under Rule 59 for a new trial.

If a timely notice of appeal is filed and served by a party, any other party may file and serve a notice of appeal within 10 days after the first notice of appeal was served on such party.

(d) *Content of Notice of Appeal.* The notice of appeal required to be filed and served by subdivision (a) 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.

(e) *Service of Notice of Appeal.* Service of copies of the notice of appeal may be made as provided in Rule 26 of these rules.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 14 April 1976;
8 December 1988—3(a),(b),(c),(d)—effective for all judgments of the trial tribunal entered on or after 1 July 1989;
8 June 1989—3(b)—effective for all judgments of the trial tribunal entered on or after 1 July 1989.

Rule 7

PREPARATION OF THE TRANSCRIPT; COURT REPORTER'S DUTIES

(a) *Ordering the Transcript.*

(1) **Civil Cases.** Within 10 days after filing the notice of appeal the appellant shall order, in writing, from the court reporter a transcript of such parts of the proceedings not already on file as he deems necessary. A copy of the order shall be filed with the clerk of the trial tribunal. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, he shall file with the record a transcript of all evidence relevant to such finding or conclusion. Unless the entire transcript is to be filed, the appellant shall, within the time above provided, file and serve on the appellee a description of the parts of the transcript which he intends to file with the record and a statement of the issues he intends to present on the appeal. If the appellee deems a transcript of other parts of the proceedings to be necessary he shall, within 10 days after the service of the statement of the appellant, file and serve on the appellant a designation of additional parts ordered by the appellee. At the time of ordering, a party shall make

satisfactory arrangements with the court reporter for payment of the cost of the transcript.

(2) **Criminal Cases.** Upon the filing of a notice of appeal, unless the parties file therewith a stipulation designating the parts of the proceedings which need not be transcribed, the clerk of the trial tribunal shall order from the court reporter a transcript of the proceedings and shall file a certificate of such order. The clerk's order of transcript shall include the caption of the case; date or dates of trial; portions of transcript requested; number of copies required; the name, address and telephone number of appellant's counsel; and the trial court's order establishing indigency for the appeal, if any. In criminal cases where there is no order establishing indigency, the defendant shall make satisfactory arrangements with the court reporter for payment of the cost of the transcript at the time of the clerk's order of transcript.

(b) *Preparation and Delivery of Transcript.*

(1) From the date of the reporter's receipt of an order for a transcript, the reporter shall have 60 days for preparation and filing of the transcript in civil cases and non-capital criminal cases and shall have 120 days for preparation and filing of the transcript in capitally tried cases. The trial tribunal, in its discretion, and for good cause shown by the reporter or by a party on behalf of the reporter may extend the time for preparation of the transcript for an additional 30 days. Where the clerk's order of transcript is accompanied by the trial court's order establishing the indigency of the appellant and directing the transcript to be prepared at State expense, the time for preparation of the transcript commences seven days after the filing of the clerk's order of transcript.

(2) The court reporter shall deliver the completed transcript to the parties, as ordered, within the time provided by this rule, unless an extension of time has been granted under Rule 7(b)(1) or Rule 27(c). The reporter shall certify to the clerk of the trial tribunal that the parties' copies have been so delivered, and shall send a copy of

such certification to the appellate court to which the appeal is taken. The appealing party shall retain custody of the original of the transcript and shall transmit the original transcript to the appellate court upon settlement of the record on appeal.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
REPEALED: JULY 1, 1978.
(See note following Rule 17.)

Re-adopted: 8 December 1988—effective for all judgments of the trial tribunal entered on or after 1 July 1989.

Amended: 8 June 1989—effective for all judgments of the trial tribunal entered on or after 1 July 1989.

Rule 9

THE RECORD ON APPEAL

(a) *Function; Composition of Record.* In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal and the verbatim transcript of proceedings, if one is designated, constituted in accordance with this Rule 9.

(1) **Composition of the Record in Civil Actions and Special Proceedings.** The record on appeal in civil actions and special proceedings shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. a copy of the summons with return, or of other papers showing jurisdiction of the trial court over person or property, or a statement showing same;

d. copies of the pleadings, and of any pre-trial order on which the case or any part thereof was tried;

e. so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned, or a statement specifying that the verbatim transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

f. where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given;

g. copies of the issues submitted and the verdict, or of the trial court's findings of fact and conclusions of law;

h. a copy of the judgment, order, or other determination from which appeal is taken;

i. a copy of the notice of appeal, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings if one is filed pursuant to Rule 9(c)(2) and (3);

j. copies of all other papers filed and statements of all other proceedings had in the trial court which are necessary to an understanding of all errors assigned unless they appear in the verbatim transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2); and

k. ~~exceptions and~~ assignments of error set out in the manner provided in Rule 10.

(2) **Composition of the Record in Appeals from Superior Court Review of Administrative Boards and Agencies.** The record on appeal in cases of appeal from judgments of the superior court rendered upon review of the proceedings of administrative boards or agencies, other than those specified in Rule 18(a), shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered

out of session, the time and place of rendition, and the party appealing;

c. a copy of the summons, notice of hearing or other papers showing jurisdiction of the board or agency over the persons or property sought to be bound in the proceeding, or a statement showing same;

d. copies of all petitions and other pleadings filed in the superior court;

e. copies of all items properly before the superior court as are necessary for an understanding of all errors assigned;

f. a copy of any findings of fact and conclusions of law and of the judgment, order, or other determination of the superior court from which appeal is taken;

g. a copy of the notice of appeal from the superior court, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings, if one is filed pursuant to Rule 9(c)(2) and (3); and

h. ~~exceptions and~~ assignments of error to the actions of the superior court, set out in the manner provided in Rule 10.

(3) **Composition of the Record in Criminal Actions.** The record on appeal in criminal actions shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. copies of all warrants, informations, presentments, and indictments upon which the case has been tried in any court;

d. copies of docket entries or a statement showing all arraignments and pleas;

e. so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned, or a statement that the entire verbatim transcript of the proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

f. where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given;

g. copies of the verdict and of the judgment, order, or other determination from which appeal is taken; and in capitally tried cases, a copy of the jury verdict sheet for sentencing, showing the aggravating and mitigating circumstances submitted and found or not found;

h. a copy of the notice of appeal, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding defendant indigent for the purposes of the appeal and assigning counsel, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings, if one is to be filed pursuant to Rule 9(c)(2);

i. copies of all other papers filed and statements of all other proceedings had in the trial courts which are necessary for an understanding of all errors assigned, unless they appear in the verbatim transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2); and

j. ~~exceptions and~~ assignments of error set out in the manner provided in Rule 10.

(b) *Form of Records; Amendments.* The record on appeal shall be in the format prescribed by Rule 26(g) and the appendixes to these rules.

(1) **Order of Arrangement.** The items constituting the record on appeal should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal.

(2) **Inclusion of Unnecessary Matter; Penalty.** It shall be the duty of counsel for all parties to an appeal to avoid

including in the record on appeal matter not necessary for an understanding of the errors assigned. The cost of including such matter may be charged as costs to the party or counsel who caused or permitted its inclusion.

(3) **Filing Dates and Signatures on Papers.** Every pleading, motion, affidavit, or other paper included in the record on appeal shall show the date on which it was filed and, if verified, the date of verification and the person who verified. Every judgment, order, or other determination shall show the date on which it was entered. The typed or printed name of the person signing a paper shall be entered immediately below the signature.

(4) **Pagination; Counsel Identified.** The pages of the record on appeal shall be numbered consecutively, be referred to as "record pages" and be cited as "(R p ___)." Pages of the verbatim transcript of proceedings filed under Rule 9(c)(2) shall be referred to as "transcript pages" and cited as "(T p ___)." At the end of the record on appeal shall appear the names, office addresses, and telephone numbers of counsel of record for all parties to the appeal.

(5) **Additions and Amendments to Record on Appeal.** On motion of any party or on its own initiative, the appellate court may order additional portions of a trial court record or transcript sent up and added to the record on appeal. On motion of any party the appellate court may order any portion of the record on appeal or transcript amended to correct error shown as to form or content. Prior to the docketing of the record on appeal in the appellate court, such motions may be made by any party to the trial tribunal.

(c) *Presentation of Testimonial Evidence and Other Proceedings.* Testimonial evidence, voir dire, and other trial proceedings necessary to be presented for review by the appellate court may be included either in the record on appeal in the form specified in Rule 9(c)(1) or by designating the verbatim transcript of proceedings of the trial tribunal as provided in Rule 9(c)(2) and (c)(3). Where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given shall be included in the record on appeal.

(1) **When Testimonial Evidence Narrated—How Set Out in Record.** Where error is assigned with respect to the admission or exclusion of evidence, the question and answer form shall be utilized in setting out the pertinent questions and answers. Other testimonial evidence required to be included in the record on appeal by Rule 9(a) shall be set out in narrative form except where such form might not fairly reflect the true sense of the evidence received, in which case it may be set out in question and answer form. Counsel are expected to seek that form or combination of forms best calculated under the circumstances to present the true sense of the required testimonial evidence concisely and at a minimum of expense to the litigants. To this end, counsel may object to particular narration that it does not accurately reflect the true sense of testimony received; or to particular question and answer portions that the testimony might with no substantial loss in accuracy be summarized in narrative form at substantially less expense. When a judge or referee is required to settle the record on appeal under Rule 11(c) and there is dispute as to the form, he shall settle the form in the course of his general settlement of the record on appeal.

(2) **Designation that Verbatim Transcript of Proceedings in Trial Tribunal Will Be Used.** Appellant may designate in the record that the testimonial evidence will be presented in the verbatim transcript of the evidence in the trial tribunal in lieu of narrating the evidence as permitted by Rule 9(c)(1). Appellant may also designate that the verbatim transcript will be used to present voir dire or other trial proceedings where those proceedings are the basis for one or more assignments of error and where a verbatim transcript of those proceedings has been made. Any such designation shall refer to the page numbers of the transcript being designated. Appellant need not designate all of the verbatim transcript which has been made, provided that when the verbatim transcript is designated to show the testimonial evidence, so much of the testimonial evidence must be designated as is necessary for an understanding of all errors assigned. When appellant has narrated the evidence and trial proceedings under Rule 9(c)(1), the appellee may designate the verbatim transcript as a proposed alternative record on appeal.

(3) **Verbatim Transcript of Proceedings—Settlement, Filing, Copies, Briefs.** Whenever a verbatim transcript is designated to be used pursuant to Rule 9(c)(2):

a. it shall be settled, together with the record on appeal, according to the procedures established by Rule 11;

b. appellant shall cause the settled, verbatim transcript to be filed, contemporaneously with the record on appeal, with the clerk of the appellate court in which the appeal is docketed;

c. in criminal appeals, the district attorney, upon settlement of the record, shall forward one copy of the settled transcript to the Attorney General of North Carolina; and

d. the briefs of the parties must comport with the requirements of Rule 28 regarding complete statement of the facts of the case and regarding appendixes to the briefs.

(4) **Presentation of Discovery Materials.** Discovery materials offered into evidence at trial shall be brought forward, if relevant, as other evidence. In all instances where discovery materials are considered by the trial tribunal, other than as evidence offered at trial, the following procedures for presenting those materials to the appellate court shall be used: Depositions shall be treated as testimonial evidence and shall be presented by narration or by transcript of the deposition in the manner prescribed by this Rule 9(c). Other discovery materials, including interrogatories and answers, requests for admission, responses to requests, motions to produce, and the like, pertinent to questions raised on appeal, may be set out in the record on appeal or may be sent up as documentary exhibits in accordance with Rule 9(d)(2).

(d) *Models, Diagrams, and Exhibits of Material.*

(1) **Exhibits.** Maps, plats, diagrams and other documentary exhibits filed as portions of or attachments to items required to be included in the record on appeal shall be included as part of such items in the record on appeal. Where such exhibits are not necessary to an understanding of the errors assigned, they may by agreement of counsel or by order of the trial court upon motion be excluded from the record on appeal.

(2) **Transmitting Exhibits.** Three legible copies of each documentary exhibit offered in evidence and required for understanding of errors assigned shall be filed in the appellate court. When an original exhibit has been settled as a necessary part of the record on appeal, any party may within 10 days after settlement of the record on appeal in writing request the clerk of superior court to transmit the exhibit directly to the clerk of the appellate court. The clerk shall thereupon promptly identify and transmit the exhibit as directed by the party. Upon receipt of the exhibit, the clerk of the appellate court shall make prompt written acknowledgment thereof to the transmitting clerk and the exhibit shall be included as part of the records in the appellate court. Portions of the record on appeal in either appellate court which are not suitable for reproduction may be designated by the Clerk of the Supreme Court to be exhibits. Counsel may then be required to submit three additional copies of those designated materials.

(3) **Removal of Exhibits from Appellate Court.** All models, diagrams, and exhibits of material placed in the custody of the Clerk of the appellate court must be taken away by the parties within 90 days after the mandate of the Court has issued or the case has otherwise been closed by withdrawal, dismissal, or other order of the Court, unless notified otherwise by the Clerk. When this is not done, the Clerk shall notify counsel to remove the articles forthwith; and if they are not removed within a reasonable time after such notice, the Clerk shall destroy them, or make such other disposition of them as to him may seem best.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 10 June 1981—9(c)(1)—applicable to all appeals docketed on or after 1 October 1981;

12 January 1982—9(c)(1)—applicable to all appeals docketed after 15 March 1982;

27 November 1984—applicable to all appeals in which the notice of appeal is filed on or after 1 February 1985;

8 December 1988—9(a), (c)—effective for all judgments of the trial tribunal entered on or after 1 July 1989;

8 June 1989—9(a)—effective for all judgments of the trial tribunal entered on or after 1 July 1989.

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. If permitted by Rule 28(h), 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. If permitted by Rule 28(h), 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.

ADMINISTRATIVE HISTORY

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;
8 June 1989—13(a)—effective 1 September 1989.

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 Su-

preme 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. If permitted by Rule 28(h), 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.

ADMINISTRATIVE HISTORY

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;
8 June 1989—14(d)(1)—effective 1 September 1989.

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. If permitted by Rule 28(h), 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, whether on petition of a party or on 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.

ADMINISTRATIVE HISTORY

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;
8 December 1988—15(i)(2)—effective 1 January 1989;
8 June 1989—15(g)(2)—effective 1 September 1989.

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.* Unless the court, upon its own initiative, orders a reply brief to be filed and served, none will be received or considered by the court, except as herein provided.

(1) If the appellee has presented in its brief new or additional questions as permitted by Rule 28(c), an appellant may, within 14 days after service of such brief, file and serve a reply brief limited to those new or additional questions.

(2) If the parties are notified under Rule 30(f) that the case will be submitted without oral argument on the record and briefs, an appellant may, within 14 days after serv-

ice of such notification, file and serve a reply brief limited to a concise rebuttal to arguments set out in the brief of the appellee which were not addressed in the appellant's principal brief.

(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.

(j) *Page Limitations Applicable to Briefs Filed in the Court of Appeals.* Principal briefs filed in the North Carolina Court of Appeals, whether filed by appellant, appellee, or *amicus curiae*, formatted according to Rule 26 and the Appendixes to these Rules, shall be limited to 35 pages of text, exclusive of tables

of contents, tables of authorities, and appendixes. Reply briefs, if permitted by this Rule shall be limited to 15 pages of text.

ADMINISTRATIVE HISTORY

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;
8 June 1989—28(h) and (j)—effective 1 September 1989.

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.

ADMINISTRATIVE HISTORY

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;
8 December 1988—4(a)—effective for all judgments of the trial tribunal entered on or after 1 July 1989;
8 June 1989—4(a)—8 December 1988 amendment rescinded prior to effective date.

APPENDIXES A THROUGH F

Appendixes A through F, effective 1 July 1989, were adopted by the Supreme Court pursuant to its Order Adopting Amendments to the Rules of Appellate Procedure entered on 8 June 1989. In order to avoid duplication, they are printed only as a part of the North Carolina Rules of Appellate Procedure published in their entirety in the following pages.

NORTH CAROLINA

RULES OF

APPELLATE PROCEDURE

Rules effective 1 July 1989

(Also includes amendments to Rules 13, 14, 15, and 28, relating to reply briefs and Court of Appeals page limitations, effective 1 September 1989.)

Table of Contents

ARTICLE I

APPLICABILITY OF RULES

Rule 1

SCOPE OF RULES: TRIAL TRIBUNAL DEFINED

(a) *Scope of Rules.* These rules govern procedure in all appeals from the courts of the trial division to the courts of the appellate division; in appeals in civil and criminal cases from the Court of Appeals to the Supreme Court; in direct appeals from administrative agencies, boards, and commissions to the appellate division; and in applications to the courts of the appellate division for writs and other relief which the courts or judges thereof are empowered to give.

(b) *Rules Do Not Affect Jurisdiction.* These rules shall not be construed to extend or limit the jurisdiction of the courts of the appellate division as that is established by law.

(c) *Definition of Trial Tribunal.* As used in these rules, the term "trial tribunal" includes the superior courts, the district courts, and any administrative agencies, boards, or commissions from which appeals lie directly to the appellate division.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 27 November 1984—1(a) and (c)—effective 1 February 1985.

Rule 2

SUSPENSION OF RULES

To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

ARTICLE II

APPEALS FROM JUDGMENTS AND ORDERS OF SUPERIOR COURTS AND DISTRICT COURTS

Rule 3

APPEAL IN CIVIL CASES—HOW AND WHEN TAKEN

(a) *Filing the Notice of Appeal.* Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subdivision (c) of this rule.

(b) *Special Provisions.* Appeals in the following types of cases shall be taken in the time and manner set out in the General Statutes section noted:

(1) Termination of Parental Rights, G.S. 7A-289.34.

(2) Juvenile matters, G.S. 7A-666.

(c) *Time For Taking Appeal.* Appeal from a judgment or order in a civil action or special proceeding must be taken within 30 days after its entry. The running of the time for filing and serving a notice of appeal in a civil action or special proceeding is tolled as to all parties by a timely motion filed by any party pursuant to the Rules of Civil Procedure enumerated in this subdivision, and the full time for appeal commences to run and is to be computed from the entry of an order upon any of the following motions:

(1) a motion under Rule 50(b) for judgment *n.o.v.* whether or not with conditional grant or denial of new trial;

(2) a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted;

(3) a motion under Rule 59 to alter or amend a judgment;

(4) a motion under Rule 59 for a new trial.

If a timely notice of appeal is filed and served by a party, any other party may file and serve a notice of appeal within 10 days after the first notice of appeal was served on such party.

(d) *Content of Notice of Appeal.* The notice of appeal required to be filed and served by subdivision (a) 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.

(e) *Service of Notice of Appeal.* Service of copies of the notice of appeal may be made as provided in Rule 26 of these rules.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 14 April 1976;
8 December 1988—3(a),(b),(c),(d)—effective for all judgments of the trial tribunal entered on or after 1 July 1989;
8 June 1989—3(b)—effective for all judgments of the trial tribunal entered on or after 1 July 1989.

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 spec-

ify 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.

ADMINISTRATIVE HISTORY

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;
8 December 1988—4(a)—effective for all judgments of the trial tribunal entered on or after 1 July 1989;
8 June 1989—4(a)—8 December 1988 amendment rescinded prior to effective date.

Rule 5

JOINDER OF PARTIES ON APPEAL

(a) *Appellants.* If two or more parties are entitled to appeal from a judgment, order, or other determination and their interests are such as to make their joinder in appeal practicable, they may give a joint oral notice of appeal or file and serve a joint notice of appeal in accordance with Rules 3 and 4; or they may join in appeal after timely taking of separate appeals by filing notice of joinder in the office of the clerk of superior court and serving copies thereof upon all other parties.

(b) *Appellees.* Two or more appellees whose interests are such as to make their joinder on appeal practicable may, by filing notice of joinder in the office of the clerk of superior court and serving copies thereof upon all other parties, so join.

(c) *Procedure after Joinder.* After joinder, the parties proceed as a single appellant or appellee. Filing and service of papers by and upon joint appellants or appellees is as provided by Rule 26(e).

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Rule 6

SECURITY FOR COSTS ON APPEAL

(a) *In Regular Course.* Except in pauper appeals an appellant in a civil action must provide adequate security for the costs of appeal in accordance with the provisions of G.S. 1-285 and 1-286.

(b) *In Forma Pauperis Appeals.* An appellant in a civil action may be allowed to prosecute an appeal in forma pauperis without providing security for costs in accordance with the provisions of G.S. 1-288.

(c) *Filed with Record on Appeal.* When security for costs is required, the appellant shall file with the record on appeal a certified copy of the appeal bond or a certificate of the clerk of the trial tribunal showing cash deposit made in lieu of bond.

(d) *Dismissal for Failure to File or Defect in Security.* For failure of the appellant to provide security as required by subdivision (a) or to file evidence thereof as required by subdivision (c), or for a substantial defect or irregularity in any security provided, the appeal may on motion of an appellee be dismissed by the appellate court where docketed, unless for good cause shown the court permits the security to be provided or the filing to be made out of time, or the defect or irregularity to be corrected. A motion to dismiss on these grounds shall be made and determined in accordance with Rule 37 of these rules. When the motion to dismiss is made on the grounds of a defect or irregularity, the appellant may as a matter of right correct the defect or irregularity by filing a proper bond or making proper deposit with the clerk of the appellate court within 10 days after service of the motion upon him or before the case is called for argument, whichever first occurs.

(e) *No Security for Costs in Criminal Appeals.* Pursuant to G.S. 15A-1449, no security for costs is required upon appeal of criminal cases to the appellate division.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 27 November 1984—6(e)—effective 1 February 1985.

Rule 7

PREPARATION OF THE TRANSCRIPT; COURT REPORTER'S DUTIES

(a) *Ordering the Transcript.*

(1) **Civil Cases.** Within 10 days after filing the notice of appeal the appellant shall order, in writing, from the court reporter a transcript of such parts of the proceedings not already on file as he deems necessary. A copy of the order shall be filed with the clerk of the trial tribunal. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, he shall file with the record a transcript of all evidence relevant to such finding or conclusion. Unless the entire transcript is to be filed, the appellant shall, within the time above provided, file and serve on the appellee a description of the parts of the transcript which he intends to file with the record and a statement of the issues he intends to present on the appeal. If the appellee deems a transcript of other parts of the proceedings to be necessary he shall, within 10 days after the service of the statement of the appellant, file and serve on the appellant a designation of additional parts ordered by the appellee. At the time of ordering, a party shall make satisfactory arrangements with the court reporter for payment of the cost of the transcript.

(2) **Criminal Cases.** Upon the filing of a notice of appeal, unless the parties file therewith a stipulation designating the parts of the proceedings which need not be transcribed, the clerk of the trial tribunal shall order from the court reporter a transcript of the proceedings and shall file a certificate of such order. The clerk's order of transcript shall include the caption of the case; date or dates of trial; portions of transcript requested; number of copies required; the name, address and telephone number of appellant's counsel; and the trial court's or-

der establishing indigency for the appeal, if any. In criminal cases where there is no order establishing indigency, the defendant shall make satisfactory arrangements with the court reporter for payment of the cost of the transcript at the time of the clerk's order of transcript.

(b) *Preparation and Delivery of Transcript.*

(1) From the date of the reporter's receipt of an order for a transcript, the reporter shall have 60 days for preparation and filing of the transcript in civil cases and non-capital criminal cases and shall have 120 days for preparation and filing of the transcript in capitally tried cases. The trial tribunal, in its discretion, and for good cause shown by the reporter or by a party on behalf of the reporter may extend the time for preparation of the transcript for an additional 30 days. Where the clerk's order of transcript is accompanied by the trial court's order establishing the indigency of the appellant and directing the transcript to be prepared at State expense, the time for preparation of the transcript commences seven days after the filing of the clerk's order of transcript.

(2) The court reporter shall deliver the completed transcript to the parties, as ordered, within the time provided by this rule, unless an extension of time has been granted under Rule 7(b)(1) or Rule 27(c). The reporter shall certify to the clerk of the trial tribunal that the parties' copies have been so delivered, and shall send a copy of such certification to the appellate court to which the appeal is taken. The appealing party shall retain custody of the original of the transcript and shall transmit the original transcript to the appellate court upon settlement of the record on appeal.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
REPEALED: JULY 1, 1978.
(See note following Rule 17.)
Re-adopted: 8 December 1988—effective for all judgments of the trial tribunal entered on or after 1 July 1989.
Amended: 8 June 1989—effective for all judgments of the trial tribunal entered on or after 1 July 1989.

Rule 8

STAY PENDING APPEAL

(a) *Stay in Civil Cases.* When appeal is taken in a civil action from a judgment, order, or other determination of a trial court, stay of execution or enforcement thereof pending disposition of the appeal must ordinarily first be sought by the deposit of security with the clerk of the superior court in those cases for which provision is made by law for the entry of stays upon deposit of adequate security, or by application to the trial court for a stay order in all other cases. After a stay order or entry has been denied or vacated by a trial court, an appellant may apply to the appropriate appellate court for a writ of supersedeas in accordance with Rule 23. Application for the writ of supersedeas may similarly be made to the appellate court in the first instance when extraordinary circumstances make it impracticable to obtain a stay by deposit of security or by application to the trial court for a stay order.

(b) *Stay in Criminal Cases.* When a defendant has given notice of appeal, those portions of criminal sentences which impose fines or costs are automatically stayed pursuant to the provisions of G.S. 15A-1451. Stays of imprisonment or of the execution of death sentences must be pursued under G.S. 15A-536 or Appellate Rule 23, Writ of Supersedeas.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 27 November 1984—8(b)—effective 1 February 1985.

Rule 9

THE RECORD ON APPEAL

(a) *Function; Composition of Record.* In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal and the verbatim transcript of proceedings, if one is designated, constituted in accordance with this Rule 9.

(1) **Composition of the Record in Civil Actions and Special Proceedings.** The record on appeal in civil actions and special proceedings shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. a copy of the summons with return, or of other papers showing jurisdiction of the trial court over person or property, or a statement showing same;

d. copies of the pleadings, and of any pre-trial order on which the case or any part thereof was tried;

e. so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned, or a statement specifying that the verbatim transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

f. where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given;

g. copies of the issues submitted and the verdict, or of the trial court's findings of fact and conclusions of law;

h. a copy of the judgment, order, or other determination from which appeal is taken;

i. a copy of the notice of appeal, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings if one is filed pursuant to Rule 9(c)(2) and (3);

j. copies of all other papers filed and statements of all other proceedings had in the trial court which are necessary to an understanding of all errors assigned unless they appear in the verbatim transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2); and

k. assignments of error set out in the manner provided in Rule 10.

(2) **Composition of the Record in Appeals from Superior Court Review of Administrative Boards and Agencies.**

The record on appeal in cases of appeal from judgments of the superior court rendered upon review of the proceedings of administrative boards or agencies, other than those specified in Rule 18(a), shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. a copy of the summons, notice of hearing or other papers showing jurisdiction of the board or agency over the persons or property sought to be bound in the proceeding, or a statement showing same;

d. copies of all petitions and other pleadings filed in the superior court;

e. copies of all items properly before the superior court as are necessary for an understanding of all errors assigned;

f. a copy of any findings of fact and conclusions of law and of the judgment, order, or other determination of the superior court from which appeal is taken;

g. a copy of the notice of appeal from the superior court, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings, if one is filed pursuant to Rule 9(c)(2) and (3); and

h. assignments of error to the actions of the superior court, set out in the manner provided in Rule 10.

(3) **Composition of the Record in Criminal Actions.** The record on appeal in criminal actions shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which

the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. copies of all warrants, informations, presentments, and indictments upon which the case has been tried in any court;

d. copies of docket entries or a statement showing all arraignments and pleas;

e. so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned, or a statement that the entire verbatim transcript of the proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

f. where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given;

g. copies of the verdict and of the judgment, order, or other determination from which appeal is taken; and in capitally tried cases, a copy of the jury verdict sheet for sentencing, showing the aggravating and mitigating circumstances submitted and found or not found;

h. a copy of the notice of appeal, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding defendant indigent for the purposes of the appeal and assigning counsel, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings, if one is to be filed pursuant to Rule 9(c)(2);

i. copies of all other papers filed and statements of all other proceedings had in the trial courts which are necessary for an understanding of all errors assigned, unless they appear in the verbatim transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2); and

j. assignments of error set out in the manner provided in Rule 10.

(b) *Form of Records; Amendments.* The record on appeal shall be in the format prescribed by Rule 26(g) and the appendixes to these rules.

(1) **Order of Arrangement.** The items constituting the record on appeal should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal.

(2) **Inclusion of Unnecessary Matter; Penalty.** It shall be the duty of counsel for all parties to an appeal to avoid including in the record on appeal matter not necessary for an understanding of the errors assigned. The cost of including such matter may be charged as costs to the party or counsel who caused or permitted its inclusion.

(3) **Filing Dates and Signatures on Papers.** Every pleading, motion, affidavit, or other paper included in the record on appeal shall show the date on which it was filed and, if verified, the date of verification and the person who verified. Every judgment, order, or other determination shall show the date on which it was entered. The typed or printed name of the person signing a paper shall be entered immediately below the signature.

(4) **Pagination; Counsel Identified.** The pages of the record on appeal shall be numbered consecutively, be referred to as "record pages" and be cited as "(R p)." Pages of the verbatim transcript of proceedings filed under Rule 9(c)(2) shall be referred to as "transcript pages" and cited as "(T p __)." At the end of the record on appeal shall appear the names, office addresses, and telephone numbers of counsel of record for all parties to the appeal.

(5) **Additions and Amendments to Record on Appeal.** On motion of any party or on its own initiative, the appellate court may order additional portions of a trial court record or transcript sent up and added to the record on appeal. On motion of any party the appellate court may order any portion of the record on appeal or transcript amended to correct error shown as to form or content. Prior to the docketing of the record on appeal in the appellate court, such motions may be made by any party to the trial tribunal.

(c) *Presentation of Testimonial Evidence and Other Proceedings.* Testimonial evidence, voir dire, and other trial proceedings necessary

to be presented for review by the appellate court may be included either in the record on appeal in the form specified in Rule 9(c)(1) or by designating the verbatim transcript of proceedings of the trial tribunal as provided in Rule 9(c)(2) and (c)(3). Where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given shall be included in the record on appeal.

(1) **When Testimonial Evidence Narrated—How Set Out in Record.** Where error is assigned with respect to the admission or exclusion of evidence, the question and answer form shall be utilized in setting out the pertinent questions and answers. Other testimonial evidence required to be included in the record on appeal by Rule 9(a) shall be set out in narrative form except where such form might not fairly reflect the true sense of the evidence received, in which case it may be set out in question and answer form. Counsel are expected to seek that form or combination of forms best calculated under the circumstances to present the true sense of the required testimonial evidence concisely and at a minimum of expense to the litigants. To this end, counsel may object to particular narration that it does not accurately reflect the true sense of testimony received; or to particular question and answer portions that the testimony might with no substantial loss in accuracy be summarized in narrative form at substantially less expense. When a judge or referee is required to settle the record on appeal under Rule 11(c) and there is dispute as to the form, he shall settle the form in the course of his general settlement of the record on appeal.

(2) **Designation that Verbatim Transcript of Proceedings in Trial Tribunal Will Be Used.** Appellant may designate in the record that the testimonial evidence will be presented in the verbatim transcript of the evidence in the trial tribunal in lieu of narrating the evidence as permitted by Rule 9(c)(1). Appellant may also designate that the verbatim transcript will be used to present voir dire or other trial proceedings where those proceedings are the basis for one or more assignments of error and where a verbatim transcript of those proceedings has been made. Any such designation shall refer to the page numbers of the transcript being designated. Appellant need not designate all of the ver-

batim transcript which has been made, provided that when the verbatim transcript is designated to show the testimonial evidence, so much of the testimonial evidence must be designated as is necessary for an understanding of all errors assigned. When appellant has narrated the evidence and trial proceedings under Rule 9(c)(1), the appellee may designate the verbatim transcript as a proposed alternative record on appeal.

(3) **Verbatim Transcript of Proceedings—Settlement, Filing, Copies, Briefs.** Whenever a verbatim transcript is designated to be used pursuant to Rule 9(c)(2):

a. it shall be settled, together with the record on appeal, according to the procedures established by Rule 11;

b. appellant shall cause the settled, verbatim transcript to be filed, contemporaneously with the record on appeal, with the clerk of the appellate court in which the appeal is docketed;

c. in criminal appeals, the district attorney, upon settlement of the record, shall forward one copy of the settled transcript to the Attorney General of North Carolina; and

d. the briefs of the parties must comport with the requirements of Rule 28 regarding complete statement of the facts of the case and regarding appendixes to the briefs.

(4) **Presentation of Discovery Materials.** Discovery materials offered into evidence at trial shall be brought forward, if relevant, as other evidence. In all instances where discovery materials are considered by the trial tribunal, other than as evidence offered at trial, the following procedures for presenting those materials to the appellate court shall be used: Depositions shall be treated as testimonial evidence and shall be presented by narration or by transcript of the deposition in the manner prescribed by this Rule 9(c). Other discovery materials, including interrogatories and answers, requests for admission, responses to requests, motions to produce, and the like, pertinent to questions raised on appeal, may be set out in the record on appeal or may be sent up as documentary exhibits in accordance with Rule 9(d)(2).

(d) *Models, Diagrams, and Exhibits of Material.*

(1) **Exhibits.** Maps, plats, diagrams and other documentary exhibits filed as portions of or attachments to items required to be included in the record on appeal shall be included as part of such items in the record on appeal. Where such exhibits are not necessary to an understanding of the errors assigned, they may by agreement of counsel or by order of the trial court upon motion be excluded from the record on appeal.

(2) **Transmitting Exhibits.** Three legible copies of each documentary exhibit offered in evidence and required for understanding of errors assigned shall be filed in the appellate court. When an original exhibit has been settled as a necessary part of the record on appeal, any party may within 10 days after settlement of the record on appeal in writing request the clerk of superior court to transmit the exhibit directly to the clerk of the appellate court. The clerk shall thereupon promptly identify and transmit the exhibit as directed by the party. Upon receipt of the exhibit, the clerk of the appellate court shall make prompt written acknowledgment thereof to the transmitting clerk and the exhibit shall be included as part of the records in the appellate court. Portions of the record on appeal in either appellate court which are not suitable for reproduction may be designated by the Clerk of the Supreme Court to be exhibits. Counsel may then be required to submit three additional copies of those designated materials.

(3) **Removal of Exhibits from Appellate Court.** All models, diagrams, and exhibits of material placed in the custody of the Clerk of the appellate court must be taken away by the parties within 90 days after the mandate of the Court has issued or the case has otherwise been closed by withdrawal, dismissal, or other order of the Court, unless notified otherwise by the Clerk. When this is not done, the Clerk shall notify counsel to remove the articles forthwith; and if they are not removed within a reasonable time after such notice, the Clerk shall destroy them, or make such other disposition of them as to him may seem best.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 10 June 1981—9(c)(1)—applicable to all appeals docketed on or after 1 October 1981;
12 January 1982—9(c)(1)—applicable to all appeals docketed after 15 March 1982;
27 November 1984—applicable to all appeals in which the notice of appeal is filed on or after 1 February 1985;
8 December 1988—9(a), (c)—effective for all judgments of the trial tribunal entered on or after 1 July 1989;
8 June 1989—9(a)—effective for all judgments of the trial tribunal entered on or after 1 July 1989.

Rule 10

ASSIGNING ERROR ON APPEAL

(a) *Function in Limiting Scope of Review.* Except as otherwise provided herein, the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10. Provided, that upon any appeal duly taken from a final judgment any party to the appeal may present for review, by properly making them the basis of assignments of error, the questions whether the judgment is supported by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction of the subject matter, and whether a criminal charge is sufficient in law.

(b) *Preserving Questions for Appellate Review.*

(1) **General.** In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion. Any such question which was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, may be made

the basis of an assignment of error in the record on appeal.

(2) **Jury Instructions; Findings and Conclusions of Judge.** A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

(3) **Sufficiency of the Evidence.** A defendant in a criminal case may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action, or for judgment as in case of nonsuit, at trial. If a defendant makes such a motion after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, his motion for dismissal or judgment in case of nonsuit made at the close of State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.

A defendant may make a motion to dismiss the action or judgment as in case of nonsuit at the conclusion of all the evidence, irrespective of whether he made an earlier such motion. If the motion at the close of all the evidence is denied, the defendant may urge as ground for appeal the denial of his motion made at the conclusion of all the evidence. However, if a defendant fails to move to dismiss the action or for judgment as in case of nonsuit at the close of all the evidence, he may not challenge on appeal the sufficiency of the evidence to prove the crime charged.

If a defendant's motion to dismiss the action or for judgment as in case of nonsuit is allowed, or shall be sustained on appeal, it shall have the force and effect of a verdict of "not guilty" as to such defendant.

(c) *Assignments of Error.*

(1) **Form; Record References.** A listing of the assignments of error upon which an appeal is predicated shall be

stated at the conclusion of the record on appeal, in short form without argument, and shall be separately numbered. Each assignment of error shall, so far as practicable, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is assigned. An assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references. Questions made as to several issues or findings relating to one ground of recovery or defense may be combined in one assignment of error, if separate record or transcript references are made.

(2) **Jury Instructions.** Where a question concerns instructions given to the jury, the party shall identify the specific portion of the jury charge in question by setting it within brackets or by any other clear means of reference in the record on appeal. A question of the failure to give particular instructions to the jury, or to make a particular finding of fact or conclusion of law which finding or conclusion was not specifically requested of the trial judge, shall identify the omitted instruction, finding or conclusion by setting out its substance in the record on appeal immediately following the instructions given, or findings or conclusions made.

(3) **Sufficiency of Evidence.** In civil cases, questions that the evidence is legally or factually insufficient to support a particular issue or finding, and challenges directed against any conclusions of law of the trial court based upon such issues or findings, may be combined under a single assignment of error raising both contentions if the record references and the argument under the point sufficiently direct the court's attention to the nature of the question made regarding each such issue or finding or legal conclusion based thereon.

(4) **Assigning Plain Error.** In criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error.

(d) *Cross-Assignments of Error by Appellee.* Without taking an appeal an appellee may cross-assign as error any action or omission of the trial court which was properly preserved for appellate review and which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken. Portions of the record or transcript of proceedings necessary to an understanding of such cross-assignments of error may be included in the record on appeal by agreement of the parties under Rule 11(a), may be included by the appellee in a proposed alternative record on appeal under Rule 11(b), or may be designated for inclusion in the verbatim transcript of proceedings, if one is filed under Rule 9(c)(2).

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 10 June 1981—10(b)(2), applicable to every case the trial of which begins on or after 1 October 1981;
7 July 1983—10(b)(3);
27 November 1984—applicable to appeals in which the notice of appeal is filed on or after 1 February 1985;
8 December 1988—effective for all judgments of the trial tribunal entered on or after 1 July 1989.

Rule 11

SETTLING THE RECORD ON APPEAL

(a) *By Agreement.* Within 35 days after the reporter's certification of delivery of the transcript, if such was ordered (70 days in capitally tried cases), or 35 days after filing of the notice of appeal if no transcript was ordered, the parties may by agreement entered in the record on appeal settle a proposed record on appeal prepared by any party in accordance with Rule 9 as the record on appeal.

(b) *By Appellee's Approval of Appellant's Proposed Record on Appeal.* If the record on appeal is not settled by agreement under Rule 11(a), the appellant shall, within the same times provided, serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 9. Within 15 days (30 days in capitally tried cases) after service of the proposed record on appeal upon him an appellee may serve upon all other

parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal in accordance with Rule 11(c). If all appellees within the times allowed them either file notices of approval or fail to file either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(c) *By Judicial Order or Appellant's Failure to Request Judicial Settlement.* Within 15 days (30 days in capitally tried cases) after service upon him of appellant's proposed record on appeal, an appellee may serve upon all other parties specific amendments or objections to the proposed record on appeal, or a proposed alternative record on appeal. Amendments or objections to the proposed record on appeal shall be set out in a separate paper.

If any appellee timely files amendments, objections, or a proposed alternative record on appeal, the appellant or any other appellee, within 10 days after expiration of the time within which the appellee last served might have filed, may in writing request the judge from whose judgment, order, or other determination appeal was taken to settle the record on appeal. A copy of the request, endorsed with a certificate showing service on the judge, shall be filed forthwith in the office of the clerk of the superior court, and served upon all other parties. Each party shall promptly provide to the judge a reference copy of the record items, amendments, or objections served by that party in the case. If only one appellee or only one set of appellees proceeding jointly have so filed, and no other party makes timely request for judicial settlement, the record on appeal is thereupon settled in accordance with the appellee's objections, amendments or proposed alternative record on appeal. If more than one appellee proceeding separately have so filed, failure of the appellant to make timely request for judicial settlement results in abandonment of the appeal as to those appellees, unless within the time allowed an appellee makes request in the same manner.

The judge shall send written notice to counsel for all parties setting a place and a time for a hearing to settle the record on appeal. The hearing shall be held not later than 15 days after service of the request for hearing upon the judge. The judge shall settle the record on appeal by order entered not more than 20 days after service of the request for hearing upon the judge. If requested, the judge shall return the record items submitted for reference during the judicial settlement process with the order settling the record on appeal.

Provided, that nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by judicial order.

(d) *Multiple Appellants; Single Record on Appeal.* When there are multiple appellants (2 or more), whether proceeding separately or jointly, as parties aligned in interest, or as cross-appellants, there shall nevertheless be but one record on appeal, and the appellants shall attempt to agree to the procedure for constituting a proposed record on appeal. The exceptions and assignments of error of the several appellants shall be set out separately in the single record on appeal and related to the several appellants by any clear means of reference. In the event multiple appellants cannot agree to the procedure for constituting a proposed record on appeal, the judge from whose judgment, order, or other determination the appeals are taken shall, on motion of any appellant with notice to all other appellants, enter an order settling the procedure, including the allocation of costs.

(e) RESERVED.

(f) *Extensions of Time.* The times provided in this rule for taking any action may be extended in accordance with the provisions of Rule 27(c).

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 27 November 1984—11(a), (c), (e), and (f)—applicable to appeals in which the notice of appeal is filed on or after 1 February 1985;
8 December 1988—11(a), (b), (c), (e), and (f)—effective for all judgments of the trial tribunal entered on or after 1 July 1989.

Note: Paragraph (e) formerly contained the requirement that the settled record on appeal be certified by the clerk of the trial tribunal. The 27 November 1984 amendments deleted that step in the process. Under the present version of the rules, once the record is settled by the parties, by agreement or by judicial settlement, the appellant has 15 days to file the settled record with the appropriate appellate court.

Rule 12

FILING THE RECORD; DOCKETING THE APPEAL; COPIES OF THE RECORD

(a) *Time for Filing Record on Appeal.* Within 15 days after the record on appeal has been settled by any of the procedures provided in this Rule 11 or Rule 18, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken.

(b) *Docketing the Appeal.* At the time of filing the record on appeal, the appellant shall pay to the clerk the docket fee fixed pursuant to G.S. 7A-20(b), and the clerk shall thereupon enter the appeal upon the docket of the appellate court. If an appellant is authorized to appeal in forma pauperis as provided in G.S. 1-288 or 7A-450 et seq., the clerk shall docket the appeal upon timely filing of the record on appeal. An appeal is docketed under the title given to the action in the trial division, with the appellant identified as such. The clerk shall forthwith give notice to all parties of the date on which the appeal was docketed in the appellate court.

(c) *Copies of Record on Appeal.* The appellant need file but a single copy of the record on appeal. Upon filing, the appellant may be required to pay to the clerk of the appellate court a deposit fixed by the clerk to cover the costs of reproducing copies of the record on appeal. The clerk will reproduce and distribute copies as directed by the court. By stipulation filed with the record on appeal the parties may agree that specified portions of the record on appeal need not be reproduced in the copies prepared by the clerk.

In civil appeals in forma pauperis the appellant need not pay a deposit for reproducing copies, but at the time of filing the original record on appeal shall also deliver to the clerk two legible copies thereof.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 27 November 1984—applicable to appeals in which the notice of appeal is filed on or after 1 February 1985;

8 December 1988—12(a) and (c)—effective for all judgments of the trial tribunal entered on or after 1 July 1989.

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. If permitted by Rule 28(h), 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. If permitted by Rule 28(h), 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.

ADMINISTRATIVE HISTORY

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;
8 June 1989—13(a)—effective 1 September 1989.

ARTICLE III

REVIEW BY SUPREME COURT OF APPEALS ORIGINALLY DOCKETED IN COURT OF APPEALS: APPEALS OF RIGHT; DISCRETIONARY REVIEW

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 Su-

preme 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. If permitted by Rule 28(h), 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.

ADMINISTRATIVE HISTORY

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;
8 June 1989—14(d)(1)—effective 1 September 1989.

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. If permitted by Rule 28(h), 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, whether on petition of a party or on 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.

ADMINISTRATIVE HISTORY

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;
8 December 1988—15(i)(2)—effective 1 January 1989;
8 June 1989—15(g)(2)—effective 1 September 1989.

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.

ADMINISTRATIVE HISTORY

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 17

APPEAL BOND IN APPEALS UNDER G.S. 7A-30, 7A-31

(a) *Appeal of Right.* In all appeals of right from the Court of Appeals to the Supreme Court in Civil cases, the party who takes appeal shall, upon filing the record on appeal in the Supreme Court, file with the Clerk of that Court a written undertaking, with good and sufficient surety in the sum of $250, or deposit

cash in lieu thereof, to the effect that he will pay all costs awarded against him on the appeal to the Supreme Court.

(b) *Discretionary Review of Court of Appeals Determination.* When the Supreme Court on petition of a party certifies a civil case for review of a determination of the Court of Appeals, the petitioner shall file an undertaking for costs in the form provided in subdivision (a). When the Supreme Court on its own initiative certifies a case for review of a determination of the Court of Appeals, no undertaking for costs shall be required of any party.

(c) *Discretionary Review by Supreme Court Before Court of Appeals Determination.* When a civil case is certified for review by the Supreme Court before being determined by the Court of Appeals, the undertaking on appeal initially filed in the Court of Appeals shall stand for the payment of all costs incurred in either the Court of Appeals or the Supreme Court and awarded against the party appealing.

(d) *Appeals in Forma Pauperis.* No undertakings for costs are required of a party appealing in forma pauperis.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 19 June 1978, effective 1 July 1978.

Note to 1 July 1978 Amendment. Repeal of Rule 7 and limiting Rule 17's application to civil cases are to conform the Rules of Appellate Procedure to Chap. 711, 1977 Session Laws, particularly that portion of Chap. 711 codified as G.S. 15A-1449 which provides, "In criminal cases no security for costs is required upon appeal to the appellate division." Section 33 of Chap. 711 repealed, among other statutes, G.S. 15-180 and 15-181 upon which Rule 7 was based. Chap. 711 becomes effective 1 July 1978. While G.S. 15A-1449, strictly construed, does not apply to cost bonds in appeals from or petitions for further review of decisions of the Court of Appeals, the Supreme Court believes the legislature intended to eliminate the giving of security for costs in criminal cases on appeal or on petition to the Supreme Court from the Court of Appeals. The Court has, therefore, amended Rule 17 to comply with what it believes to be the legislative intent in this area.

ARTICLE IV

DIRECT APPEALS FROM ADMINISTRATIVE AGENCIES TO COURT OF APPEALS

Rule 18

TAKING APPEAL; RECORD ON APPEAL— COMPOSITION AND SETTLEMENT

(a) *General.* Appeals of right from administrative agencies, boards, or commissions (hereinafter "agency") directly to the appellate division under G.S. 7A-29 shall be in accordance with the procedures provided in these rules for appeals of right from the courts of the trial divisions, except as hereinafter provided in this Article.

(b) *Time and Method for Taking Appeals.*

(1) The times and methods for taking appeals from an agency shall be as provided in this Rule 18 unless the statutes governing the agency provide otherwise, in which case those statutes shall control.

(2) Any party to the proceeding may appeal from a final agency determination to the appropriate court of the appellate division for alleged errors of law by filing and serving a notice of appeal within 30 days after receipt of a copy of the final order of the agency. The final order of the agency is to be sent to the parties by Registered or Certified Mail. The notice of appeal shall specify the party or parties taking the appeal; shall designate the final agency determination 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) *Composition of Record on Appeal.* The record on appeal in appeals from any agency shall contain:

(1) an index of the contents of the record, which shall appear as the first page thereof;

(2) a copy of the summons with return, notice of hearing, or other papers showing jurisdiction of the agency over persons or property sought to be bound in the proceeding, or a statement showing same;

(3) copies of all other notices, pleadings, petitions, or other papers required by law or rule of the agency to be filed with the agency to present and define the matter for determination;

(4) a copy of any findings of fact and conclusions of law and a copy of the order, award, decision, or other determination of the agency from which appeal was taken;

(5) so much of the evidence taken before the agency or before any division, commissioner, deputy commissioner, or hearing officer of the agency, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned, or a statement specifying that the verbatim transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2) and (3);

(6) where the agency has reviewed a record of proceedings before a division, or an individual commissioner, deputy commissioner, or hearing officer of the agency, copies of all items included in the record filed with the agency which are necessary for an understanding of all errors assigned;

(7) copies of all other papers filed and statements of all other proceedings had before the agency or any of its individual commissioners, deputies, or divisions which are necessary to an understanding of all errors assigned unless they appear in the verbatim transcript of proceedings which is being filed pursuant to Rule 9(c)(2) and (3);

(8) a copy of the notice of appeal from the agency, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings if one is filed pursuant to Rule 9(c)(2) and (3); and

(9) exceptions and assignments of error to the actions of the agency, set out as provided in Rule 10.

(d) *Settling the Record on Appeal.* The record on appeal may be settled by any of the following methods:

(1) **By Agreement.** Within 60 days after appeal is taken, the parties may by agreement entered in the record on appeal settle a proposed record on appeal prepared by any party in accordance with this Rule 18 as the record on appeal.

(2) **By Appellee's Approval of Appellant's Proposed Record on Appeal.** If the record on appeal is not settled by agreement under Rule 18(d)(1), the appellant shall, within 60 days after appeal is taken, file in the office of the agency head and serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 18(c). Within 30 days after service of the proposed record on appeal upon him, an appellee may file in the office of the agency head and serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal. If all appellees within the times allowed them either file notices of approval or fail to file either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(3) **By Conference or Agency Order; Failure to Request Settlement.** If any appellee timely files amendments, objections, or a proposed alternative record on appeal, the appellant or any other appellee, within 10 days after expiration of the time within which the appellee last served might have filed, may in writing request the agency head to convene a conference to settle the record on appeal. A copy of that request, endorsed with a certificate showing service on the agency head, shall be served upon all other parties. If only one appellee or only one set of appellees proceeding jointly have so filed and no other party makes timely request for agency conference or settlement by order, the record on appeal is thereupon settled in accordance with the one appellee's, or one set of appellees', objections, amendments, or proposed alternative record on appeal. If more than one appellee proceeding separately have so filed, failure of the appellant to make timely request for agency conference or for settlement by order results in aban-

donment of the appeal as to those appellees, unless within the time allowed an appellee makes request in the same manner.

Upon receipt of a request for settlement of the record on appeal, the agency head shall send written notice to counsel for all parties setting a place and a time for a conference to settle the record on appeal. The conference shall be held not later than 15 days after service of the request upon the agency head. The agency head or his delegate shall settle the record on appeal by order entered not more than 20 days after service of the request for settlement upon the agency; provided, however, that when the agency head is a party to the appeal, the agency head shall forthwith request the Chief Judge of the Court of Appeals or the Chief Justice of the Supreme Court, as appropriate, to appoint a referee to settle the record on appeal. The referee so appointed shall proceed after conference with all parties to settle the record on appeal in accordance with the terms of these Rules and the appointing order.

Nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by agency order.

(e) *Further Procedures.* Further procedures for perfecting and prosecuting the appeal shall be as provided by these Rules for appeals from the courts of the trial divisions.

(f) *Extensions of Time.* The times provided in this Rule for taking any action may be extended in accordance with the provisions of Rule 27(c).

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 21 June 1977;
7 October 1980—18(d)(3)—effective 1 January 1981;
27 February 1985—applicable to all appeals in which the notice of appeal is filed on or after 15 March 1985.

Rule 19

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 21 June 1977—19(d).
REPEALED: 27 February 1985—effective 15 March 1985.

Rule 20

MISCELLANEOUS PROVISIONS OF LAW GOVERNING IN AGENCY APPEALS

Specific provisions of law pertaining to stays pending appeals from any agency to the appellate division, to pauper appeals therein, and to the scope of review and permissible mandates of the Court of Appeals therein shall govern the procedure in such appeals notwithstanding any provisions of these rules which may prescribe a different procedure.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 27 February 1985—effective 15 March 1985.

ARTICLE V

EXTRAORDINARY WRITS

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.

(f) *Petition for Writ in Post Conviction Matters—Death Penalty Cases.* A petition for writ of certiorari to review orders of the trial court denying motions for appropriate relief in death penalty cases shall be filed in the Supreme Court within 60 days after delivery of the transcript of the hearing on the motion for appropriate relief to the petitioning party. The responding party shall file its response within 30 days of service of the petition.

ADMINISTRATIVE HISTORY

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;
8 December 1988—21(f)—applicable to all cases in which the superior court order is entered on or after 1 July 1989.

Rule 22

MANDAMUS AND PROHIBITION

(a) *Petition for Writ; to Which Appellate Court Addressed.* Applications for the writs of mandamus or prohibition directed to a judge, judges, commissioner, or commissioners shall be made by filing a petition therefor with the clerk of the court to which appeal of right might lie from a final judgment entered in the cause by the judge, judges, commissioner, or commissioners to whom issuance of the writ is sought.

(b) *Same; Filing and Service; Content.* The petition shall be filed without unreasonable delay after the judicial action sought to be prohibited or compelled has been undertaken, or has occurred, or has been refused, and shall be accompanied by proof of service on the respondent judge, judges, commissioner, or commissioners and on all other parties to the action. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and the relief sought; a statement of the reasons why the

writ should issue; and certified copies of any 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 shall docket the petition.

(c) *Response; Determination by Court.* Within 10 days after service upon him of the petition the respondent or 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.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Rule 23

SUPERSEDEAS

(a) *Pending Review of Trial Tribunal Judgments and Orders.*

(1) **Application—When Appropriate.** Application may be made to the appropriate appellate court for a writ of supersedeas to stay the execution or enforcement of any judgment, order, or other determination of a trial tribunal which is not automatically stayed by the taking of appeal when an appeal has been taken or a petition for mandamus, prohibition, or certiorari has been filed to obtain review of the judgment, order, or other determination; and

a. a stay order or entry has been sought by the applicant by deposit of security or by motion in the trial tribunal and such order or entry has been denied or vacated by the trial tribunal, or

b. extraordinary circumstances make it impracticable to obtain a stay by deposit of security or by application to the trial tribunal for a stay order.

(2) **Same—How and to Which Appellate Court Made.** Application for the writ is by petition which shall in all cases, except those initially docketed in the Supreme Court, be first made to the Court of Appeals. Except where an appeal from a superior court is initially docketed in the Supreme Court no petition will be entertained by the Supreme Court unless application has first been made to the Court of Appeals and by that court denied.

(b) *Pending Review by Supreme Court of Court of Appeals Decisions.* Application may be made in the first instance to the Supreme Court for a writ of supersedeas to stay the execution or enforcement of a judgment, order or other determination mandated by the Court of Appeals when a notice of appeal of right or a petition for discretionary review has been or will be timely filed, or a petition for review by certiorari, mandamus, or prohibition has been filed to obtain review of the decision of the Court of Appeals. No prior motion for a stay order need be made to the Court of Appeals.

(c) *Petition; Filing and Service; Content.* The petition shall be filed with the clerk of the court to which application is being made, and shall be accompanied by proof of service upon all other parties. The petition shall be verified by counsel or the petitioner. Upon receipt of the required docket fee, the clerk will docket the petition.

For stays of the judgments of trial tribunals, the petition shall contain a statement that the stay has been sought in the court to which issuance of the writ is sought and by that court denied or vacated, or of facts showing that it was impracticable there to seek a stay. For stays of any judgment, the petition shall contain:

(1) a statement of any facts necessary to an understanding of the basis upon which the writ is sought; and

(2) a statement of reasons why the writ should issue in justice to the applicant.

The petition may be accompanied by affidavits and by any certified portions of the record pertinent to its consideration. It may be included in a petition for discretionary review by the Supreme Court under G.S. 7A-31, or in a petition to either appellate court for certiorari, mandamus or prohibition.

(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 rec-

ord 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) *Temporary Stay.* Upon the filing of a petition for supersedeas, the applicant may apply, either within the petition or by separate paper, for an order temporarily staying enforcement or execution of the judgment, order, or other determination pending decision by the court upon the petition for supersedeas. If application is made by separate paper, it shall be filed and served in the manner provided for the petition for supersedeas in Rule 23(c). The court for good cause shown in such a petition for temporary stay may issue such an order ex parte.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 2 December 1980—23(b)—effective 1 January 1981.

Rule 24

FORM OF PAPERS; COPIES

A party need file with the appellate court but a single copy of any paper required to be filed in connection with applications for extraordinary writs. The court may direct that additional copies be filed. The clerk will not reproduce copies.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

ARTICLE VI

GENERAL PROVISIONS

Rule 25

PENALTIES FOR FAILURE TO COMPLY WITH RULES

(a) *Failure of Appellant to Take Timely Action.* If after giving notice of appeal from any court, commission, or commissioner the appellant shall fail within the times allowed by these rules or by order of court to take any action required to present the appeal for decision, the appeal may on motion of any other party be dismissed. Prior to the filing of an appeal in an appellate court motions to dismiss are made to the court, commission, or commissioner from which appeal has been taken; after an appeal has been docketed in an appellate court motions to dismiss are made to that court. Motions to dismiss shall be supported by affidavits or certified copies of docket entries which show the failure to take timely action or otherwise perfect the appeal, and shall be allowed unless compliance or a waiver thereof is shown on the record, or unless the appellee shall consent to action out of time, or unless the court for good cause shall permit the action to be taken out of time.

Motions heard under this rule to courts of the trial divisions may be heard and determined by any judge of the particular court specified in Rule 36 of these rules; motions made under this rule to a commission may be heard and determined by the chairman of the commission; or if to a commissioner, then by that commissioner. The procedure in all motions made under this rule to trial tribunals shall be that provided for motion practice by the N. C. Rules of Civil Procedure; in all motions made under this rule to courts of the appellate division, shall be that provided by Rule 37 of these rules.

(b) *Sanctions for Failure to Comply With Rules.* A court of the appellate division may, on its own initiative or motion of a party, impose a sanction against a party or attorney or both when the court determines that such party or attorney or both substantially failed to comply with these appellate rules. The court may impose sanctions of the type and in the manner prescribed by Rule 34 for frivolous appeals.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 8 December 1988—effective 1 July 1989.

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 ($8\frac{1}{2} \times 11''$) 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 ($8\frac{1}{2} \times 14''$). 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.

ADMINISTRATIVE HISTORY

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 27

COMPUTATION AND EXTENSION OF TIME

(a) *Computation of Time.* In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a legal holiday.

(b) *Additional Time After Service by Mail.* Whenever a party has the right to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period.

(c) *Extensions of Time; By Which Court Granted.* Except as herein provided, courts for good cause shown may upon motion extend any of the times prescribed by these rules or by order of court for doing any act required or allowed under these rules; or may permit an act to be done after the expiration of such time. Courts may not extend the time for taking an appeal or for filing a petition for discretionary review or a petition for rehearing prescribed by these rules or by law.

(1) **Motions for Extension of Time in the Trial Division.** The trial tribunal for good cause shown by the appellant may extend once for no more than 30 days the time permitted by Rule 11 for the service of the proposed record on appeal.

Motions for extensions of time made to a trial tribunal may be made orally or in writing and without notice to other parties and may be determined at any

time or place within the state. Such motions may be determined *ex parte*, but the moving party shall promptly serve on all other parties to the appeal a copy of any order extending time. Provided that motions made after the expiration of the time allowed in these rules for the action sought to be extended must be in writing and with notice to all other parties and may be allowed only after all other parties have had opportunity to be heard.

Motions made under this Rule 27 to a court of the trial divisions may be heard and determined by any of those judges of the particular court specified in Rule 36 of these rules. Such motions made to a commission may be heard and determined by the chairman of the commission; or if to a commissioner, then by that commissioner.

(2) **Motions for Extension of Time in the Appellate Division.** All motions for extensions of time other than those specifically enumerated in Rule 27(c)(1) may only be made to the appellate court to which appeal has been taken.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 7 March 1978—27(c);
4 October 1978—27(c)—effective 1 January 1979;
27 November 1984—27(a) and (c)—effective 1 February 1985;
8 December 1988—27(c)—effective for all judgments of the trial tribunal entered on or after 1 July 1989.

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:

a. those portions of the transcript of proceedings which must be reproduced verbatim in order to understand any question presented in the brief;

b. 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;

c. 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:

a. whenever the portion of the transcript necessary to understand a question presented in the brief is reproduced verbatim in the body of the brief;

b. 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

c. 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:

a. 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.

b. 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.* Unless the court, upon its own initiative, orders a reply brief to be filed and served, none will be received or considered by the court, except as herein provided.

(1) If the appellee has presented in its brief new or additional questions as permitted by Rule 28(c), an appellant may, within 14 days after service of such brief, file and serve a reply brief limited to those new or additional questions.

(2) If the parties are notified under Rule 30(f) that the case will be submitted without oral argument on the record and briefs, an appellant may, within 14 days after service of such notification, file and serve a reply brief limited to a concise rebuttal to arguments set out in the brief of the appellee which were not addressed in the appellant's principal brief.

(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.

(j) *Page Limitations Applicable to Briefs Filed in the Court of Appeals.* Principal briefs filed in the North Carolina Court of Appeals, whether filed by appellant, appellee, or *amicus curiae*, formatted according to Rule 26 and the Appendixes to these Rules, shall be limited to 35 pages of text, exclusive of tables of contents, tables of authorities, and appendixes. Reply briefs, if permitted by this Rule shall be limited to 15 pages of text.

ADMINISTRATIVE HISTORY

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;
8 June 1989—28(h) and (j)—effective 1 September 1989.

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 re-calendared for hearing at a time not less than 10 days after the time for filing the reply brief.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 3 March 1982—29(a)(1);
3 September 1987—29(a)(1).

Rule 30

ORAL ARGUMENT

(a) *Order and Content of Argument.* The appellant is entitled to open and conclude the argument. The opening argument shall include a fair statement of the case. Oral arguments should complement the written briefs, and counsel will therefore not be permitted to read at length from briefs, records, and authorities.

(b) *Time Allowed for Argument.*

(1) **In General.** Ordinarily a total of thirty minutes will be allowed all appellants and a total of thirty minutes will be allowed all appellees for oral argument. Upon written or oral application of any party, the court for good cause shown may extend the times limited for argument. Among other causes, the existence of adverse interests between multiple appellants or between multiple appellees may be suggested as good cause for such an extension. The court of its own initiative may direct argument on specific points outside the times limited. Counsel is not obliged to use all the time allowed, and the court may terminate argument whenever it considers further argument unnecessary.

(2) **Numerous Counsel.** Any number of counsel representing individual appellants or appellees proceeding separately or jointly may be heard in argument within the times herein limited or allowed by order of court. When more than one counsel is heard, duplication or supplementation of argument on the same points shall be avoided unless specifically directed by the court.

(c) *Non-Appearance of Parties.* If counsel for any party fails to appear to present oral argument, the court will hear argument from opposing counsel. If counsel for no party appears, the court will decide the case on the written briefs unless it orders otherwise.

(d) *Submission on Written Briefs.* By agreement of the parties, a case may be submitted for decision on the written briefs; but the court may nevertheless order oral argument prior to deciding the case.

(e) *Decision of Appeal Without Publication of an Opinion.*

(1) In order to minimize the cost of publication and of providing storage space for the published reports, the Court of Appeals is not required to publish an opinion in every decided case. If the panel which hears the case determines that the appeal involves no new legal principles and that an opinion, if published, would have no value as a precedent, it may direct that no opinion be published.

(2) Decisions without published opinion shall be reported only by listing the case and the decision in the Advance Sheets and the bound volumes of the Court of Appeals Reports.

(3) A decision without a published opinion is authority only in the case in which such decision is rendered and should not be cited in any other case in any court for any purpose, nor should any court consider any such decision for any purpose except in the case in which such decision is rendered.

(f) *Pre-argument Review; Decision of Appeal Without Oral Argument.*

(1) At any time that the Supreme Court concludes that oral argument in any case pending before it will not be of assistance to the Court, it may dispose of the case on the record and briefs. In those cases, counsel will be notified not to appear for oral argument.

(2) The Chief Judge of the Court of Appeals may from time to time designate a panel to review any pending case, after all briefs are filed but before argument, for decision under this rule. If all of the judges of the panel to which a pending appeal has been referred conclude that oral argument will not be of assistance to the Court, the case may be disposed of on record and briefs. Counsel will be notified not to appear for oral argument.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 18 December 1975—(e);
3 May 1976—(f);
5 February 1979—(e);
10 June 1981—(f)—to become effective 1 July 1981.

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 for rehearing shall be addressed to the court which issued the opinion sought to be reconsidered. 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 with-

in 30 days after the case is certified for rehearing, and the opposing party's brief, within 30 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. No reply brief shall be received on rehearing. 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.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 27 November 1984—31(a)—effective 1 February 1985;
3 September 1987—31(d);
8 December 1988—31(b) and (d)—effective 1 January 1989.

Rule 32

MANDATES OF THE COURTS

(a) *In General.* Unless a court of the appellate division directs that a formal mandate shall issue, the mandate of the court consists of certified copies of its judgment and of its opinion and any direction of its clerk as to costs. The mandate is issued by its transmittal from the clerk of the issuing court to the clerk or comparable officer of the tribunal from which appeal was taken to the issuing court.

(b) *Time of Issuance.* Unless a court orders otherwise, its clerk shall enter judgment and issue the mandate of the court 20 days after the written opinion of the court has been filed with the clerk.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 27 November 1984—32(b)—effective 1 February 1985.

Rule 33

ATTORNEYS

(a) *Appearances.* An attorney will not be recognized as appearing in any case unless he is entered as counsel of record therein. The signature of an attorney on a record on appeal, motion, brief, or other document permitted by these rules to be filed in a court of the appellate division constitutes entry of the attorney as counsel of record for the parties designated and a certification that he represents such parties. The signature of a member or associate in a firm's name constitutes entry of the firm as counsel of record for the parties designated. Counsel of record may not withdraw from a case except by leave of court. Only those counsel of record who have personally signed the brief prior to oral argument may be heard in argument.

(b) *Agreements.* Only those agreements of counsel which appear in the record on appeal or which are filed in the court where an appeal is docketed will be recognized by that court.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Rule 34

FRIVOLOUS APPEALS; SANCTIONS

(a) A court of the appellate division may, on its own initiative or motion of a party, impose a sanction against a party or attorney or both when the court determines that an appeal or any proceeding in an appeal was frivolous because of one or more of the following:

(1) the appeal was not well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(2) the appeal was taken or continued for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(3) a petition, motion, brief, record, or other paper filed in the appeal was so grossly lacking in the requirements of propriety, grossly violated appellate court rules, or grossly disregarded the requirements of a fair presentation of the issues to the appellate court.

(b) A court of the appellate division may impose one or more of the following sanctions:

(1) dismissal of the appeal;

(2) monetary damages including, but not limited to,

a. single or double costs,

b. damages occasioned by delay,

c. reasonable expenses, including reasonable attorney fees, incurred because of the frivolous appeal or proceeding;

(3) any other sanction deemed just and proper.

(c) A court of the appellate division may remand the case to the trial division for a hearing to determine one or more of the sanctions under (b)(2) or (b)(3) of this rule.

(d) If a court of the appellate division deems a sanction appropriate under this rule, the court shall order the person subject to sanction to show cause in writing or in oral argument or both why a sanction should not be imposed. If a court of the appellate division remands the case to the trial division for a hearing to determine a sanction under (c) of this rule, the person subject to sanction shall be entitled to be heard on that determination in the trial division.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 8 December 1988—effective 1 July 1989.

Rule 35

COSTS

(a) *To Whom Allowed.* Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered by the court; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is reversed in part, or modified in any way, costs shall be allowed as directed by the court.

(b) *Direction as to Costs in Mandate.* The clerk shall include in the mandate of the court an itemized statement of costs taxed in the appellate court and designate the party against whom taxed.

(c) *Costs of Appeal Taxable in Trial Tribunals.* Any costs of an appeal which are assessable in the trial tribunal shall upon receipt of the mandate be taxed as directed therein, and may be collected by execution of the trial tribunal.

(d) *Execution to Collect Costs in Appellate Courts.* Costs taxed in the courts of the appellate division may be made the subject of execution issuing from the court where taxed. Such execution may be directed by the clerk of the court to the proper officials of any county of the State; may be issued at any time after the mandate of the court has been issued; and may be returnable on any day named. Any officer to whom such execution is directed is amenable to the penalties prescribed by law for failure to make due and proper return.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Rule 36

TRIAL JUDGES AUTHORIZED TO ENTER ORDERS UNDER THESE RULES

(a) *When Particular Judge Not Specified by Rule.* When by these rules a trial court or a judge thereof is permitted or required to enter an order or to take some other judicial action with respect to a pending appeal and the rule does not specify the particular

judge with authority to do so, the following judges of the respective courts have such authority with respect to causes docketed in their respective divisions:

(1) **Superior Court:** the judge who entered the judgment, order, or other determination from which appeal was taken, and any regular or special judge resident in the district or assigned to hold courts in the district wherein the cause in docketed;

(2) **District Court:** the judge who entered the judgment, order, or other determination from which appeal was taken; the chief district judge of the district wherein the cause is docketed; and any judge designated by such chief district judge to enter interlocutory orders under G.S. 7A-192.

(b) *Upon Death, Incapacity, or Absence of Particular Judge Authorized.* When by these rules the authority to enter an order or to take other judicial action is limited to a particular judge and that judge is unavailable for the purpose by reason of death, mental or physical incapacity, or absence from the state, the Chief Justice will upon motion of any party designate another judge to act in the matter. Such designation will be by order entered *ex parte*, copies of which will be mailed forthwith by the Clerk of the Supreme Court to the judge designated and to all parties.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Rule 37

MOTIONS IN APPELLATE COURTS

(a) *Time; Content of Motions; Response.* An application to a court of the appellate division for an order or for other relief available under these rules may be made by filing a motion for such order or other relief with the clerk of the court, with service on all other parties. Unless another time is expressly provided by these rules, the motion may be filed and served at any time before the case is called for oral argument. The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion and shall state with particularity the grounds on which it is based and the order or relief

sought. If a motion is supported by affidavits, briefs, or other papers, these shall be served and filed with the motion. Within 10 days after a motion is served upon him or until the appeal is called for oral argument, whichever period is shorter, a party may file and serve copies of a response in opposition to the motion, which may be supported by affidavits, briefs, or other papers in the same manner as motions. The court may shorten or extend the time for responding to any motion.

(b) *Determination.* Notwithstanding the provisions of Rule 37(a), a motion may be acted upon at any time, despite the absence of notice to all parties, and without awaiting a response thereto. A party who has not received actual notice of such a motion or who has not filed a response at the time such action is taken, and who is adversely affected by the action may request reconsideration, vacation or modification thereof. Motions will be determined without argument, unless the court orders otherwise.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Rule 38

SUBSTITUTION OF PARTIES

(a) *Death of a Party.* No action abates by reason of the death of a party while an appeal may be taken or is pending, if the cause of action survives. If a party acting in an individual capacity dies after appeal is taken from any tribunal, the personal representative of the deceased party in a personal action, or the successor in interest of the deceased party in a real action may be substituted as a party on motion filed by the representative or the successor in interest or by any other party with the clerk of the court in which the action is then docketed. A motion to substitute made by a party shall be served upon the personal representative or successor in interest in addition to all other parties. If such a deceased party in a personal action has no personal representative, any party may in writing notify the court of the death, and the court in which the action is then docketed shall direct the proceedings to be had in order to substitute a personal representative.

If a party against whom an appeal may be taken dies after entry of a judgment or order but before appeal is taken, any party entitled to appeal therefrom may proceed as appellant as if death

had not occurred; and after appeal is taken, substitution may then be effected in accordance with this subdivision. If a party entitled to appeal dies before filing a notice of appeal, appeal may be taken by his personal representative, or, if he has no personal representative, by his attorney of record within the time and in the manner prescribed by these rules; and after appeal is taken, substitution may then be effected in accordance with this rule.

(b) *Substitution for Other Causes.* If substitution of a party to an appeal is necessary for any reason other than death, substitution shall be effected in accordance with the procedure prescribed in subdivision (a).

(c) *Public Officers; Death or Separation from Office.* When a person is a party to an appeal in an official or representative capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Prior to the qualification of a successor, the attorney of record for the former party may take any action required by these rules to be taken. An order of substitution may be made, but neither failure to enter such an order nor any misnomer in the name of a substituted party shall affect the substitution unless it be shown that the same affected the substantial rights of a party.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Rule 39

DUTIES OF CLERKS; WHEN OFFICES OPEN

(a) *General Provisions.* The clerks of the courts of the appellate division shall take the oaths and give the bonds required by law. The courts shall be deemed always open for the purpose of filing any proper paper and of making motions and issuing orders. The offices of the clerks with the clerks or deputies in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but the respective courts may provide by order that the offices of their clerks shall be open for specified hours on Saturdays or on particular legal holidays or shall be closed on particular business days.

(b) *Records to be Kept.* The clerk of each of the courts of the appellate division shall keep and maintain the records of that

court, on paper, microfilm, or electronic media, or any combination thereof. The records kept by the clerk shall include indexed listings of all cases docketed in that court, whether by appeal, petition, or motion and a notation of the dispositions attendant thereto; a listing of final judgments on appeals before the court, indexed by title, docket number, and parties, containing a brief memorandum of the judgment of the court and the party against whom costs were adjudicated; and records of the proceedings and ceremonies of the court.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 8 December 1988—39(b)—effective 1 January 1989.

Rule 40

CONSOLIDATION OF ACTIONS ON APPEAL

Two or more actions which involve common questions of law may be consolidated for hearing upon motion of a party to any of the actions made to the appellate court wherein all are docketed, or upon the initiative of that court. Actions so consolidated will be calendared and heard as a single case. Upon consolidation, the parties may set the course of argument, within the times permitted by App.R. 30(b), by written agreement filed with the court prior to oral argument. This agreement shall control unless modified by the court.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Rule 41

TITLE

The title of these rules is "*North Carolina Rules of Appellate Procedure.*" They may be so cited either in general references or in reference to particular rules. In reference to particular rules the abbreviated form of citation, "*App.R.* —," is also appropriate.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

APPENDIXES

Effective 1 July 1989

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APPENDIX A

TIMETABLE OF APPEALS FROM TRIAL DIVISION UNDER ARTICLE II OF THE RULES OF APPELLATE PROCEDURE

Action	*Time (Days)*	*From Date of*	*Rule Ref.*
Taking Appeal (civil)	30	entry of judgment (unless tolled)	3(c)
Taking Appeal (crim.)	10	entry of judgment (unless tolled)	4(a)
Ordering Transcript (civil)	10	filing notice of appeal	7(a)(1)
Ordering Transcript (criminal indigent)	—	order filed by clerk of superior court	7(a)(2)
Ordering Transcript (criminal)	10	filing notice of appeal	7(a)(2)
Preparing & delivering transcript (civil, non-capital criminal)	60	receipt of order for transcript	7(b)(1)
(capital criminal)	120		
Filing and serving proposed record on appeal (civil, non-capital criminal)	35	notice of appeal (no transcript) or reporter's certificate of delivery of transcript	11(b)
Filing and serving proposed record on appeal (capital)	70	reporter's certificate of delivery	11(b)
Filing and serving objections or proposed alternative record on appeal (civil, non-capital criminal)	15	service of proposed record	11(c)
(capital criminal)	30		
Requesting judicial settlement of record	10	last day within which an appellee served could file objections, etc.	11(c)

Action	*Time (Days)*	*From Date of*	*Rule Ref.*
Judicial settlement of record	20	service on judge of request for settlement	11(c)
Filing Record on Appeal in appellate court	15	settlement of record on appeal	12(a)
Filing appellant's brief (or mailing brief under Rule 26(a))	30	Clerk's mailing of printed record—or from docketing record in civil appeals in forma pauperis (60 days in Death Cases)	13(a)
Filing appellee's brief (or mailing brief under Rule 26(a))	30	service of appellant's brief (60 days in Death Cases)	13(a)
Oral Argument	30	filing appellant's brief (usual minimum time.)	29
Certification or Mandate	20	Issuance of opinion	32
Petition for Rehearing (civil action only)	15	Mandate	31(a)

TIMETABLE OF APPEALS TO THE SUPREME COURT FROM THE COURT OF APPEALS UNDER ARTICLE III OF THE APPELLATE RULES

Action	*Time (Days)*	*From Date of*	*Rule Ref.*
Petition for Discretionary Review prior to determination	15	docketing appeal in Court of Appeals	15(a)
Notice of Appeal and/or Petition for Discretionary Review	15	Mandate of Court of Appeals (or from order of Court of Appeals denying petition for rehearing)	14(a) 15(a)
Cross-Notice of Appeal	10	filing of first notice of appeal	14(a)
Response to Petition for Discretionary Review	10	service of petition	15(d)

Action	*Time (Days)*	*From Date of*	*Rule Ref.*
Filing appellant's brief (or mailing brief under Rule 26(a))	30	Clerk's mailing of printed record—or from docketing record in civil appeals in forma pauperis	14(d) 15(g)
Filing appelle's brief (or mailing brief under Rule 26(a))	30	service of appellant's brief	14(d) 15(g)
Oral Argument	30	filing appellant's brief (usual minimum time.)	29
Certification or Mandate	20	Issuance of opinion	32
Petition for Rehearing (civil action only)	15	Mandate	31(a)

NOTES

All of the critical time intervals here outlined except those for taking an appeal and petitioning for discretionary review or for rehearing may be extended by order of the Court wherein the appeal is docketed at the time. Note that Rule 27 has been amended and now grants the trial tribunal the authority to grant only one extension of time for service of the proposed record. All other motions for extension of the times provided in the rules must be filed with the appellate court to which the appeal of right lies.

No time limits are prescribed for petitions for writs of certiorari other than that they be "filed without unreasonable delay." (Rule 21(c).)

APPENDIX B

Format and Style

All documents for filing in either Appellate Court are prepared on $8\frac{1}{2} \times 11$ inch, white plain, white paper of 16 to 20 pound weight. Typing is done on one side only, although the document will be reproduced in two-sided format. No vertical rules, law firm marginal return addresses, or punched holes will be accepted. The papers need not be stapled; a binder clip or rubber bands are adequate to secure them in order.

Papers shall be prepared using 10-12 point type and spacing, so as to produce a clear, black image. To allow for binding of documents, a margin of approximately one inch shall be left on all sides of the page. The formatted page should be approximately 6½ inches wide and 9 inches long. Tabs are located at the following distances from the left margin: ½", 1", 1½", 2", 4¼" (center), and 5".

CAPTIONS OF DOCUMENTS

All documents to be filed in either appellate court shall be headed by a caption. The caption contains: the number to be assigned the case by the Clerk; the Judicial District from which the case arises; the appellate court to whose attention the document is addressed; the style of the case showing the names of all parties to the action; the county from which the case comes; the indictment or docket numbers of the case below (in records on appeal and in motions and petitions in the cause filed prior to the filing of the record); and the title of the document. The caption shall be placed beginning at the top margin of a cover page and, again, on the first textual page of the document.

No. ____ (Number) DISTRICT

(SUPREME COURT OF NORTH CAROLINA)
(or)
(NORTH CAROLINA COURT OF APPEALS)

****

STATE OF NORTH CAROLINA)
or)
(Name of Plaintiff)) From (Name) County
) No._____
v.)
)
(Name of Defendant))

****
(TITLE OF DOCUMENT)
****

The caption should reflect the title of the action (all parties named) as it appeared in the trial division. The appellant or petitioner is not automatically given topside billing; the relative position of the plaintiff and defendant should be retained.

The caption of a record on appeal and of a notice of appeal from the Trial Division should include directly below the name

of the county, the indictment or docket numbers of the case in the trial division. Those numbers, however, should not be included in other documents except for a petition for writ of certiorari or other petitions and motions where no record on appeal has yet been created in the case. In notices of appeal or petitions to the Supreme Court from decisions of the Court of Appeals, the caption should show the Court of Appeals' docket number in similar fashion.

Immediately below the caption of each document, centered and underlined, in all capital letters, should be the title of the document, e.g., PETITION FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31, or DEFENDANT-APPELLANT'S BRIEF. A brief filed in the Supreme Court in a case previously heard and decided by the Court of Appeals is entitled to a NEW BRIEF.

INDEXES

A brief or petition which is long or complex or which treats multiple issues, and all Appendixes to briefs (Rule 28) and Records on Appeal (Rule 9) must contain an index to the contents.

The index should be indented approximately ¾" from each margin, providing a five-inch line. The form of the index for a record on appeal should be as follows (indexes for briefs are addressed in Appendix E):

(Record)

INDEX

USE OF THE TRANSCRIPT OF EVIDENCE WITH RECORD ON APPEAL

Those portions asterisked (*) in the sample index above would be omitted if the transcript option were selected under Appellate Rule 9(c). In their place in the record, counsel should place a statement in substantially the following form:

> "Per Appellate Rule 9(c) the transcript of proceedings in this case, taken by (name), court reporter, from (date) to (date) and consisting of (# of pages) pages, numbered (1) through (last page #), and bound in (# of volumes) volumes is filed contemporaneously with this record."

The transcript should be prepared with a clear, black image on $8\frac{1}{2} \times 11$ paper of 16-20 pound substance. Enough copies should be reproduced to assure the parties of a reference copy, and file one copy in the Appellate Court. In criminal appeals, the District Attorney is responsible for conveying a copy to the Attorney General (App. Rule 9(c)).

The transcript should not be inserted into the record on appeal, but, rather, should be separately bound and submitted for filing in the proper appellate court with the record. Transcript pages inserted into the record on appeal will be treated in the manner of a narration and will be printed at the standard page charge. Counsel should note that the separate transcript will not be reproduced with the record on appeal, but will be treated and used as an exhibit.

TABLE OF CASES AND AUTHORITIES

Immediately following the index and before the inside caption, all briefs, petitions, and motions greater than five pages in length shall contain a table of cases and authorities. Cases should be arranged alphabetically, followed by constitutional provisions, statutes, regulations, and other textbooks and authorities. The format should be similar to that of the index. Citations should be made according to A Uniform System of Citation (14th ed.).

FORMAT OF BODY OF DOCUMENT

The body of the document of records on appeal should be single-spaced with double-spaces between paragraphs. The body of the document of petitions, notices of appeal, responses, motions, and briefs should be double-spaced, with captions, headings, and long quotes single-spaced.

Adherence to the margins is important since the document will be reproduced front and back and will be bound on the side. No part of the text should be obscured by that binding.

Quotations of more than three lines in length should be indented ¾ inch from each margin and should be single-spaced. The citation should immediately follow the quote.

References to the record on appeal should be made through a parenthetic entry in the text (R pp. 38-40). References to the transcript, if used, should be made in similar manner (T p. 558, line 21).

TOPICAL HEADINGS

The various sections of the brief or petition should be separated (and indexed) by topical headings, centered and underlined, in all capital letters.

Within the argument section, the issues presented should be set out as a heading in all capital letters and in paragraph format from margin to margin. Sub-issues should be presented in similar format, but block indented ½ inch from the left margin.

NUMBERING PAGES

The cover page containing the caption of the document (and the index in Records on Appeal) is unnumbered. The index and table of cases and authorities are on pages numbered with lower case roman numerals, e.g., i, ii, iv.

While the page containing the inside caption and the beginning of the substance of the petition or brief bears no number, it is page 1. Subsequent pages are sequentially numbered by arabic numbers, flanked by dashes, at the center of the top margin of the page, e.g., -4-.

An appendix to the brief should be separately numbered in the manner of a brief.

SIGNATURE AND ADDRESS

All original papers filed in a case will bear the original signature of at least one counsel participating in the case, as in the example below. The name, address, and telephone number of the person signing, together with the capacity in which he signs the paper will be included. Where counsel or the firm is retained, the firm name should be included above the signature; however, if counsel is appointed in an indigent criminal appeal, only the name of the appointed counsel should appear, without identification of any firm affiliation. Counsel participating in argument must have signed the brief in the case prior to that argument.

(Retained) ATTORNEY, COUNSELOR, LAWYER & HOWE

By: _____
John Q. Howe

By: _____
M. R. N. Associate
Attorneys for Plaintiff Appellants
P. O. Box 0000
Raleigh, NC 27600
(919) 999-9999

(Appointed) _____
John Q. Howe
Attorney for Defendant Appellant
P. O. Box 0000
Raleigh, NC 27600
(919) 999-9999

APPENDIX C

ARRANGEMENT OF RECORD ON APPEAL

Only those items listed in the following tables which are required by Rule 9(a) in the particular case should be included in the record. See Rule 9(b)(2) for sanctions against including unnecessary items in the record. The items marked by an asterisk (*) could be omitted from the record proper if the transcript option of Rule 9(c) is used, and there exists a transcript of the items.

Table 1

SUGGESTED ORDER IN APPEAL FROM CIVIL JURY CASE

1. Title of action (all parties named) and case number in caption per Appendix B
2. Index, per Rule 9(a)(1)a.
3. Statement of organization of trial tribunal, per Rule 9(a)(1)b.
4. Statement of record items showing jurisdiction, per Rule 9(a)(1)c.
5. Complaint
6. Pre-answer motions of defendant, with rulings thereon
7. Answer
8. Motion for summary judgment, with rulings thereon (* if oral)
9. Pre-trial order

*10. Plaintiff's evidence, with any evidentiary rulings assigned as error

*11. Motion for directed verdict, with ruling thereon

*12. Defendant's evidence, with any evidentiary rulings assigned as error

*13. Plaintiff's rebuttal evidence, with any evidentiary rulings assigned as error

14. Issues tendered by parties
15. Issues submitted by court

*16. Court's instructions to jury, per Rule 9(a)(1)f.

17. Verdict
18. Motions after verdict, with rulings thereon (* if oral)
19. Judgment
20. Appeal entries, per Rule 9(a)(1)i.
21. Entries showing settlement of record on appeal, extension of time, etc.
22. Assignments of error, per Rule 10
23. Names, office addresses, and telephone numbers of counsel for all parties to appeal

Table 2

SUGGESTED ORDER IN APPEAL FROM SUPERIOR COURT REVIEW OF ADMINISTRATIVE AGENCY

1. Title of action (all parties named) and case number in caption per Appendix B
2. Index, per Rule 9(a)(2)a.
3. Statement of organization of superior court, per Rule 9(a)(2)b.
4. Statement of record items showing jurisdiction of the board or agency, per Rule 9(a)(2)c.

5. Copy of petition or other initiating pleading
6. Copy of answer or other responsive pleading
7. Copies of all pertinent items from administrative proceeding filed for review in superior court, including evidence
*8. Evidence taken in superior court, in order received
9. Copies of findings of fact, conclusions of law, and judgment of superior court
10. Appeal entries, per Rule 9(a)(2)g.
11. Entries showing settlement of record on appeal, extension of time, etc.
12. Assignments of error, per Rule 9(a)(2)h.
13. Names, office addresses, and telephone numbers of counsel for all parties to appeal

Table 3

SUGGESTED ORDER IN APPEAL OF CRIMINAL CASE

1. Title of action (all parties named) and case number in caption per Appendix B
2. Index, per Rule 9(a)(3)a.
3. Statement of organization of trial tribunal, per Rule 9(a)(3)b.
4. Warrant
5. Judgment in district court (where applicable)
6. Entries showing appeal to superior court (where applicable)
7. Bill of indictment (if not tried on original warrant)
8. Arraignment and plea in superior court
9. Voir dire of Jurors
*10. State's evidence, with any evidentiary rulings assigned as error
11. Motions at close of state's evidence, with rulings thereon (* if oral)
*12. Defendant's evidence, with any evidentiary rulings assigned as error
13. Motions at close of defendant's evidence, with rulings thereon (* if oral)
*14. State's rebuttal evidence, with any evidentiary rulings assigned as error
15. Motions at close of all evidence, with rulings thereon (* if oral)
*16. Court's instructions to jury, per Rules 9(a)(3)f., 10(b)(2)
17. Verdict
18. Motions after verdict, with rulings thereon (* if oral)
19. Judgment and order of commitment
20. Appeal entries
21. Entries showing settlement of record on appeal, extension of time, etc.

22. Assignments of error, per Rule 9(a)(3)j.
23. Names, office addresses and telephone numbers of counsel for all parties to appeal

Table 4

ASSIGNMENTS OF ERROR

A. Examples related to pre-trial rulings in civil action.

Defendant assigns as error:

1. The court's denial of defendant's motion under N.C.R.Civ.P. 12(b)(2) to dismiss for lack of jurisdiction over the person of the defendant on the grounds (that the uncontested affidavits in support of the motion show that no grounds for jurisdiction existed) (or other appropriately stated grounds).

   Record, p. 4.

2. The court's denial of defendant's motion under N.C.R.Civ.P. 12(b)(6) to dismiss for failure of the complaint to state a claim upon which relief can be granted, on the ground that the complaint affirmatively shows that the plaintiff's own negligence contributed to any injuries sustained.

   Record, p. 7.

3. The court's denial of defendant's motion requiring the plaintiff to submit to physical examination under N.C.R.Civ.P. 35, on the ground that on the record before the court, good cause for the examination was shown.

   Transcript, vol. 1, p. 137, lines 17-20.

4. The court's denial of defendant's motion for summary judgment, on the ground that there was not genuine issue of fact that the statute of limitations had run and defendant was therefore entitled to judgment as a matter of law.

   Record, p. 15.

B. Examples related to civil jury trial rulings.

Defendant assigns as error the following:

1. The court's admission of the testimony of the witness E.F., on the ground that the testimony was hearsay.

   Transcript, vol. 1, p. 295, line 5 through p. 297, line 12.
   Transcript, vol. 1, p. 299, lines 1-8.

2. The court's denial of the defendant's motion for directed verdict at the conclusion of all the evidence, on the ground that plaintiff's evidence as a matter of law established his contributory negligence.

   Record, p. 45.

3. The court's instructions to the jury, Record pp. 50-51, as bracketed, explaining the doctrine of last clear chance, on the ground that the doctrine was not correctly explained.

4. The court's instructions to the jury, Record pp. 53-54, as bracketed, applying the doctrine of sudden emergency to the evidence, on the ground that the evidence referred to by the court did not support application of the doctrine.

5. The court's denial of defendant's motion for a new trial for newly discovered evidence, on the ground that on the uncontested affidavits in support of the motion the court abused its discretion in denying the motion.

   Record, p. 80; Transcript, Vol. 3, p. 764, lines 8-23.

C. Examples related to civil non-jury trial

Defendant assigns as error:

1. The court's refusal to enter judgment of dismissal on the merits against plaintiff upon defendant's motion for dismissal made at the conclusion of plaintiff's evidence, on the ground that plaintiff's evidence established as a matter of law that plaintiff's own negligence contributed to the injury.

   Record, p. 20.

2. The court's Finding of Fact No. 10, on the ground that there was insufficient evidence to support it.

   Record, p. 25.

3. The court's Conclusion of Law No. 3, on the ground that there are findings of fact which support the conclusion that defendant had the last clear chance to avoid the collision alleged.

   Record, p. 27.

APPENDIX D

FORMS

Captions for all documents filed in the Appellate Division should be in the format prescribed by Appendix B, addressed to the Court whose review is sought.

1. NOTICES OF APPEAL

a. to Court of Appeals from Trial Division

Appropriate in all appeals of right from district or superior court except appeals from criminal judgments imposing sentences of death or of imprisonment for life.

(Caption)
****

TO THE HONORABLE COURT OF APPEALS
OF NORTH CAROLINA:

(Plaintiff)(Defendant)(Name of Party) hereby gives notice of appeal to the Court of Appeals of North Carolina (from the final judgment)(from the order) entered on (date) in the (District)(Superior) Court of (name) County, (describing it).

Respectfully submitted this ____ day of _____ 19____.

s/_____
Attorney for (Plaintiff)(Defendant)
(Address and Telephone)

b. to Supreme Court from a Judgment of the Superior Court Including a Sentence of Life Imprisonment or Death

(Caption)
****

TO THE HONORABLE SUPREME COURT
OF NORTH CAROLINA:

(Name of Defendant), Defendant, hereby gives notice of appeal to the Supreme Court of North Carolina from the final judgment, entered by (name of Judge), in the Superior Court of (name) County on (date), which judgment included a conviction of murder in the first degree and a sentence of (death)(imprisonment for life).

Respectfully submitted this ____ day of _____ 19____.

s/_____
Attorney for Defendant-Appellant
(Address and Telephone)

c. to the Supreme Court from a Judgment of the Court of Appeals

Appropriate in all appeals taken as of right from opinions and judgments of the Court of Appeals to the Supreme Court under G.S. 7A-30. The appealing party shall enclose a certified copy of the opinion of the Court of Appeals with the notice. To take account of the possibility that the Supreme Court may determine that the appeal does not lie of right, an alternative petition for discretionary review may be filed with the notice of appeal.

(Caption)
****

TO THE HONORABLE SUPREME COURT
OF NORTH CAROLINA:

(Plaintiff)(Defendant)(name of party) hereby appeals to the Supreme Court of North Carolina from the judgment of the Court of Appeals (describe it), which judgment . . .

(Constitutional question—G.S. 7A-30(1)) . . . directly involves substantial questions arising under the (Constitutions)(of the United States)(and)(or)(of the State of North Carolina) as follows:

(here describe the specific issues, citing Constitutional provisions under which they arise, and showing how such issues were timely raised below and are set out in the record on appeal, e.g.:

"Question 1: Said judgment directly involves a substantial question arising under the Fourth and Fourteenth Amendments to the Constitution of United States and under Article 1, Section 20 of the Constitution of the State of North Carolina, in that it deprives rights secured thereunder to the defendant by overruling defendant's assignment of error to the denial of his Motion to Suppress Evidence Obtained by a Search warrant, thereby depriving defendant of his Constitutional right to be secure in his person, house, papers, and effects, against unreasonable searches and seizures and violating constitutional prohibitions against warrants issued without prob-

able cause and warrants not supported by evidence. This constitutional issue was timely raised in the trial tribunal by defendant's Motion to Suppress Evidence Obtained by a Search Warrant made prior to trial of defendant (R pp. 7 through 10). This constitutional issue was determined erroneously by the Court of Appeals."

In the event the Court finds this constitutional question to be substantial, petitioner intends to present the following issues in his brief for review:

(Here list all issues to be presented in appellant's brief to the Supreme Court, not limited to those which are the basis of the constitutional question claim. An issue may not be briefed if it is not listed in the notice of appeal.)

(dissent—G.S. 7A-30(2)) . . . was entered with a dissent by Judge (name), based on the following issue(s):

(Here state the issue or issues which are the basis of the dissenting opinion in the Court of Appeals. Do not state additional issues as with the constitutional question appeal, above. Any additional issues desired to be raised in the Supreme Court where the appeal of right is based solely on a dissenting opinion must be presented by a petition for discretionary review as to the additional issues.)

Respectfully submitted this ____ day of _____ 19____.

s/_____
Attorney for (Plaintiff)(Defendant)-Appellant
(Address and Telephone)

2. APPEAL ENTRIES

The appeal entries are appropriate as a ready means of providing in composite form for the record on appeal:

1) the entry required by App. Rule 9(b) showing appeal duly taken by written notice under App. Rule 3(a) or 4(a);

2) judicial approval of the undertaking on appeal required by App. Rule 6; and

3) the entry required by App. Rule 9(b) showing any judicial extension of time for serving proposed record on appeal under App. Rule 27(c).

These entries of record may also be made separately.

Where appeal is taken by filing and serving written notice after the term of court, a copy of the notice with filing date and proof of service is appropriate as the record entry required.

Per Tables 1, 2, and 3 of Appendix C, such "appeal entries" are appropriately included in the record on appeal following the judgment from which appeal is taken.

The judge's signature, while not technically required, is traditional and serves as authentication of the substance of the entries.

(Defendant) gave due notice of appeal to the (Court of Appeals)(Supreme Court). Appeal bond in the sum of $____ adjudged to be sufficient. (Defendant) shall have 10 days in which to order the transcript, or, in the alternative, 35 days in which to serve a proposed record on appeal on the appellee. (Plaintiff) is allowed 15 days thereafter within which to serve objections or a proposed alternative record on appeal.

This _____ day of _____, 19____.

s/ _____
Judge Presiding

3. PETITION FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

To seek review of the opinion and judgment of the Court of Appeals where appellant contends case involves issues of public interest or jurisprudential significance. May also be filed as a separate paper in conjunction with a notice of appeal to the Supreme Court when the appellant considers that such appeal lies of right due to substantial constitutional questions under G.S. 7A-30, but desires to have the Court consider discretionary review should it determine that appeal does not lie of right in the particular case.

(Caption)
****

TO THE HONORABLE SUPREME COURT
OF NORTH CAROLINA:

(Plaintiff)(Defendant),(Name of Party), respectfully petitions the Supreme Court of North Carolina that the Court certify for discretionary review the judgment of the Court of Appeals (describing it) on the basis that (here set out the grounds from G.S. 7A-31 which provide the basis for the petition). In support of this petition, (Plaintiff)(Defendant) shows the following:

Facts

(Here state first the procedural history of the case through the trial division and the Court of Appeals. Then set out factual background necessary for understanding the basis of the petition.)

Reasons Why Certification Should Issue

(Here set out factual and legal argument to justify certification of case for full review. While some substantive argument will certainly be helpful, the focus of the argument in the petition should be to show how the opinion of the Court of Appeals conflicts with prior decisions of the Supreme Court or how the case is one significant to the jurisprudence of the State or one which offers significant public interest. If the Court is persuaded to take the case, then the appellant may deal thoroughly with the substantive issues in the new brief.)

Issues to be Briefed

In the event the Court allows this petition for discretionary review, petitioner intends to present the following issues in his brief for review:

(Here list all issues to be presented in appellant's brief to the Supreme Court, not limited to those which are the basis of the petition. An issue may not be briefed if it is not listed in the petition.)

Respectfully submitted this ____ day of _____ 19____.

s/_____
Attorney for (Plaintiff)(Defendant)
(Address and Telephone)

Attached to the petition shall be a certificate of service upon the opposing parties and a clear copy of the opinion of the Court of Appeals in case.

4. PETITION FOR WRIT OF CERTIORARI

To seek review 1) of the judgments or orders of trial tribunals in the appropriate appellate court when the right to prosecute an appeal has been lost or where no right to appeal exists; 2) by the Supreme Court of the decisions and orders of the Court of Appeals where no right to appeal or to petition for discretionary review exists or where such right has been lost by failure to take timely action.

(Caption)
****

TO THE HONORABLE (SUPREME COURT)
(COURT OF APPEALS) OF NORTH CAROLINA:

(Plaintiff)(Defendant), (Name of Party), respectfully petitions this Court to issue its writ of certiorari pursuant to Rule 21 of the N.C. Rules of Appellate Procedure to review the (judgment)(order)(decree) of the [Honorable (name), Judge Presiding, (name) County Superior (District) Court] [North Carolina Court of Appeals], dated (date), (here describe the judgment, order, or decree appealed from), and in support of this petition shows the following:

Facts

(Here set out factual background necessary for understanding the basis of the petition: e.g., failure to perfect appeal by reason of circumstances constituting excusable neglect; nonappealability of right of an interlocutory order, etc.) (If circumstances are that transcript could not be procured from reporter, statement should include estimate of date of availability, and supporting affidavit from the Court Reporter.)

Reasons Why Writ Should Issue

(Here set out factual and legal argument to justify issuance of writ: e.g., reasons why interlocutory order makes it impractical for petitioner to proceed further in trial court; meritorious basis of petitioner's proposed assignments of error; etc.)

Attachments

Attached to this petition for consideration by the Court are certified copies of the (judgment)(order)(decree) sought to be reviewed, and (here list any other certified items from the trial court record and any affidavits attached as pertinent to consideration of the petition).

Wherefore, petitioner respectfully prays that this Court issue its writ of certiorari to the [Superior Court of (name) County] [North Carolina Court of Appeals] to permit review of the (judgment)(order)(decree) above specified, upon errors [(to be) assigned in the record on appeal constituted in accordance with the Rules of Appellate Procedure] [stated as follows: (here list the errors, as issues, in the manner provided for the petition for discretionary review)]; and that the petitioner have such other relief as to the Court may seem proper.

Respectfully submitted this the ____ day of _____, 19____.

s/_____
Attorney for Petitioner
(Address and Telephone)

(Verification by petitioner or counsel)
(Certificate of service upon opposing parties)
(Attach a clear copy of the opinion, order, etc. which is the subject of the petition and other attachments as described in petition.)

5. PETITION FOR WRIT OF SUPERSEDEAS UNDER RULE 23 AND MOTION FOR TEMPORARY STAY

A writ of supersedeas operates to stay the execution or enforcement of any judgment, order, or other determination of a trial court or of the Court of Appeals in civil cases under Appellate Rule 8 or to stay imprisonment or execution of a sentence of death in criminal cases (other portions of criminal sentences, e.g., fines, are stayed automatically pending an appeal of right).

A motion for temporary stay is appropriate to show good cause for immediate stay of execution on an ex parte basis pending the Court's decision on the Petition for Supersedeas or the substantive petition in the case.

(Caption)
****

TO THE HONORABLE (COURT OF APPEALS) (SUPREME COURT) OF NORTH CAROLINA:

(Plaintiff)(Defendant), (Name of Party), respectfully petitions this Court to issue its writ of supersedeas to stay (execution)(enforcement) of the (judgment)(order)(decree) of the [Honorable _____, Judge Presiding, (Superior)(District) Court of _____ County] [North Carolina Court of Appeals] dated _____, pending review by this Court of said (judgment)(order)(decree) which (here describe the judgment, order, or decree and its operation if not stayed); and in support of this petition shows the following:

Facts

(Here set out factual background necessary for understanding basis of petition and justifying its filing under Rule 23: e.g., trial judge has vacated the entry upon finding security deposited under G.S. Section _____ inadequate; or that trial judge has refused to stay execution upon motion therefor by petitioner; or that circum-

stances make it impracticable to apply first to trial judge for stay, etc.; and showing that review of the trial court judgment is being sought by appeal or extraordinary writ.)

Reasons Why Writ Should Issue

(Here set out factual and legal argument for justice of issuing writ; e.g., that security deemed inadequate by trial judge is adequate under the circumstances; that irreparable harm will result to petitioner if he is required to obey decree pending its review; that petitioner has meritorious basis for seeking review, etc.)

Attachments

Attached to this petition for consideration by the court are certified copies of the (judgment)(order)(decree) sought to be stayed and (here list any other certified items from the trial court record and any affidavits deemed necessary to consideration of the petition).

Wherefore, petitioner respectfully prays that this Court issue its writ of supersedeas to the [(Superior)(District) Court of _____ County] [(North Carolina Court of Appeals)] staying (execution)(enforcement) of its (judgment)(order)(decree) above specified, pending issuance of the mandate to this Court following its review and determination of the (Appeal)(discretionary review)(review by extraordinary writ)(now pending)(the petition for which will be timely filed); and that the petitioner have such other relief as to the Court may seem proper.

Respectfully submitted this the ____ day of _____, 19____.

s/_____
Attorney for Petitioner
(Address and Telephone)

(Verification by petitioner or counsel.)
(Certificate of Service upon opposing party.)

Rule 23(e) provides that in conjunction with such a petition for supersedeas, either as part of it or separately, the petitioner may move for a temporary stay of execution or enforcement pending the Court's ruling on the petition for supersedeas. The following form is illustrative of such a motion for temporary stay, either included in the main petition as part of it or filed separately.

Motion for Temporary Stay

(Plaintiff)(Defendant) respectfully applies to the Court for an order temporarily staying (execution)(enforcement) of the (judgment)

(order)(decree) which is the subject of (this)(the accompanying) petition for writ of supersedeas, such order to be in effect until determination by this Court whether it shall issue its writ. In support of this Application, movant shows that (here set out the legal and factual argument for the issuance of such a temporary stay order; e.g., irreparable harm practically threatened if petitioner must obey decree of trial court during interval before decision by Court whether to issue writ of supersedeas).

Motion for Stay of Execution

In death cases, the Supreme Court uses an order for stay of execution of death sentence in lieu of the writ of supersedeas. Counsel should promptly apply for such a stay after the judgment of the Superior Court imposing the death sentence. The stay of execution order will provide that it remains in effect until dissolved. The following form illustrates the contents needed in such a motion.

(Caption)
****

TO THE HONORABLE SUPREME COURT
OF NORTH CAROLINA:

Now comes the defendant (name), who respectfully shows the Court:

1. That on (date of judgment), The Honorable _____, Judge Presiding, Superior Court of _____ County, sentenced the defendant to death, execution being set for (date of execution).

2. That pursuant to G.S. 15A-2000(d)(1), there was an automatic appeal of this matter to the Supreme Court of North Carolina, and that defendant's notice of appeal was given (describe the circumstances and date of notice).

3. That the record on appeal in this case cannot be served and settled, the matter docketed, the briefs prepared, the arguments heard, and a decision rendered before the scheduled date for execution.

WHEREFORE, the defendant prays the Court to enter an Order staying the execution pending judgment and further orders of this Court.

Respectfully submitted this the ____ day of _____, 19____.

s/_____
Attorney for Defendant
(Address and Telephone)

(Certificate of Service on Attorney General, District Attorney, and Warden of Central Prison.)

APPENDIX E

CONTENT OF BRIEFS

CAPTION

Briefs should use the caption as shown in Appendix B. The Title of the Document should reflect the position of the filing party both at the trial level and on the appeal, e.g., DEFENDANT-APPELLANT'S BRIEF, PLAINTIFF-APPELLEE'S BRIEF or BRIEF FOR THE STATE. A brief filed in the Supreme Court in a case decided by the Court of Appeals is captioned a "New Brief" and the position of the filing party before the Supreme Court should be reflected, e.g., DEFENDANT-APPELLEE'S NEW BRIEF (where the State has appealed from the Court of Appeals in a criminal matter).

The cover page should contain only the caption of the case. Succeeding pages should present the following items, in order.

INDEX OF THE BRIEF

Each brief should contain a topical index beginning at the top margin of the first page following the cover, in substantially the following form:

INDEX

* * * * *

TABLE OF CASES AND AUTHORITIES

This table should begin at the top margin of the page following the Index. Page reference should be made to the first citation of the authority in each question to which it pertains.

TABLE OF CASES AND AUTHORITIES

* * * * *

QUESTIONS PRESENTED

The inside caption is on "page 1" of the brief, followed by the questions presented. The phrasing of the questions presented need not be identical with that set forth in the assignments of error in the Record; however, the brief may not raise additional questions or change the substance of the questions already presented in those documents. The appellee's brief need not restate the questions unless the appellee desires to present additional questions to the Court.

QUESTIONS PRESENTED

I. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS HIS INCULPATORY STATEMENT BECAUSE THAT STATEMENT WAS THE PRODUCT OF AN ILLEGAL DETENTION?

* * *

STATEMENT OF THE CASE

If the Questions Presented carry beyond page 1, the Statement of the Case should follow them, separated by the heading. If the Questions Presented do not carry over, the Statement of the Case should begin at the top of page 2 of the brief.

Set forth a concise chronology of the course of the proceedings in the trial court and the route of appeal, including pertinent dates. For example:

STATEMENT OF THE CASE

The defendant, John Q. Public, was convicted of first degree rape at the October 5, 1988, Criminal Session of the Superior Court of Bath County, the Honorable I. M. Wright presiding, and received the mandatory life sentence for the Class B felony. The defendant gave written notice of appeal in open court to the Supreme Court of North Carolina at the time of the entry of judgment on October 8, 1988, the transcript was ordered on October 15, 1988, and was delivered to parties on December 10, 1988.

A motion to extend the time for serving and filing the record on appeal was allowed by the Supreme Court on January 12, 1989. The record was filed and docketed in the Supreme Court on February 25, 1989.

STATEMENT OF THE FACTS

The facts constitute the basis of the dispute or criminal charges and the procedural mechanics of the case if they are significant to the questions presented. The facts should be stated objectively and concisely and should be limited to those which are relevant to the issue or issues presented.

Do not include verbatim portions of the record or other matters of an evidentiary nature in the statement of the facts. Summaries and record or transcript citations should be used. No appendix should be compiled simply to support the statement of the facts.

The appellee's brief need contain no statement of the case or facts if there is no dispute. The appellee may state additional facts where deemed necessary, or, if there is a dispute of the facts, may restate the facts as they objectively appear from the appellee's viewpoint.

ARGUMENT

Each question will be set forth in upper case type as the party's contention, followed by the assignments of error pertinent to the question, identified by their numbers and by the pages in the printed record on appeal or in the transcript at which they appear, and separate arguments pertaining to and supporting that contention, e.g.,

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS HIS INCULPATORY STATEMENT BECAUSE THAT STATEMENT WAS THE PRODUCT OF AN ILLEGAL DETENTION.

ASSIGNMENT OF ERROR NO. 2

(T p. 45, lines 20-23)

Parties should feel free to summarize, quote from, or cite to the record or transcript during the presentation of argument. If the transcript option is selected under Appellate Rule 9(c), the Appendix to the Brief becomes a consideration, as described in Appellate Rule 28 and below.

Where statutory or regulatory materials are cited, the relevant portions should be quoted in the body of the argument or placed in the appendix to the brief. Rule 28(d)(1)c.

CONCLUSION

State briefly and clearly the specific objective or relief sought in the appeal. It is not necessary to restate the party's contentions, since they are presented both in the index and as headings to the individual arguments.

SIGNATURE AND CERTIFICATE OF SERVICE

Following the conclusion, the brief must be dated and signed, with the attorney's mailing address and telephone number, all indented to the center of the page.

The Certificate of Service is then shown with centered, upper case heading. The certificate itself, describing the manner of service upon the opposing party with the complete mailing address of the party or attorney served is followed by the date and the signature of the person certifying the service.

APPENDIX TO THE BRIEF UNDER THE TRANSCRIPT OPTION

Appellate Rules 9(c) and 28 require additional steps to be taken in the brief to point the Court to appropriate excerpts of the transcript considered essential to the understanding of the arguments presented.

Counsel is encouraged to cite, narrate, and quote freely within the body of the brief. However, if because of length a verbatim quotation is not included in the body of the brief, that portion of the transcript and others like it shall be gathered into an appendix to the brief which is situated at the end of the brief, following all signatures and certificates. Counsel should not compile the entire transcript into an appendix to support issues involving directed verdict, sufficiency of evidence, or the like.

The appendix should be prepared so as to be clear and readable, distinctly showing the transcript page or pages from which each passage is drawn. Counsel may reproduce transcript pages themselves, clearly indicating those portions to which attention is directed.

The Appendix should include a table of contents, showing the pertinent contents of the appendix, the transcript or appendix page reference and a reference back to the page of the brief citing the appendix.

For example:

CONTENTS OF APPENDIX

* * * * *

The appendix will be printed with the brief to which it is appended; however, it will not be retyped, but run as is. Therefore, clarity of image is extremely important.

APPENDIX F

FEES AND COSTS

Fees and costs are provided by order of the Supreme Court and apply to proceedings in either appellate court. There is no fee for filing a motion in a cause; other fees are as follows, and should be submitted with the document to which they pertain, made payable to the Clerk of the appropriate appellate court:

Notice of Appeal, Petition for Discretionary Review, Petition for Writ of Certiorari or other extraordinary writ, Petition for Writ of Supersedeas—docketing fee of $10.00 for each document, i.e.: docketing fees for a notice of appeal and petition for discretionary review filed jointly would be $20.00.

Petitions to rehear require a docketing fee of $20.00. (Petitions to rehear are only entertained in civil cases.)

Certification fee of $10.00 (payable to Clerk, Court of Appeals) where review of a judgment of Court of Appeals is sought in Supreme Court by notice of appeal or by petition.

An appeal bond of $250.00 is required in civil cases per Appellate Rules 6 and 17. The bond should be filed contemporaneously

with the record in the Court of Appeals and with the notice of appeal in the Supreme Court. The Bond will not be required in cases brought by petition for discretionary review or certiorari unless and until the Court allows the petition.

Costs for printing documents are $2.00 per printed page where the Clerk determines that the document is in proper format and can be printed from the original, and $5.00 per printed page where the document must be retyped and printed. The Appendix to a brief under the Transcript option of Appellate Rules 9(c) and 28(b) and (c) will be reproduced as is, but billed at the rate of the printing of the brief.

The Clerk of the Court of Appeals requires that a deposit for estimated printing costs accompany the document at filing. The Clerk of the Supreme Court prefers to bill the party for the costs of printing after the fact.

Court costs on appeal total $9.00, plus the cost of copies of the opinion to each party filing a brief, and are imposed when a notice of appeal is withdrawn or dismissed and when the mandate is issued following the opinion in a case.

Photocopying charges are $.20 per page. Facsimile transmission fees, which are in addition to standard photocopying charges, are $5.00 for the first 25 pages and $.20 for each page thereafter.

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

ABATEMENT AND REVIVAL

§ 8.2. Identity of Actions for Negligent Injury

The trial court correctly granted summary judgment for the third party defendant where the identical issue was already pending in a prior action between the same parties in another county. *Shore v. Brown*, 427.

ADMINISTRATIVE LAW

§ 2. Exclusiveness of Statutory Remedy

A decision by the Board of Trustees of the State Employees' Medical Plan denying plaintiff's claim for reimbursement for medical expenses was subject to review only under the terms of the Administrative Procedure Act, and where plaintiff had not exhausted the administrative remedies available to him under the Act, the district court had no subject matter jurisdiction of plaintiff's civil action against the Board for breach of contract. *Vass v. Bd. of Trustees of State Employees' Medical Plan*, 402.

§ 3. Duties and Authority of Administrative Boards and Agencies in General

Art. IV, § 3 of the N. C. Constitution does not prohibit the legislature from conferring on administrative agencies the power to assess civil penalties and to exercise discretion in determining civil penalties within an authorized range. *In the Matter of Appeal from Civil Penalty*, 373.

APPEAL AND ERROR

§ 2. Review of Decision of Lower Court

A panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless that decision has been overturned by a higher court. *In the Matter of Appeal from Civil Penalty*, 373.

§ 36.1. Timeliness of Service of Case on Appeal

Good cause was shown for the trial court's denial of appellees' Rule 25 motion to dismiss the appeal for failure of appellant to serve the case on appeal within the time allowed. *State ex rel. Thornburg v. Currency*, 276.

§ 36.2. Enlargement of Time for Service of Case on Appeal

The trial judge did not err in extending ex parte the time for the State to serve the record on appeal in an action involving a forfeiture. *State ex rel. Thornburg v. Currency*, 276.

AUTOMOBILES AND OTHER VEHICLES

§ 84. Contributory Negligence in Connection with Children

The trial judge correctly entered summary judgment for defendant Holland in an action brought by State Farm for contribution arising from the death of Holland's child in an automobile accident because the failure of Holland to restrain the child in a child restraint system did not constitute actionable negligence and Holland thus could not be jointly liable with the insured for damages to the estate of the child. *State Farm Mut. Ins. Co. v. Holland*, 466.

CONSTITUTIONAL LAW

§ 10.3. Delegation of Judicial Power to Administrative Agencies

Art. IV, § 3 of the N. C. Constitution does not prohibit the legislature from conferring on administrative agencies the power to assess civil penalties and to exercise discretion in determining civil penalties within an authorized range. *In the Matter of Appeal from Civil Penalty*, 373.

§ 19.1. Privileges and Immunities Clause

Per capita distribution of sales and use tax revenues did not violate the privileges and immunities clause of the federal constitution. *Town of Beech Mountain v. County of Watauga*, 409.

§ 20. Equal Protection Generally

The strict scrutiny test for resolving equal protection claims was not applicable to an action in which plaintiffs alleged that per capita distribution of sales and use tax revenues created an arbitrary distinction between those who reside in Watauga County for more than six months of the year and those who reside primarily out of state or in other counties. *Town of Beech Mountain v. County of Watauga*, 409.

The per capita distribution of sales and use tax revenues based on a six-month residence test did not violate equal protection under the rational relationship test. *Ibid.*

Plaintiffs' equal protection rights were not violated by its annexation where other similarly situated property was not also annexed. *Piedmont Ford Truck Sale v. City of Greensboro*, 499.

§ 32. Right to Fair and Public Trial

The trial judge's warning to spectators of a first degree murder trial that they would not be allowed to leave the courtroom after closing arguments began did not constitute the denial of a public trial and was authorized by statute. *S. v. Clark*, 146.

§ 34. Double Jeopardy

Defendant was not subjected to double jeopardy where the State was allowed to try him for both burglary and first degree murder with the murder as the intended felony for the burglary. *S. v. Parks*, 94.

§ 53. Speedy Trial; Delay Caused by Defendant

Defendant was not denied his Sixth Amendment right to a speedy trial by a delay of two years and two months between the issuance of a warrant for defendant's arrest and his trial on a first degree murder charge. *S. v. Groves*, 360.

§ 56. Trial by Jury Generally

The transfer of defendant's retrial to a neighboring county did not violate defendant's constitutional right to be tried by a jury of the vicinage where it appeared necessary to the trial judge to move the case to another county in order to provide for a fair trial. *S. v. Chandler*, 172.

§ 63. Exclusion from Jury for Opposition to Capital Punishment

The trial court did not err in a prosecution for murder by denying defendant's request to limit death qualification of the jury. *S. v. Parks*, 94.

CONSTITUTIONAL LAW — Continued

§ 65. Right of Confrontation Generally

The trial judge did not err in declaring a four-year-old witness unavailable because she was overcome with fear to the extent that she could not respond to questions and in permitting the introduction of a transcript of testimony given by the witness at a prior trial of defendant. *S. v. Chandler*, 172.

Defendant's constitutional right to confrontation was not violated by the admission of the transcript of an unavailable witness's testimony at a prior trial of defendant on the same charges where defendant was present and represented by counsel at the prior trial. *Ibid.*

§ 75. Self-Incrimination; Testimony by Defendant

The trial court in a murder case did not err in the denial of defendant's request to admit his post-arrest statements to the police prior to his testimony. *S. v. Ball*, 233.

CRIMINAL LAW

§ 5.2. Mental Capacity as Affected by Unconsciousness

The trial court in a first degree murder case erred in refusing to instruct the jury on the defense of unconsciousness or automatism. *S. v. Fields*, 204.

§ 15. Venue

The transfer of defendant's retrial to a neighboring county did not violate defendant's constitutional right to be tried by a jury of the vicinage where it appeared necessary to the trial judge to move the case to another county in order to provide for a fair trial. *S. v. Chandler*, 172.

§ 15.1. Inability to Receive Fair Trial as Grounds for Change of Venue

After a mistrial was declared for failure of the jury to reach a verdict in a case involving sexual offenses, indecent liberties and crime against nature, the trial court properly exercised its inherent power to order a change of venue in the interest of justice by granting the State's motion for change of venue of the retrial. *S. v. Chandler*, 172.

§ 33.3. Evidence as to Collateral Matters

Testimony in a prosecution for the murder of a highway patrolman did not address a collateral matter and was properly admitted where defendant's wife's friend and employer were both called to corroborate the wife's testimony that defendant had threatened to kill her on the day before he left Kentucky. *S. v. McQueen*, 118.

§ 34. Evidence of Defendant's Guilt of other Offenses; Inadmissibility

Evidence of a lack of prior convictions was not admissible in a prosecution for trafficking in marijuana to show the character trait of being law-abiding. *S. v. Bogle*, 190.

§ 34.2. Evidence of Defendant's Guilt of other Offenses; Admission of Inadmissible Evidence as Harmless Error

Assuming that the admission of evidence that defendant set a fire, possessed a knife and made threats to others while in jail awaiting trial violated Rule of Evidence 404(b), defendant failed to establish any resulting prejudice. *S. v. Groves*, 360.

CRIMINAL LAW — Continued

§ 34.7. Admissibility of Evidence of other Offenses to Show Premeditation or Deliberation

Evidence that defendant threatened to kill the victim two weeks before he did so was relevant and admissible to show premeditation and deliberation and to negate self-defense. *S. v. Groves*, 360.

§ 34.8. Admissibility of Evidence of other Offenses to Show Common Plan or Scheme

Prior similar sexual acts committed by defendant against his daughter over an eleven-year period were not too remote to be considered as evidence of defendant's common scheme or plan to abuse his daughter sexually. *S. v. Shamsid-Deen*, 437.

Testimony by the sisters of an alleged victim of rape by their father that their father had forced them to have sexual intercourse with him in the past was admissible to show a common plan or scheme embracing the offense charged. *Ibid.*

§ 40. Evidence at Former Trial; Requirement that Witness Be Unavailable

The trial judge did not err in declaring a four-year-old witness unavailable because she was overcome with fear to the extent that she could not respond to questions and in permitting the introduction of a transcript of testimony given by the witness at a prior trial of defendant. *S. v. Chandler*, 172.

§ 50.1. Admissibility of Opinion Testimony

A clinical psychologist was not precluded from stating an opinion as to whether defendant was able to form the specific intent to kill the victim merely because such testimony embraced an ultimate issue to be decided by the jury. *S. v. Clark*, 146.

The trial court properly excluded expert testimony by a clinical psychologist as to whether defendant had the ability to form the specific intent to kill the victim where the witness admitted that his conclusions were "purely speculative" and "conjecture," and the witness indicated no comprehension of the legal significance of "specific intent." *Ibid.*

§ 66.5. Right to Counsel at Lineup

There was no prejudicial error in a prosecution for felony murder in admitting the results of a lineup identification where defendant's attorney was not allowed to accompany the witness and an officer in an elevator in which the witness observed the lineup. *S. v. Hunt*, 343.

§ 72. Evidence as to Age

No constitutional issue as to burden of proof was presented concerning the practice of permitting jurors in a statutory rape case to determine defendant's age based on their observations of the defendant. *S. v. Barnes*, 539.

§ 73. Hearsay Testimony in General

There was no prejudicial error in a first degree murder prosecution for the killing of a state trooper where the trial court sustained the State's objection to testimony that a companion asked defendant the morning after "You don't remember killing a state trooper?" *S. v. McQueen*, 118.

§ 73.2. Statements not within Hearsay Rule

A statement by a murder victim expressing an intent to disinherit defendant was admissible for the nonhearsay purpose of showing that ill will existed between

defendant and his father and was also admissible under the state of mind exception to the hearsay rule. *S. v. Greene*, 1.

§ 74.2. Confession by or Implicating Codefendant

The prosecutor's question to defendant as to whether a non-testifying codefendant "tried to put the blame on you, and you are trying to put the blame on him, is that right?" did not violate the *Bruton* rule. *S. v. Clark*, 146.

§ 75.2. Admissibility of Confession; Effect of Promises, Threats or other Statements of Officers

The trial court in a prosecution for first degree murder correctly ruled on the admissibility of a group of statements made during and after defendant's arrest. *S. v. McQueen*, 118.

§ 75.4. Admissibility of Confession Obtained in Absence of Counsel

The admission of defendant's in-custody statement made without counsel was harmless since the statement does nothing to inculpate defendant and is not probative of his guilt or innocence. *S. v. Greene*, 1.

Defendant's inculpatory statement was not inadmissible on the ground that interrogation continued despite her request to have an attorney present where the court found that she never invoked her right to counsel and signed a waiver of rights form even though she expressed reservations about whether to talk with officers without first contacting a lawyer. *S. v. Clark*, 146.

Encouraging a defendant to tell the truth, even after he or she has asked for a lawyer, does not constitute interrogation or its functional equivalent. *Ibid.*

The trial court did not err in a first degree murder prosecution by admitting statements defendant made after receiving Miranda warnings and requesting an attorney. *S. v. McQueen*, 118.

§ 75.7. Admissibility of Confession; Requirement that Defendant Be Warned of Constitutional Rights

Oral and written exculpatory statements made by defendant at the police station were not the products of custodial interrogation, and Miranda warnings were not required for their admission. *S. v. Clark*, 146.

§ 75.9. Volunteered Statements

The trial court's conclusion in a prosecution for first degree murder that defendant's pretrial statement to detectives was voluntary and understanding was supported by the findings. *S. v. McSwain*, 241.

§ 81. Best Evidence

Testimony that a witness saw at defendant's residence a life insurance policy which insured deceased and named defendant as beneficiary did not violate the best evidence rule. *S. v. Clark*, 146.

§ 83.1. Actions in which Husband or Wife May Testify against Spouse

The trial court did not err in a prosecution for the first degree murder of a state trooper by admitting testimony from defendant's wife that defendant was on his way to North Carolina to kill his wife. *S. v. McQueen*, 118.

CRIMINAL LAW — Continued

§ 84. Evidence Obtained by Unlawful Means

The good faith exception to the exclusionary rule arises only upon the exclusion of evidence based upon federal constitutional grounds. *S. v. Hyleman*, 506.

§ 85.1. Character Evidence; What Questions and Evidence Are Admissible

The trial court in a prosecution for trafficking in marijuana correctly refused to give defendant's requested instruction that evidence of defendant's reputation for truthfulness and honesty could be considered as substantive evidence of defendant's innocence. *S. v. Bogle*, 190.

§ 85.3. Character Evidence; State's Cross-Examination of Defendant

The prosecutor's cross-examination of defendant about whether she enjoyed smoking marijuana was improper. *S. v. Clark*, 146.

§ 86.1. Impeachment of Defendant

Questions asked defendant on cross-examination concerning his religious beliefs did not constitute plain error. *S. v. Shamsid-Deen*, 437.

A question asked defendant during cross-examination about his religious beliefs as to whether his children were taught not to have sex with anyone but their father was not an improper question insulting the Islamic religion. *Ibid.*

§ 86.2. Impeachment of Defendant; Prior Convictions Generally

The testimony of defendant's wife in a first degree murder prosecution concerning a prior incident in which defendant had used a gun and made threats against her was relevant. *S. v. McQueen*, 118.

§ 87.1. Leading Questions

The trial court did not err in permitting the State to ask leading questions of children during their testimony about alleged sexual offenses. *S. v. Chandler*, 172.

§ 89.2. Credibility of Witnesses; Corroboration

The trial court in a murder case did not err in the denial of defendant's request to admit his post-arrest statements to the police prior to his testimony. *S. v. Ball*, 233.

Testimony by a social worker consisting of statements and drawings made by a child sexual offense victim was admissible to corroborate the child's testimony, to corroborate a doctor's testimony concerning the physical evidence and the child's statements during medical diagnosis and treatment, and to corroborate testimony by an eyewitness. *S. v. Chandler*, 172.

§ 89.4. Credibility of Witnesses; Prior Inconsistent Statements

A witness's testimony that she "felt that he (defendant) had killed once and that he would kill again" and that "I told them that I believe if he was not locked up that he would kill me" was admissible to explain her reason for making prior inconsistent statements. *S. v. Greene*, 1.

The trial court erred in a prosecution for felony murder by admitting the prior inconsistent statements of a hostile witness. *S. v. Hunt*, 343.

It was improper for the State to impeach a witness who denied making a prior statement to an officer by use of the officer's testimony relating the substance of that prior statement. *S. v. Hyleman*, 506.

CRIMINAL LAW — Continued

§ 89.7. Impeachment; Mental Capacity of Witness

The trial court did not err in a murder prosecution by denying defendant's motion to compel a witness to submit to an independent psychiatric exam. *S. v. Liles*, 529.

§ 92.4. Consolidation of Multiple Charges against same Defendant Held Proper

The trial court did not err by allowing two murder charges to be joined for trial. *S. v. McNeil*, 33.

Indictments charging defendant with seven counts of first degree sexual offense, seven counts of taking indecent liberties with a minor, and seven counts of crime against nature were properly consolidated for trial. *S. v. Chandler*, 172.

§ 92.5. Severance

There was no merit to defendant's contention that he was unfairly prejudiced by the trial court's refusal to sever cases involving various sexual offenses against seven different children over a four and one-half month period of time on the ground that the jury would believe he was guilty of all offenses simply because there were so many. *S. v. Chandler*, 172.

§ 102.6. Particular Conduct and Comments in Jury Argument

The trial court did not err in a prosecution for two first degree murders by failing to intervene *ex mero motu* in the prosecutor's closing argument. *S. v. McNeil*, 33.

§ 111.1. Particular Miscellaneous Instructions

Erroneously giving a willful blindness instruction in a prosecution for trafficking in marijuana was prejudicial. *S. v. Bogle*, 190.

§ 112.1. Instructions on Reasonable Doubt

The trial court did not err in failing to give defendant's requested instruction that "proof beyond a reasonable doubt is proof that satisfies or entirely convinces you of the defendant's guilt." *S. v. Greene*, 1.

§ 114.2. No Expression of Opinion by Court in Statement of Evidence

The trial court's instruction in a first degree murder case that there was evidence tending to show that defendant confessed to the crime charged did not amount to an expression of opinion on the evidence or to an expression of opinion that defendant had in fact confessed. *S. v. Young*, 489.

§ 117.5. Charge on Character Evidence of Defendant

The trial court erred in a prosecution for trafficking in marijuana by failing to instruct that defendant's evidence of the particular character trait of being law-abiding could be considered as substantive evidence of his innocence. *S. v. Bogle*, 190.

§ 119. Requests for Instructions

The trial court's failure to inform defense counsel that it would not use the full tendered instruction on reasonable doubt did not materially prejudice defendant's case although counsel relied on the omitted language in his closing argument to the jury. *S. v. Greene*, 1.

The trial court did not err in a first degree murder prosecution by refusing to use defendant's proffered instructions on sudden provocation and heat of passion. *S. v. Rhinehart*, 310.

CRIMINAL LAW — Continued

§ 138.25. Aggravating Factor of Pretrial Release as to other Charges

The trial court did not err when sentencing defendant for burglary by finding in aggravation that defendant committed the burglary while on pretrial release from another felony charge. *S. v. Parks*, 94.

§ 138.29. Other Aggravating Factors

The Supreme Court upheld a finding as a nonstatutory aggravating factor in a rape prosecution that the victim continued to suffer mentally and emotionally from the incident. *S. v. Cofield*, 452.

§ 138.42. Other Mitigating Factors

The trial court did not err when sentencing defendant for burglary by refusing to find the presence of two requested nonstatutory mitigating factors. *S. v. Parks*, 94.

The trial court erred in failing to find the statutory mitigating circumstance that defendant had been honorably discharged from the armed services. *S. v. Clark*, 146.

§ 165. Exceptions and Assignments of Error to Remarks of Court

Defendant's failure to object to alleged expressions of opinion by the trial court in violation of G.S. § 15A-1222 and G.S. § 15A-1232 does not preclude his raising the issue on appeal. *S. v. Young*, 489.

§ 171.2. Error Relating to One Count Where More than One Sentence Is Imposed

Statements in prior decisions of the Supreme Court and the Court of Appeals that "where concurrent sentences of equal length are imposed, any error in the charge relating to one count only is harmless" are disavowed. *S. v. Barnes*, 539.

§ 173. Invited Error

Where a statement made by defendant during in-custody interrogation was elicited by defense counsel on cross-examination of an S.B.I. agent, any error in the admission of the statement was invited. *S. v. Greene*, 1.

The trial court did not err in a murder prosecution by failing to strike *ex mero motu* an answer given during cross-examination that defendant had threatened to kill the victim on a prior occasion. *S. v. Rivers*, 573.

CUSTOMS AND USAGES

§ 1. Generally

Uncontradicted evidence that the owner of an apartment complex observed standards for fire safety customarily followed by the building industry and other apartment complex owners in the area did not absolve the owner from liability for negligence in failing to install additional fire safety features in the common areas of the complex. *Collingwood v. G.E. Real Estate Equities*, 63.

DEEDS

§ 20.2. Restrictive Covenants in Subdivisions; Building Size Restrictions

Although a homeowners association did not reject plaintiffs' proposed house plans on the basis of a minimum square footage restrictive covenant, there was sufficient evidence before the trial court to support the court's independent finding that plaintiffs' plans called for construction of a house which would violate the square footage requirement, and this finding supported the court's dismissal of

HOMICIDE — Continued

§ 7.1. Defense of Unconsciousness

The trial court in a first degree murder case erred in refusing to instruct the jury on the defense of unconsciousness or automatism. *S. v. Fields*, 204.

§ 8.1. Defense of Intoxication; Instructions

There was no prejudicial error in the trial court's instruction on voluntary intoxication in a prosecution for the murder of a state trooper where the court erroneously charged the jury that defendant would not be guilty of murder in the first degree if, as a result of intoxication, he was utterly incapable of forming the specific intent to kill. *S. v. McQueen*, 118.

No inference of the absence of premeditation and deliberation arises from intoxication as a matter of law. *S. v. Vaughn*, 301.

§ 15. Relevancy and Competency of Evidence in General

There was no prejudice in a prosecution for first degree murder from the State's questioning of a woman with whom defendant lived regarding his behavior when angry. *S. v. Vaughn*, 301.

§ 15.2. Evidence of Defendant's Mental Condition

A clinical psychologist was not precluded from stating an opinion as to whether defendant was able to form the specific intent to kill the victim merely because such testimony embraced an ultimate issue to be decided by the jury. *S. v. Clark*, 146.

The trial court properly excluded expert testimony by a clinical psychologist as to whether defendant had the ability to form the specific intent to kill the victim where the witness admitted that his conclusions were "purely speculative" and "conjecture," and the witness indicated no comprehension of the legal significance of "specific intent." *Ibid.*

§ 18. Evidence of Premeditation and Deliberation

The trial court did not err in a prosecution for first degree murder by denying defendant's motion to dismiss, based on allegedly insufficient evidence of premeditation and deliberation. *S. v. Woodard*, 227.

§ 18.1. Particular Circumstances Showing Premeditation and Deliberation

There was sufficient evidence of premeditation and deliberation to deny defendant's motion to dismiss a charge of first degree murder. *S. v. McNeil*, 33.

There was sufficient evidence of premeditation and deliberation in a prosecution for first degree murder. *S. v. Rhinehart*, 310.

The evidence was sufficient in a noncapital prosecution for first degree murder to show premeditation and deliberation. *S. v. Vaughn*, 301.

The State presented sufficient evidence of premeditation and deliberation, including evidence that defendant threatened to kill the victim two weeks before actually killing him, to support defendant's conviction of first degree murder. *S. v. Groves*, 360.

§ 19. Evidence Competent on Question of Self-Defense

The trial court erred in a prosecution for first degree murder by sustaining the district attorney's objection to a question as to whether defendant believed that his life was threatened. *S. v. Webster*, 385.

The trial court erred in a prosecution for first degree murder by refusing to allow defendant to testify that he feared for his life and the life of his family

HOMICIDE — Continued

as the victim rushed toward him, and that the victim was violent when drunk. *S. v. Reed*, 535.

§ 21.5. Sufficiency of Evidence of Guilt of First Degree Murder

The State's evidence of premeditation and deliberation was sufficient to support defendant's conviction of first degree murder of his estranged wife. *S. v. Ball*, 233.

§ 25. Instructions on First Degree Murder Generally

The trial court in a first degree murder case sufficiently gave defendant's requested instructions on malice, intent to kill, and premeditation and deliberation by giving the pattern jury instructions on those elements. *S. v. Ball*, 233.

§ 25.2. Sufficiency of Evidence of Premeditation and Deliberation

The reasonable doubt test is the proper test of the legal sufficiency of the evidence for an instruction that the jury may consider the mental condition of defendant in deciding whether he or she formed a premeditated and deliberate specific intent to kill the victim. *S. v. Clark*, 146.

The evidence in a first degree murder case did not require the trial court to instruct the jury that it could consider evidence of defendant's mental disorder as rendering her incapable of forming the specific intent to kill. *Ibid.*

There was no plain error in a prosecution for first degree murder from the court's use of the absence of any excuse or justification as a factor in determining premeditation and deliberation. *S. v. McQueen*, 118.

§ 27.1. Sufficiency of Evidence of Voluntary Manslaughter; Heat of Passion

The trial court did not err in a prosecution for first degree murder by denying defendant's request for an instruction on manslaughter on the theory that defendant killed the victim in the heat of passion where there was no evidence that the sudden passion was produced by adequate provocation. *S. v. Woodard*, 227.

§ 28.1. Duty of Trial Court to Instruct on Self-Defense

The evidence in a first degree murder prosecution did not entitle defendant to jury instructions on either perfect or imperfect self-defense where defendant presented evidence of a long history of physical and mental abuse by her husband due to his alcoholism but there was no evidence that at the time of the killing defendant reasonably believed herself to be confronted by circumstances which necessitated her killing her husband to save herself from imminent death or great bodily harm. *S. v. Norman*, 253.

§ 30. Submission of Lesser Offense of Second Degree Murder

Defendant's evidence did not present a jury question on intent to kill so as to require the trial court to instruct on second degree murder. *S. v. Clark*, 146.

§ 30.2. Submission of Lesser Offense of Voluntary Manslaughter

There was no prejudicial error in a first degree murder prosecution from the court's denial of defendant's request to instruct the jury on voluntary manslaughter. *S. v. Vaughn*, 301.

§ 31. Verdict Generally

The trial court's addition of the basis for first degree murder in its listing on the verdict form of the possible verdict of "guilty of murder in the first degree by aiding and abetting" did not constitute an expression of opinion and was supported by statute. *S. v. Clark*, 146.

HOMICIDE — Continued

§ 32.1. Harmless or Prejudicial Error and Cure by Verdict

Assuming the trial court in a first degree murder case erred in failing to instruct the jury to consider a possible verdict of involuntary manslaughter, the error was harmless where the trial court gave correct instructions as to possible verdicts on murder in the first and second degrees and the jury found defendant guilty of the greater crime of murder in the first degree upon a theory of premeditation and deliberation. *S. v. Young*, 489.

INSURANCE

§ 69. Protection against Injury by Underinsured Motorist

An insured plaintiff's entry into a settlement with a tort-feasor without the consent of plaintiff's underinsured motorist coverage carrier does not bar plaintiff's claim for underinsured motorist benefits as a matter of law. *Silvers v. Horace Mann Ins. Co.*, 289; *Parrish v. Grain Dealers Mutual Ins. Co.*, 323.

Plaintiff's entry into a settlement with a tortfeasor after a failed attempt to procure the consent of defendant underinsured motorist coverage carrier did not bar his claim for underinsured motorist benefits as a matter of law. *Branch v. Travelers Indemnity Co.*, 430.

G.S. 20-279.21(e) permits an insurance carrier to reduce the underinsured motorist coverage liability in a business auto insurance policy by amounts paid to the insured as workers' compensation benefits. *Manning v. Fletcher*, 513.

§ 69.1. Policy Provisions in Conflict with Underinsured Motorist Statutes

Where an automobile liability policy in which underinsured motorist coverage was required by former statute because the insured had not rejected such coverage did not state the existence or amount of such coverage, the statute required underinsured motorist coverage equal to the maximum liability coverage provided by the policy. *Proctor v. N.C. Farm Bureau Mutual Ins. Co.*, 221.

§ 85. Automobile Liability Insurance; "Use of other Automobiles" Clause; "Non-owned Automobile" Clause

A provision in an automobile liability insurance policy excluding coverage arising from the use of an unlisted owned vehicle did not apply to an unregistered, untitled vehicle which had been driven once in two years. *Jenkins v. Aetna Casualty and Surety Co.*, 394.

An exclusion clause in an automobile liability insurance policy for a vehicle furnished for regular use did not apply where the vehicle was not in good driving condition and had been driven only once in two years. *Ibid.*

INTEREST

§ 2. Time and Computation

In a negligence action arising from plaintiff's combine coming into contact with defendant's power lines, the Court of Appeals erred by holding that the trial court should have awarded interest from the date of the directed verdict in defendant's favor. *Phelps v. Duke Power Co.*, 72.

INTOXICATING LIQUOR

§ 24. Civil Liability Generally

The personal representative of the estate of an underage person who consumes alcoholic beverages and dies from injuries in a single-car accident may not recover damages under the Dram Shop Act from the seller of the beverages. *Clark v. Inn West*, 415.

JUDGES

§ 7. Misconduct in Office

A district court judge's outbursts toward an arresting officer in a case tried by the judge, which occurred in the privacy of the judge's office, did not amount to conduct prejudicial to the administration of justice that brings the judicial office into disrepute. *In re Bullock*, 320.

A district court judge, now retired, is censured by the Supreme Court for conduct prejudicial to the administration of justice that brings the judicial office into disrepute. *In re Hair*, 324.

JURY

§ 6.3. Voir Dire; Questions as to Belief in Capital Punishment

There was no error in a prosecution for first degree murder in denying defendant's request to question potential jurors as to their understanding of the length of time a person would serve if sentenced to life imprisonment for first degree murder. *S. v. McNeil*, 33.

The trial court in a murder case did not abuse its discretion in refusing to permit defense counsel to ask prospective jurors whether any of them felt that defendant must be guilty of something, no matter what the circumstances, if defendant pulled the trigger of a gun in his hand and the death of another resulted therefrom. *S. v. Parks*, 420.

The trial court in a murder case did not abuse its discretion in refusing to permit defense counsel to ask one prospective juror whether she felt that she would uphold her service as a juror equally well by returning a verdict of not guilty if she had a reasonable doubt as she would by returning a verdict of guilty if she were satisfied beyond a reasonable doubt. *Ibid.*

§ 7.7. Challenges for Cause; Waiver of Right

Defendant did not preserve his right to appeal the denial of his challenges for cause of three prospective jurors in a murder prosecution. *S. v. McNeil*, 33.

§ 7.11. Challenge for Cause; Scruples against or Belief in Capital Punishment

There was no error in a prosecution for two first degree murders in excusing three prospective jurors for cause due to their feelings about the death penalty without inquiry as to their ability to follow the law and without giving defendant the opportunity to question those prospective jurors. *S. v. McNeil*, 33.

§ 7.13. Peremptory Challenges Generally

Defendant's constitutional rights were not violated by the State's use of peremptory challenges to remove jurors who were ambivalent concerning their ability to impose the death penalty. *S. v. Parks*, 94.

JURY — Continued

§ 7.14. Manner of Exercising Peremptory Challenge

The trial court erred in an evidentiary hearing held on the prosecutor's use of peremptory challenges in a murder prosecution by not allowing defendant to introduce evidence at the hearing. *S. v. Green*, 238.

LANDLORD AND TENANT

§ 8.2. Liability of Landlord for Injuries to Persons on Premises

The manager of an apartment complex did not owe plaintiff tenant a legal duty with respect to the design and construction of the complex. *Collingwood v. G.E. Real Estate Equities*, 63.

Compliance with applicable building and housing codes as required by G.S. 42-42(a)(1) does not insulate landlords from liability for defects in building design or construction. *Ibid.*

Uncontradicted evidence that the owner of an apartment complex observed standards for fire safety customarily followed by the building industry and other apartment complex owners in the area did not absolve the owner from liability for negligence in failing to install additional fire safety features in the common areas of the complex. *Ibid.*

§ 8.3. Injuries to Persons on Premises; Sufficiency of Evidence to Show Negligence of Landlord

In an action to recover for injuries received by plaintiff when she jumped from the window of her third floor apartment to escape a fire, plaintiff raised a genuine issue of material fact as to whether defendant owner was negligent in failing to take appropriate fire safety precautions in the design and construction of the apartment complex. *Collingwood v. G.E. Real Estate Equities*, 63.

The jury could find that it was foreseeable that a resident trapped in a third floor apartment of Type 6 construction by the spreading of a fire would jump from the apartment. *Ibid.*

§ 8.4. Injuries to Persons on Premises; Negligence on Part of Tenant

Plaintiff was not contributorily negligent as a matter of law in jumping from the window of her third floor apartment when she was confronted with a raging fire outside her apartment door. *Collingwood v. G.E. Real Estate Equities*, 63.

MASTER AND SERVANT

§ 11. Solicitation of Former Employer's Customers

The trial court erred by entering a judgment notwithstanding the verdict for defendants in an action to enforce a covenant not to compete. *Whittaker General Medical Corp. v. Daniel*, 523.

§ 69.3. Workers' Compensation; Compromise Settlements

A settlement with third party tortfeasors entered into without the written consent of plaintiff's employer which had paid workers' compensation benefits was void. *Williams v. International Paper Co.*, 567.

§ 79. Workers' Compensation; Persons Entitled to Payment Generally

An employer was entitled to a jury trial on the issue of joint and concurrent negligence where the plaintiff was the employee, the defendants were third parties,

MASTER AND SERVANT — Continued

and the third parties alleged the joint and concurrent negligence of the employer. *Williams v. International Paper Co.*, 567.

§ 108. Right to Unemployment Compensation Generally

Plaintiff in an unemployment compensation case left her work involuntarily where plaintiff commuted daily with her brother-in-law, defendant decided to move its plant eleven miles further away for business reasons, and plaintiff thereafter had no transportation. *Barnes v. The Singer Co.*, 213.

MUNICIPAL CORPORATIONS

§ 2. Annexation

Plaintiff's equal protection rights were not violated by its annexation where other similarly situated property was not also annexed. *Piedmont Ford Truck Sale v. City of Greensboro*, 499.

NARCOTICS

§ 4.5. Instructions

The trial court erred in a prosecution for trafficking in marijuana by instructing the jury on willful blindness. *S. v. Bogle*, 190.

§ 6. Forfeitures

The criminal forfeiture provisions of the Controlled Substances Act take precedence over the civil forfeiture provisions of the RICO Act where the possessor of the items seized and subject to forfeiture has been validly indicted and awaits trial under the Controlled Substances Act. *State ex rel. Thornburg v. Currency*, 276.

Any judgment of property forfeiture entered against a defendant as a result of convictions pursuant to the Controlled Substances Act will accrue to the State and thus to the appropriate county school fund. *Ibid.*

NEGLIGENCE

§ 47. Negligence in Condition of Buildings Generally

In an action to recover for injuries received by plaintiff when she jumped from the window of her third floor apartment to escape a fire, plaintiff raised a genuine issue of material fact as to whether defendant owner was negligent in failing to take appropriate fire safety precautions in the design and construction of the apartment complex. *Collingwood v. G.E. Real Estate Equities*, 63.

§ 54. Contributory Negligence of Invitee

Plaintiff was not contributorily negligent as a matter of law in jumping from the window of her third floor apartment when she was confronted with a raging fire outside her apartment door. *Collingwood v. G.E. Real Estate Equities*, 63.

PARENT AND CHILD

§ 1. The Relationship Generally

A child's claim for loss of parental consortium is not recognized in North Carolina. *Vaughn v. Clarkson*, 108.

PENALTIES

§ 1. Generally

The criminal forfeiture provisions of the Controlled Substances Act take precedence over the civil forfeiture provisions of the RICO Act where the possessor of the items seized and subject to forfeiture has been validly indicted and awaits trial under the Controlled Substances Act. *State ex rel. Thornburg v. Currency*, 276.

Any judgment of property forfeiture entered against a defendant as a result of convictions pursuant to the Controlled Substances Act will accrue to the State and thus to the appropriate county school fund. *Ibid.*

PHYSICIANS, SURGEONS, AND ALLIED PROFESSIONS

§ 7. Appeal and Review of Orders of Licensing Boards

The Court of Appeals is the proper court to determine appeals taken from decisions of the superior court in proceedings for judicial review of decisions of the Board of Medical Examiners. *In re Guess*, 105.

RAPE AND ALLIED OFFENSES

§ 4. Relevancy and Competency of Evidence

A social worker's testimony concerning her use of anatomical dolls during interviews with children who allegedly were sexually abused by defendant was admissible to illustrate the social worker's testimony and to corroborate the testimony of each child. *S. v. Chandler*, 172.

A question asked defendant during cross-examination about his religious beliefs as to whether his children were taught not to have sex with anyone but their father was not an improper question insulting the Islamic religion. *S. v. Shamsid-Deen*, 437.

§ 4.1. Evidence of other Acts and Crimes

Prior similar sexual acts committed by defendant against his daughter over an eleven-year period were not too remote to be considered as evidence of defendant's common scheme or plan to abuse his daughter sexually. *S. v. Shamsid-Deen*, 437.

Testimony by the sisters of an alleged victim of rape by their father that their father had forced them to have sexual intercourse with him in the past was admissible to show a common plan or scheme embracing the offense charged. *Ibid.*

§ 5. Sufficiency of Evidence

No constitutional issue as to burden of proof was presented concerning the practice of permitting jurors in a statutory rape case to determine defendant's age based on their observations of the defendant. *S. v. Barnes*, 539.

REFORMATION OF INSTRUMENTS

§ 7. Sufficiency of Evidence

A genuine issue of material fact was presented as to the intention of the parties in an action seeking reformation of a deed to reflect the true acreage of the tract conveyed and specific performance of the buyer's contractual obligation to pay for the excess acreage. *Dettor v. BHI Property Co.*, 518.

RULES OF CIVIL PROCEDURE

§ 4. Process

The trial court properly dismissed plaintiff's action pursuant to Rule 41(b) based upon plaintiff's violation of Rule 4(a) for the purpose of delay and to gain an unfair advantage over defendant where plaintiff's counsel filed the suit only to toll the statute of limitations and intentionally failed to deliver the summons to the sheriff for service for some eight months so that defendant and her insurer would not be notified of the suit. *Smith v. Quinn*, 316.

SCHOOLS

§ 13.2. Dismissal of Teachers

The Durham City Board of Education was justified in reducing the number of teaching positions for its Exceptional Children Program following funding cuts because there was a rational basis for the decision. *Taborn v. Hammonds*, 546.

SEARCHES AND SEIZURES

§ 4. Particular Methods of Search

The good faith exception to the exclusionary rule arises only upon the exclusion of evidence based upon federal constitutional grounds. *S. v. Hyleman*, 506.

§ 24. Application for Warrant; Sufficiency of Showing of Probable Cause; Information from Informers

An officer's affidavit was sufficient under the totality of the circumstances to establish probable cause for the issuance of a warrant authorizing a search of defendant's trailer and car and the performance of luminol tests for traces of blood. *S. v. Greene*, 1.

§ 26. Application for Warrant; Insufficiency of Showing of Probable Cause; Information from Informers

An officer's affidavit was insufficient under G.S. 15A-244(3) to establish probable cause for a search warrant, and the trial court erred in denying defendant's motion to suppress evidence seized from defendant's residence pursuant to the warrant. *S. v. Hyleman*, 506.

STATE

§ 4. Actions against the State

NCNB's crossclaim against the State for contribution and indemnification should not have been dismissed. The State may be held liable as a coparty under G.S. 1A-1, Rule 13(g) for purposes of contribution and indemnification to the same extent that it may be held liable as a third-party defendant under Rule 14(c). *Selective Ins. Co. v. NCNB*, 560.

STATUTES

§ 2.5. Constitutional Prohibition against Enactment of Local Acts Relating to Sanitation

Plaintiff's challenge to annexation by defendant on the ground that the Session Law under which it was annexed was a local act relating to sanitation was properly dismissed. *Piedmont Ford Truck Sale v. City of Greensboro*, 499.

SUBROGATION

§ 1. Generally

A settlement agreement between a highway patrolman injured in an automobile accident and the estate of the other party involved in the collision was void where the Department of Crime Control and Public Safety had paid workers' compensation benefits to the patrolman and did not give its written consent to the settlement. *Pollard v. Smith*, 424.

TORTS

§ 5. Judgment in Prior Actions as Affecting Right to Contribution or Right to File Cross Action

The trial judge correctly granted summary judgment in favor of the mother of a child killed in an automobile accident where the doctrine of collateral estoppel was not available to show the mother's joint liability to the estate of the daughter. *State Farm Mut. Ins. Co. v. Holland*, 466.

UTILITIES COMMISSION

§ 36. Property Included in Rate Base; Transactions with Subsidiaries or Affiliates

The Utilities Commission did not improperly allow Nantahala a rate of return exceeding the amount it requested in its filing where the Commission ordered a refund based on compensation Nantahala received from Tapoco pursuant to an FERC order, and based on this refund, the amount paid by ratepayers was thus not more than the rate requested. *State ex rel. Utilities Comm. v. Thornburg*, 478.

The Utilities Commission did not err in showing the amount paid by Tapoco to Nantahala pursuant to an FERC order as a reduction in the amount of an increase in revenue required by Nantahala to produce a 12.54% rate of return rather than treating this item as a reduction of the purchased power expense. *Ibid.*

§ 46. Proceeding before Utilities Commission; Necessity for Hearing

Where the Utilities Commission's original orders in three general rate cases were reversed by the N. C. appellate courts because of the Commission's failure to give adequate consideration to a method which has now been found to be unlawful by the U. S. Supreme Court, it was not error for the Commission to reinstate the rates it originally allowed without further evidentiary hearings. *State ex rel. Utilities Comm. v. Thornburg*, 478.

WITNESSES

§ 1.1. Mental Capacity

The trial court did not err in a prosecution for first degree murder by concluding that a codefendant was competent to testify against defendant because he was competent to assist in his own defense. *S. v. Liles*, 529.

WORD AND PHRASE INDEX