NORTH CAROLINA REPORTS

VOLUME 326

SUPREME COURT OF NORTH CAROLINA

18 JANUARY 1990

13 JUNE 1990

RALEIGH
1990

CITE THIS VOLUME

326 N.C.

TABLE OF CONTENTS

THE SUPREME COURT
OF
NORTH CAROLINA

Chief Justice

JAMES G. EXUM, JR.

Associate Justices

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

Retired Chief Justices

WILLIAM H. BOBBITT
SUSIE SHARP
JOSEPH BRANCH

Retired Justices

I. BEVERLY LAKE
DAVID M. BRITT
J. FRANK HUSKINS

Clerk

J. GREGORY WALLACE

Librarian

LOUISE H. STAFFORD

ADMINISTRATIVE OFFICE OF THE COURTS

Director

FRANKLIN E. FREEMAN, JR.

Assistant Director

DALLAS A. CAMERON, JR.

APPELLATE DIVISION REPORTER

RALPH A. WHITE, JR.

ASSISTANT APPELLATE DIVISION REPORTER

H. JAMES HUTCHESON

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

First Division

DISTRICT	JUDGES	ADDRESS
1	J. HERBERT SMALL	Elizabeth City
	THOMAS S. WATTS	Elizabeth City
2	WILLIAM C. GRIFFIN	Williamston
3A	DAVID E. REID, JR.	Greenville
3B	HERBERT O. PHILLIPS III	Morehead City
4A	HENRY L. STEVENS III	Kenansville
4B	JAMES R. STRICKLAND	Jacksonville
5	NAPOLEON B. BAREFOOT	Wilmington
	ERNEST B. FULLWOOD	Wilmington
6A	RICHARD B. ALLSBROOK	Halifax
6B	CY A. GRANT	Windsor
7A	LEON H. HENDERSON, JR.	Rocky Mount
7B-C	FRANK R. BROWN	Tarboro
	G. K. BUTTERFIELD, JR.	Wilson
8A	JAMES D. LLEWELLYN	Kinston
8B	PAUL MICHAEL WRIGHT	Goldsboro
	Second Division	
9	ROBERT H. HOBGOOD	Louisburg
	HENRY W. HIGHT, JR.	Henderson
10A-D	ROBERT L. FARMER	Raleigh
	HENRY V. BARNETTE, JR.	Raleigh
	DONALD W. STEPHENS	Raleigh
	HOWARD E. MANNING, JR.	Raleigh
	GEORGE R. GREENE	Raleigh
11	WILEY F. BOWEN	Dunn
12A-C	DARIUS B. HERRING, JR.	Fayetteville
	COY E. BREWER, JR.	Fayetteville
	E. LYNN JOHNSON	Fayetteville
	GREGORY A. WEEKS	Fayetteville
13	GILES R. CLARK	Elizabethtown
14A-B	ANTHONY M. BRANNON	Durham
	J. MILTON READ, JR.	Durham
	ORLANDO F. HUDSON, JR.	Durham
	ALBERT LEON STANBACK, JR.	Durham
15A	J. B. ALLEN, JR.	Burlington
15B	F. GORDON BATTLE	Chapel Hill
16A	B. CRAIG ELLIS	Laurinburg
16B	JOE FREEMAN BRITT	Lumberton
	DEXTER BROOKS	Pembroke
	Third Division	
17A	MELZER A. MORGAN, JR.	Wentworth
17B	JAMES M. LONG	Pilot Mountain

DISTRICT	JUDGES	ADDRESS
18A-E	W. DOUGLAS ALBRIGHT	Greensboro
	THOMAS W. ROSS	Greensboro
	JOSEPH R. JOHN	Greensboro
	W. STEVEN ALLEN, SR.	Greensboro
	HOWARD R. GREESON, JR.	High Point
19A	JAMES C. DAVIS	Concord
19B	RUSSELL G. WALKER	Asheboro
19C	THOMAS W. SEAY, JR.	Spencer
20A	F. FETZER MILLS	Wadesboro
20B	WILLIAM H. HELMS	Monroe
21A-D	JUDSON D. DERAMUS, JR.	Winston-Salem
	WILLIAM H. FREEMAN	Winston-Salem
	JAMES A. BEATY, JR.	Winston-Salem
	JAMES B. BOOKER	Winston-Salem
22	PRESTON CORNELIUS	Mooresville
	LESTER P. MARTIN, JR.	Mocksville
23	JULIUS A. ROUSSEAU, JR.	North Wilkesboro
	Fourth Division	
24	CHARLES C. LAMM, JR.	Boone
25A	CLAUDE S. SITTON	Morganton
25B	FORREST A. FERRELL	Hickory
26A-C	KENNETH A. GRIFFIN	Charlotte
	ROBERT M. BURROUGHS	Charlotte
	CHASE BOONE SAUNDERS	Charlotte
	RAYMOND A. WARREN[1]	Charlotte
	SHIRLEY L. FULTON	Charlotte
	SAM A. WILSON III	Charlotte
27A	ROBERT W. KIRBY	Gastonia
	ROBERT E. GAINES	Gastonia
27B	JOHN MULL GARDNER	Shelby
28	ROBERT D. LEWIS	Asheville
	C. WALTER ALLEN	Asheville
29	HOLLIS M. OWENS, JR.	Rutherfordton
30A	JAMES U. DOWNS, JR.	Franklin
30B	JANET MARLENE HYATT	Waynesville

SPECIAL JUDGES

I. BEVERLY LAKE, JR.	Raleigh
MARVIN K. GRAY	Charlotte
SAMUEL T. CURRIN	Raleigh

EMERGENCY JUDGES

HENRY A. MCKINNON, JR.	Lumberton
JOHN R. FRIDAY	Lincolnton

DISTRICT	JUDGES	ADDRESS
	D. MARSH MCLELLAND	Graham
	EDWARD K. WASHINGTON	High Point
	L. BRADFORD TILLERY	Wilmington
	ROBERT A. COLLIER, JR.	Statesville
	THOMAS H. LEE	Durham

1. Appointed 18 June 1990 to replace W. Terry Sherrill who resigned 19 March 1990.

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	JOHN T. CHAFFIN (Chief)	Elizabeth City
	GRAFTON G. BEAMAN	Elizabeth City
	J. RICHARD PARKER	Manteo
2	HALLETT S. WARD (Chief)	Washington
	JAMES W. HARDISON	Williamston
	SAMUEL C. GRIMES	Washington
3	E. BURT AYCOCK, JR. (Chief)	Greenville
	JAMES E. RAGAN III	Oriental
	JAMES E. MARTIN	Grifton
	H. HORTON ROUNTREE	Greenville
	WILLIE LEE LUMPKIN III	Morehead City
	WILTON R. DUKE, JR.	Greenville
	DAVID A. LEECH	Greenville
4	KENNETH W. TURNER (Chief)	Rose Hill
	STEPHEN M. WILLIAMSON	Kenansville
	WILLIAM M. CAMERON, JR.	Jacksonville
	WAYNE G. KIMBLE, JR.	Jacksonville
	LEONARD W. THAGARD	Clinton
5	GILBERT H. BURNETT (Chief)	Wilmington
	CHARLES E. RICE	Wrightsville Beach
	JACQUELINE MORRIS-GOODSON	Wilmington
	ELTON G. TUCKER	Wilmington
	JOHN W. SMITH II	Wilmington
6A	NICHOLAS LONG (Chief)	Roanoke Rapids
	HAROLD P. MCCOY, JR.	Scotland Neck
6B	ROBERT E. WILLIFORD (Chief)	Lewiston-Woodville
	JAMES D. RIDDICK III	Como
7	GEORGE M. BRITT (Chief)	Tarboro
	ALLEN W. HARRELL	Wilson
	ALBERT S. THOMAS, JR.	Wilson
	QUENTIN T. SUMNER	Rocky Mount
	SARAH F. PATTERSON	Rocky Mount
8	JOHN PATRICK EXUM (Chief)	Kinston
	ARNOLD O. JONES	Goldsboro
	KENNETH R. ELLIS	Goldsboro
	RODNEY R. GOODMAN, JR.	Kinston
	JOSEPH E. SETZER, JR.	Goldsboro
9	CLAUDE W. ALLEN, JR. (Chief)	Oxford
	CHARLES W. WILKINSON, JR.	Oxford
	J. LARRY SENTER	Franklinton
	HERBERT W. LLOYD, JR.	Henderson
	FLOYD B. MCKISSICK, SR.[1]	Oxford
10	GEORGE F. BASON (Chief)	Raleigh
	STAFFORD G. BULLOCK	Raleigh
	RUSSELL G. SHERRILL III	Raleigh
	L. W. PAYNE	Raleigh

DISTRICT	JUDGES	ADDRESS
	WILLIAM A. CREECH	Raleigh
	JOYCE A. HAMILTON	Raleigh
	FRED M. MORELOCK	Raleigh
	JERRY W. LEONARD	Raleigh
	DONALD W. OVERBY	Raleigh
	JAMES R. FULLWOOD	Raleigh
11	WILLIAM A. CHRISTIAN (Chief)	Sanford
	EDWARD H. MCCORMICK	Lillington
	O. HENRY WILLIS, JR.	Dunn
	TYSON Y. DOBSON, JR.	Smithfield
	SAMUEL S. STEPHENSON	Angier
12	SOL G. CHERRY (Chief)	Fayetteville
	ANNA ELIZABETH KEEVER	Fayetteville
	JOHN S. HAIR, JR.	Fayetteville
	JAMES F. AMMONS, JR.	Fayetteville
13	WILLIAM C. GORE, JR. (Chief)	Whiteville
	JERRY A. JOLLY	Tabor City
	D. JACK HOOKS, JR.	Whiteville
	DAVID G. WALL	Elizabethtown
14	KENNETH C. TITUS (Chief)	Durham
	DAVID Q. LABARRE	Durham
	RICHARD CHANEY	Durham
	CAROLYN D. JOHNSON	Durham
	WILLIAM Y. MANSON	Durham
15A	JAMES KENT WASHBURN (Chief)	Burlington
	SPENCER B. ENNIS	Burlington
	ERNEST J. HARVIEL	Burlington
15B	STANLEY PEELE (Chief)	Chapel Hill
	PATRICIA HUNT	Chapel Hill
	LOWRY M. BETTS	Pittsboro
16A	WARREN L. PATE (Chief)	Raeford
	WILLIAM C. MCILWAIN	Wagram
16B	CHARLES G. MCLEAN (Chief)	Lumberton
	HERBERT LEE RICHARDSON	Lumberton
	GARY M. LOCKLEAR	Pembroke
	ROBERT F. FLOYD, JR.	Fairmont
	J. STANLEY CARMICAL	Lumberton
17A	PETER M. MCHUGH (Chief)	Wentworth
	ROBERT R. BLACKWELL	Yanceyville
	PHILIP W. ALLEN	Yanceyville
17B	JERRY CASH MARTIN (Chief)	Mount Airy
	CLARENCE W. CARTER	King
18	J. BRUCE MORTON (Chief)	Greensboro
	WILLIAM L. DAISY	Greensboro
	EDMUND LOWE	High Point
	SHERRY FOWLER ALLOWAY	Greensboro
	LAWRENCE C. MCSWAIN	Greensboro

DISTRICT	JUDGES	ADDRESS
	WILLIAM A. VADEM	Greensboro
	THOMAS G. FOSTER, JR.	Greensboro
	JOSEPH E. TURNER	Greensboro
	DONALD L. BOONE	High Point
19A	ADAM C. GRANT, JR. (Chief)	Concord
	CLARENCE E. HORTON, JR.	Kannapolis
19B	WILLIAM M. NEELY (Chief)	Asheboro
	RICHARD M. TOOMES	Asheboro
	VANCE B. LONG	Asheboro
19C	FRANK M. MONTGOMERY (Chief)	Salisbury
	ROBERT M. DAVIS, SR.	Salisbury
20	DONALD R. HUFFMAN (Chief)	Wadesboro
	KENNETH W. HONEYCUTT	Monroe
	RONALD W. BURNS	Albemarle
	MICHAEL EARLE BEALE	Pinehurst
	TANYA T. WALLACE	Rockingham
21	ABNER ALEXANDER (Chief)	Winston-Salem
	JAMES A. HARRILL, JR.	Winston-Salem
	ROBERT KASON KEIGER	Winston-Salem
	ROLAND HARRIS HAYES	Winston-Salem
	WILLIAM B. REINGOLD	Winston-Salem
	LORETTA BIGGS	Kernersville
	MARGARET L. SHARPE	Winston-Salem
22	ROBERT W. JOHNSON (Chief)	Statesville
	SAMUEL ALLEN CATHEY	Statesville
	GEORGE THOMAS FULLER	Lexington
	KIMBERLY T. HARBINSON	Taylorsville
	WILLIAM G. IJAMES, JR.	Mocksville
23	SAMUEL L. OSBORNE (Chief)	Wilkesboro
	EDGAR B. GREGORY	Wilkesboro
	MICHAEL E. HELMS	Wilkesboro
24	ROBERT HOWARD LACEY (Chief)	Newland
	ROY ALEXANDER LYERLY	Banner Elk
	CHARLES PHILIP GINN	Boone
25	L. OLIVER NOBLE, JR. (Chief)	Hickory
	TIMOTHY S. KINCAID	Newton
	RONALD E. BOGLE	Hickory
	JONATHAN L. JONES	Valdese
	NANCY L. EINSTEIN	Lenoir
	ROBERT E. HODGES	Morganton
26	JAMES E. LANNING (Chief)	Charlotte
	L. STANLEY BROWN	Charlotte
	WILLIAM G. JONES	Charlotte
	DAPHENE L. CANTRELL	Charlotte
	WILLIAM H. SCARBOROUGH	Charlotte
	RESA L. HARRIS	Charlotte
	ROBERT P. JOHNSTON	Charlotte
	RICHARD ALEXANDER ELKINS	Charlotte
	MARILYN R. BISSELL	Charlotte
	RICHARD D. BONER	Charlotte

DISTRICT	JUDGES	ADDRESS
	H. WILLIAM CONSTANGY, JR.	Charlotte
	H. BRENT MCKNIGHT	Charlotte
27A	LAWRENCE B. LANGSON (Chief)	Gastonia
	TIMOTHY L. PATTI	Gastonia
	HARLEY B. GASTON, JR.	Belmont
	CATHERINE C. STEVENS	Gastonia
	DANIEL J. WALTON	Gastonia
27B	GEORGE HAMRICK (Chief)	Shelby
	JAMES THOMAS BOWEN III	Lincolnton
	J. KEATON FONVIELLE	Shelby
28	EARL JUSTICE FOWLER, JR. (Chief)	Arden
	PETER L. RODA	Asheville
	ROBERT L. HARRELL	Asheville
	GARY S. CASH	Asheville
29	LOTO GREENLEE CAVINESS (Chief)	Marion
	THOMAS N. HIX	Mill Spring
	STEVEN F. FRANKS	Hendersonville
	ROBERT S. CILLEY	Brevard
30	JOHN J. SNOW (Chief)	Murphy
	DANNY E. DAVIS	Waynesville
	STEVEN J. BRYANT	Bryson City

1. Appointed 29 June 1990.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General

LACY H. THORNBURG

Administrative Deputy Attorney General
JOHN D. SIMMONS III

Deputy Attorney General for Policy and Planning
ALAN D. BRIGGS

Deputy Attorney General for Training and Standards
PHILLIP J. LYONS

Chief Deputy Attorney General
ANDREW A. VANORE, JR.

Senior Deputy Attorneys General

H. AL COLE, JR.
JAMES J. COMAN
ANN REED DUNN
EUGENE A. SMITH
EDWIN M. SPEAS, JR.
REGINALD L. WATKINS

Special Deputy Attorneys General

ISAAC T. AVERY III
DAVID R. BLACKWELL
GEORGE W. BOYLAN
CHRISTOPHER P. BREWER
STEVEN F. BRYANT
ELISHA H. BUNTING, JR.
JOAN H. BYERS
LUCIEN CAPONE III
JOHN R. CORNE
T. BUIE COSTEN
FRANCIS W. CRAWLEY
JAMES P. ERWIN, JR.
WILLIAM N. FARRELL, JR.
JANE P. GRAY
JAMES C. GULICK
NORMA S. HARRELL
WILLIAM P. HART
RALF F. HASKELL
CHARLES M. HENSEY
ALAN S. HIRSCH
I. B. HUDSON, JR.
J. ALLEN JERNIGAN
RICHARD N. LEAGUE
DANIEL F. MCLAWHORN
BARRY S. MCNEILL
GAYL M. MANTHEI
THOMAS R. MILLER
CHARLES J. MURRAY
DAVID M. PARKER
JAMES B. RICHMOND
HENRY T. ROSSER
JACOB L. SAFRON
JO ANNE SANFORD
TIARE B. SMILEY
JAMES PEELER SMITH
RALPH B. STRICKLAND, JR.
PHILIP A. TELFER
JAMES M. WALLACE, JR.
ROBERT G. WEBB
JAMES A. WELLONS
THOMAS J. ZIKO

Assistant Attorneys General

ARCHIE W. ANDERS
VALERIE L. BATEMAN
ROBERT J. BLUM
WILLIAM H. BORDEN
WILLIAM F. BRILEY
MABEL Y. BULLOCK
KATHRYN J. COOPER
KIMBERLY L. CRAMER
LAURA E. CRUMPLER
CLARENCE J. DELFORGE III
JANE T. FRIEDENSEN
DEBRA K. GILCHRIST
ROY A. GILES, JR.
MICHAEL D. GORDON
L. DARLENE GRAHAM
JEFFREY P. GRAY
RICHARD L. GRIFFIN
P. BLY HALL
JENNIE J. HAYMAN
EDMUND B. HAYWOOD
HOWARD E. HILL
CHARLES H. HOBGOOD
DAVID F. HOKE
DORIS A. HOLTON
LAVEE H. JACKSON
DOUGLAS A. JOHNSTON
LORINZO L. JOYNER
GRAYSON G. KELLEY
DAVID N. KIRKMAN
DONALD W. LATON
M. JILL LEDFORD
PHILIP A. LEHMAN
FLOYD M. LEWIS
KAREN E. LONG
ELIZABETH G. MCCRODDEN
J. BRUCE MCKINNEY
RODNEY S. MADDOX
JOHN F. MADDREY
JAMES E. MAGNER, JR.
ANGELINA M. MALETTO
THOMAS L. MALLONEE, JR.
SARAH Y. MEACHAM
THOMAS G. MEACHAM, JR.
D. SIGGSBEE MILLER
DAVID R. MINGES
VICTOR H. E. MORGAN, JR.
LINDA A. MORRIS
MARILYN R. MUDGE
G. PATRICK MURPHY
DENNIS P. MYERS
PATRICIA F. PADGETT
J. MARK PAYNE
ROBIN P. PENDERGRAFT
MEG S. PHIPPS
NEWTON G. PRITCHETT, JR.
WILLIAM B. RAY
GRAYSON L. REEVES, JR.
JULIA F. RENFROW
NANCY E. SCOTT
ELLEN B. SCOUTEN
BARBARA A. SHAW
ROBIN W. SMITH
T. BYRON SMITH
RICHARD G. SOWERBY, JR.
D. DAVID STEINBOCK, JR.
KIP D. STURGIS
SUEANNA P. SUMPTER
W. DALE TALBERT
SYLVIA H. THIBAUT
JANE R. THOMPSON
MELISSA L. TRIPPE
VICTORIA L. VOIGHT
JOHN C. WALDRUP
MARTHA K. WALSTON
JOHN H. WATTERS
TERESA L. WHITE
THOMAS B. WOOD
THOMAS D. ZWEIGART

DISTRICT ATTORNEYS

DISTRICT	DISTRICT ATTORNEY	ADDRESS
1	H. P. Williams, Jr.	Elizabeth City
2	Mitchell D. Norton	Washington
3A	Thomas D. Haigwood	Greenville
3B	W. David McFadyen, Jr.	New Bern
4	William H. Andrews	Jacksonville
5	Jerry Lee Spivey	Wilmington
6A	Sam Barnes	Halifax
6B	David H. Beard, Jr.	Murfreesboro
7	Howard S. Boney, Jr.	Tarboro
8	Donald M. Jacobs	Goldsboro
9	David R. Waters	Oxford
10	Colon Willoughby	Raleigh
11	John W. Twisdale	Smithfield
12	Edward W. Grannis, Jr.	Fayetteville
13	Michael F. Easley	Bolivia
14	Ronald L. Stephens	Durham
15A	Steve A. Balog	Graham
15B	Carl R. Fox	Pittsboro
16A	Jean E. Powell	Raeford
16B	J. Richard Townsend	Lumberton
17A	Thurman B. Hampton	Wentworth
17B	H. Dean Bowman	Dobson
18	Horace M. Kimel, Jr.	Greensboro
19A	James E. Roberts	Concord
19B	Garland N. Yates	Asheboro
20	Carroll R. Lowder	Monroe
21	William Warren Sparrow	Winston-Salem
22	H. W. Zimmerman, Jr.	Lexington
23	Michael A. Ashburn	Wilkesboro
24	James T. Rusher	Boone
25	Robert E. Thomas	Newton
26	Peter S. Gilchrist III	Charlotte
27A	Calvin B. Hamrick	Gastonia
27B	William Carlos Young	Shelby
28	Robert W. Fisher	Asheville
29	Alan C. Leonard	Rutherfordton
30	Roy H. Patton, Jr.	Waynesville

PUBLIC DEFENDERS

DISTRICT	PUBLIC DEFENDER	ADDRESS
3A	ROBERT L. SHOFFNER, JR.	Greenville
3B	HENRY C. BOSHAMER	Beaufort
12	MARY ANN TALLY	Fayetteville
15B	JAMES E. WILLIAMS	Carrboro
16A	J. GRAHAM KING	Laurinburg
16B	ANGUS B. THOMPSON	Lumberton
18	WALLACE C. HARRELSON	Greensboro
26	ISABEL S. DAY	Charlotte
27	ROWELL C. CLONINGER, JR.	Gastonia
28	J. ROBERT HUFSTADER	Asheville

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

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

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

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

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 hereby 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:

ROBERT THOMAS DUFFY ..... Winston-Salem, North Carolina
Applied from the State of Ohio
License Date: March 2, 1990

J. EDWARD HESS ..... West Chester, Pennsylvania
Applied from the State of Pennsylvania
License Date: March 2, 1990

TAMI LYNN FITZGERALD ..... Scottsdale, Arizona
Applied from the State of Oklahoma
License Date: March 2, 1990

MICHAEL R. VACCARO ..... West Babylon, New York
Applied from the State of New York
License Date: March 2, 1990

DAYTON L. THOMAS ..... Ridgway, Illinois
Applied from the State of Illinois
License Date: March 2, 1990

RICHARD H. MCCALL, JR. ..... Fayetteville, North Carolina
Applied from the District of Columbia
License Date: March 2, 1990

MAUREEN BREEN GERHARDT ..... Greensboro, North Carolina
Applied from the State of Tennessee
License Date: March 2, 1990

STEPHANIE ANNE NESBITT ..... Cary, North Carolina
Applied from the State of Michigan
License Date: March 2, 1990

PATRICIA BRYDEN MANNING ..... Burlington, North Carolina
Applied from the State of Connecticut
License Date: March 2, 1990

Given over my hand and seal of the Board of Law Examiners this the 12th day of March, 1990.

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

LICENSED ATTORNEYS

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 23rd day of March, 1990, and said persons have been issued license certificates.

BRIDGETT BRITT AGUIRRE ..... Fuquay-Varina
MARY ZEHR ALEXANDER ..... Raleigh
JORGELINA ELCIRA ARANEDA-CHANDLER ..... Chapel Hill
THOMAS RICHARD ASCIK ..... Asheville
DAVID GREGORY BALMER ..... Charlotte
J. STEWART BANKHEAD ..... Shelby
ROBERT DONALD BENSON, JR. ..... Vienna, Virginia
JEFFREY JOHN BERG ..... Lexington
DOUGLAS EARL BERGER ..... Smithfield
SARA MACHELLE BIGGERS ..... Chapel Hill
CHARLES KEVIN BLACKMON ..... Philadelphia, Pennsylvania
GEORGE B. BLUME ..... Mars Hill
ALBERT L. BOSSIER, III ..... Cary
JOHN MARK BOYD, JR. ..... Durham
KENNETH HALEY BOYER ..... Charlotte
JAMES GORDON BOYETT ..... Jacksonville
NANCY O. BRAME ..... Charlotte
JEANETTE MCPHERSON BROCKINGTON ..... Chapel Hill
LISSA LAMKIN BROOME ..... Chapel Hill
LEO D. BURRELL ..... West End
HELEN ELIZABETH BURRIS ..... Lincolnton
MARIANNA REILEY BURT ..... Apex
KEVIN MICHAEL CAPALBO ..... Chapel Hill
KAREN KELLY CARLTON ..... Laguna Niguel, California
TERRY JAY CARLTON ..... Laguna Niguel, California
ANDRE L. CARSON ..... Raleigh
MARY ELIZABETH CELLA ..... Charlotte
DAVID N. CHAMBERS ..... Charlotte
MARTHA ANN CHAPMAN ..... Morganton
KAREN MARIE CHRISTINE ..... Wilmington
HOWARD M. COHEN ..... Charlotte
VIRGINIA ABDELLA CONLEY ..... Charlotte
JAYNE KAREN CONWAY ..... Chapel Hill
THOMAS HUMPHREY COOK, JR. ..... Raleigh
JILL F. CRAMER ..... Raleigh
RONDA GAYLE DAVIS ..... Durham
JULIE DEWS ..... Black Mountain
BRIAN DOWLING ..... Raleigh
DAVID LEE EDWARDS ..... Charlotte
C. RANDOLPH EMORY ..... Charlotte
ERIC KEITH ENGLEBARDT ..... Greenville, South Carolina
JAMES JERVALLE EXUM ..... Charlotte
PATRICIA YVONNE FORD, R.N. ..... Winston-Salem
ARTHUR WILLIAM FRANCIS ..... Charlotte
DAVID MICHAEL GARTON ..... Browns Summit
RONALD STEWART GAYNOR ..... Winston-Salem

LICENSED ATTORNEYS

LAWRENCE J. GILLEN	Clemmons
JOHN BENJAMIN GLADDEN	Kill Devil Hills
EDWIN JAMES GOOCH, III	Durham
CAROLE MELANIE GORDON	Winston-Salem
GAYLA R. GRAHAM	Lumberton
WILLIAM THOMAS GRAHAM, JR.	Winston-Salem
CHARLES LEON GREENE	High Point
DANIEL BENET GREGORY	Raleigh
BRIAN HARRELL HARBOUR	Cameron
CAROL N. HARDMAN	Raleigh
WILLIS HAROLD HARPER, JR.	Tabor City
CHRISTINE BROCK HARVEY	Advance
SUSAN HAYES	Greensboro
JOAN ELIZABETH HODGES	Durham
DALE CURTIS HOGUE, SR.	Charlotte
STEVEN EARL HOLLOWELL	Bayboro
ROBERT CLARENCE HORNE	Gastonia
LARRY GLENN HOYLE	Charlotte
SANDRA GAYLE JARVIS	Greensboro
ROBIN S. JOHNSON	Durham
DAVID PASCAL JONES	Kernersville
VALERIE FELICIA KENNEDY	Durham
LEE LEWIS LEIDY	Manteo
INEZ I. LINVILLE	Kernersville
ROBIN R. LUFFMAN	Elkin
MICHAEL VANCE MATTHEWS	Mooresville
MARK RUSSELL MELROSE	Chapel Hill
AARON E. MICHEL	Charlotte
JOHN WALTON MINIER	Raleigh
PATRICIA ANN MONTGOMERY	Raleigh
KELLY ANN MOORE	Cary
WILLIAM RUSSELL MORRIS, JR.	Pittsboro
ANGELEA CALDWELL NORCROSS	Kill Devil Hills
BRIAN PATRICK O'SHAUGHNESSY	Charlotte
PHYLLIS ANN PALMIERI	Morganton
EDWARD WALTER PHELPS	Greensboro
DAVID ALAN PHILLIPS	Belmont
WILLIAM FRANKLIN PORTER	Matthews
GEORGE GREGORY POZEGA	Buies Creek
JAMES D.K.F. RANDOLPH	Salisbury
DAVID ALAN RAYNES	Raleigh
JOHN RICHARD RITTELMEYER	Cary
CHRISTOPHER TODD ROPER	Siler City
KENNETH JUSTIN ROSE	Durham
JAMES STEPHEN RUANE, JR.	Fayetteville
MARIE BOYCE RUSSELL	Cary
THOMAS BENJAMIN SAWYER, JR.	Greensboro
VELMA J. SIMMONS	Walkertown
REGINA EUDORA SMITH	Durham
ROBERT STEVEN SMITH	Rock Hill
SHERRA ROBINSON SMITH	Raleigh

DOUGLAS LEON SUTTON ..... Cary
MAUREEN A. SWEENEY ..... Durham
JOSHUA NUNN THARRINGTON, JR. ..... Raleigh
AUDREY BOONE TILLMAN ..... Winston-Salem
ELYSE MICHELLE TOPKINS ..... Carrboro
ANN THOMPSON UGLIETTA ..... Durham
ROSE VAUGHN WILLIAMS ..... Chapel Hill
N. JEROME WILLINGHAM ..... Jacksonville
ANDREW LEROY WOODS ..... Chapel Hill
JOHN ROSS YODER, JR. ..... N. Charleston, South Carolina

Given over my hand and seal of the Board of Law Examiners this the 6th day of April, 1990.

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 March 23, 1990, and said persons have been issued license certificates.

DOUGLAS ROGER GUNSON ..... Charlotte
MARK JOSEPH LONGVAL ..... San Diego, California
THOMAS WORTHINGTON PAGE ..... Raleigh

I further certify that the following named persons duly passed the examinations of the Board of Law Examiners as of April 13, 1990, and said persons have been issued license certificates.

JOHN MARSHALL ALLEN ..... Raleigh
CAROL KELLY BARNHILL ..... Richmond, Virginia
ALLEN W. BOYER ..... Charlotte
HILDA BURNETT-BAKER ..... Orange, New Jersey
BONNIE P. CARDIFF ..... Hickory
SEAN CHARLES COBOURN ..... Charlotte
MARK JOSEPH COLLINS ..... Winston-Salem
BRUCE GEORGE DEARING ..... Covington, Louisiana
ROBERT M. FRIESEN ..... Southern Pines
FARRELL JAY GOODMAN ..... Rock Hill, South Carolina
KATHRYN ELIZABETH GREEN ..... Raleigh
ELIZABETH DIANA HAMNER ..... Chapel Hill
BETH BARBAN HEDBERG ..... Winston-Salem
ROBERT J. HIGDON, JR. ..... Decatur, Georgia
JAMES MICHAEL KERR ..... Concord
MICHAEL RAY LEE ..... Spartanburg, South Carolina
DONNA G. LEGRAND ..... Raleigh
PAUL JOSEPH MCDONOUGH ..... Hendersonville
EILEEN MCMANUS MCMINN ..... Hendersonville

MARK PATRICK MOIR ..... Winston-Salem
CHRISTOPHER F. REGAN ..... Charlotte
JOHN W. RINTOUL ..... Carrboro
CHERI JOAN RUCH ..... Wilson
ANNA KATHERINE SCHWAB ..... Chapel Hill
MURRAY ORIS STANTON ..... Chapel Hill
PAMELA PEARSON WARNEMENT ..... Sparta, New Jersey

I further certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners and said persons have been issued license certificates of this Board.

LINDA J. SARAZEN ..... Charlotte
Applied from the State of New York
License Date: April 13, 1990
FRANCES LYCAN LANGSTAFF ..... Westbury, New York
Applied from the State of New York
License Date: April 13, 1990
DAVID ALEXANDER GRANT ..... Raleigh
Applied from the State of Minnesota
License Date: April 13, 1990

Given over my hand and seal of the Board of Law Examiners this the 20th day of April, 1990.

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 person duly passed the examinations of the Board of Law Examiners as of April 13, 1990, and said person has been issued a license certificate.

J. TODD CHASTEEN ..... Bessemer City

I further certify that the following named persons duly passed the examinations of the Board of Law Examiners as of April 27, 1990, and said persons have been issued license certificates.

SCOTT MCFADYEN ANDERSON ..... Greenville, South Carolina
CHRISTINE LANG ..... Huntersville

Given over my hand and seal of the Board of Law Examiners this the 10th day of May, 1990.

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

LICENSED ATTORNEYS

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 were admitted to the North Carolina Bar by comity by the Board of Law Examiners and said persons were issued certificates of this Board:

JOHN F. COWLEY ..... Mansfield, Pennsylvania
Applied from the State of Pennsylvania
License Date: June 8, 1990

PAUL G. RIFFLE ..... Pinehurst
Applied from the State of Pennsylvania
License Date: June 8, 1990

OLIVIA PARKER SCOTT ..... Fayetteville
Applied from the States of West Virginia and Virginia
License Date: June 8, 1990

CHARLES EDWARD HOWARD SCOTT ..... Fayetteville
Applied from the State of West Virginia
License Date: June 8, 1990

RANDALL RAY ADAMS ..... Birmingham, Michigan
Applied from the State of Michigan
License Date: June 8, 1990

JOHN EVANS ..... Chapel Hill
Applied from the State of Colorado
License Date: June 8, 1990

DIXIE ELIZABETH HORTON ..... Washington, D.C.
Applied from the District of Columbia
License Date: June 8, 1990

Given over my hand and seal of the Board of Law Examiners this the 18th day of June, 1990.

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 were admitted to the North Carolina Bar by comity by the Board of Law Examiners and said persons have been issued certificates of this Board:

KATE DREHER ..... Asheville
Applied from the State of Pennsylvania
License Date: July 13, 1990

STEPHEN ALLRED ..... Chapel Hill
Applied from the District of Columbia
License Date: July 27, 1990

VIRGINIA R. HAGER ..... Wilmington
Applied from the State of Ohio and the State of Kentucky
License Date: July 27, 1990

LICENSED ATTORNEYS

MIRIAM ROSAMOND HOLMES ..... Washington, D.C.
Applied from the District of Columbia
License Date: July 27, 1990

DAVID M. ROSENTHAL ..... Durham
Applied from the State of Illinois
License Date: July 27, 1990

JEROME A. PERLMUTTER ..... Greensboro
Applied from the State of New York
License Date: July 27, 1990

Given over my hand and seal of the Board of Law Examiners this the 7th day of August, 1990.

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

DEIDRE V. BATCH v. TOWN OF CHAPEL HILL

No. 121PA89

(Filed 18 January 1990)

1. Municipal Corporations § 31.2 (NCI3d)— denial of subdivision application—joinder of complaint and writ of certiorari

A petition for a writ of certiorari to review a decision of the town denying a subdivision application was improperly joined with a cause of action alleging constitutional violations and seeking damages, costs, and attorney's fees pursuant to 42 U.S.C. § 1988, 42 U.S.C. § 1983 and N.C.G.S. § 40A-8.

Am Jur 2d, Zoning and Planning §§ 337, 338.

2. Administrative Law § 6 (NCI3d); Municipal Corporations § 31.2 (NCI3d)— denial of subdivision permit—appeal to superior court—court may not grant summary judgment or make additional findings

In reviewing errors raised by plaintiff's petition for a writ of certiorari from the denial of a subdivision application by the town, the superior court was sitting as a court of appellate review and could not properly grant summary judgment or make additional findings. The sole question before

the trial court was whether the decision of the town council was based upon findings of fact supported by competent evidence and whether such findings supported the conclusion reached by the town; if even one of the reasons articulated by the town for the denial of the subdivision permit was supported by valid enabling legislation and competent evidence on the record, the town's decision must be affirmed.

Am Jur 2d, Administrative Law §§ 452, 456-458.

3. **Municipal Corporations § 30.10 (NCI3d) — denial of subdivision permit — failure to accommodate thoroughfare plan — denial proper**

The Chapel Hill Town Council properly denied plaintiff's petition for approval of her subdivision where a Chapel Hill ordinance expressly requires that subdivision plans for streets and driveways be in compliance with and coordinate to Chapel Hill's transportation plan; there was competent and substantial evidence before the town council to support a finding that plaintiff's subdivision application failed to take into account present and future road plans set forth in the town's thoroughfare plan; and there was no evidence in the record which would support any inference that the findings and decision of the council were not made in good faith.

Am Jur 2d, Zoning and Planning §§ 166, 167.

4. **Municipal Corporations § 30.10 (NCI3d) — subdivision application — requirement that plan coordinate with street plan**

The Town of Chapel Hill's denial of plaintiff's subdivision permit for failure to take future road plans into account was neither *ultra vires* nor unconstitutionally vague. Under N.C.G.S. § 160A-372, a town is authorized to require a developer to take future as well as present road development into account when designing a subdivision, and such a requirement is not necessarily tantamount to compulsory dedication.

Am Jur 2d, Zoning and Planning §§ 166, 167.

5. **Municipal Corporations § 30.22 (NCI3d) — denial of subdivision application — summary judgment for plaintiff improper — further action**

The trial court improperly granted summary judgment for plaintiff on her claims for a taking without just compensa-

tion and without due process of law in an action arising from the Town of Chapel Hill's denial of her subdivision application for failure to take into account future road plans. Summary judgment should have been entered for the defendant and the doctrine of res judicata would bar plaintiff from reasserting her claim that the town unlawfully denied approval of her subdivision plan despite the fact that the original claim arose in a quasi-judicial administrative hearing. However, plaintiff has not been foreclosed from filing another petition with the town for the development of her property as a subdivision or for other use.

Am Jur 2d, Zoning and Planning § 13.

ON discretionary review of the decision of the Court of Appeals, 92 N.C. App. 601, 376 S.E.2d 22 (1989), affirming in part and reversing in part the order granting summary judgment in favor of the plaintiff entered by *Brannon, J.*, in the Superior Court, ORANGE County, on 31 December 1987. Heard in the Supreme Court 10 October 1989.

Michael B. Brough & Associates, by Michael B. Brough & Frayda S. Bluestein, for plaintiff-appellee.

Hunter, Wharton & Lynch, by John V. Hunter, III, and Ralph D. Karpinos, Town Attorney, Town of Chapel Hill, for the defendant-appellant.

Thomas A. McCormick, Jr., City Attorney, and Ira J. Botvinick, Deputy City Attorney, for City of Raleigh, and S. Ellis Hankins, General Counsel, for N.C. League of Municipalities, amicus curiae.

Gregory D. Porter for North Carolina Home Builders Association, amicus curiae.

Karen A. Sindelar, Assistant City Attorney, for City of Durham, amicus curiae.

Maupin, Taylor, Ellis & Adams, P.A., by John C. Cooke, and R. S. Radford, for Pacific Legal Foundation, amicus curiae.

MARTIN, Justice.

This case raises the question of whether the proceeding pursuant to plaintiff's petition for writ of certiorari to review the

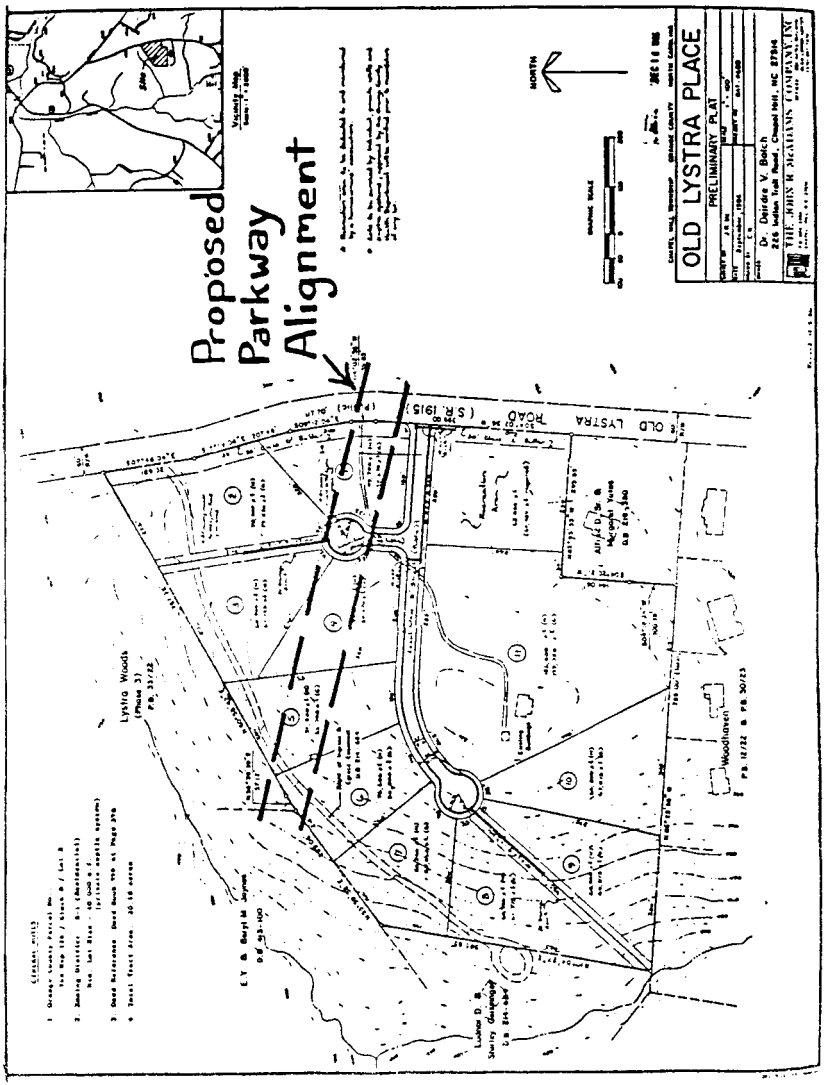
decision of the Town of Chapel Hill which denied plaintiff's subdivision permit application was properly joined with her cause of action alleging in her complaint constitutional violations and seeking damages, costs, and attorney's fees pursuant to 42 U.S.C. § 1988, 42 U.S.C. § 1983 and N.C.G.S. § 40A-8. Also presented is the further question of whether summary judgment in favor of plaintiff was properly granted as to both proceedings. We hold that these proceedings were improperly joined and examine each separately in this opinion. Concerning the writ of certiorari, we reverse the Court of Appeals' ruling and order that the decision of the Town Council denying plaintiff's subdivision application be upheld. Turning to the questions raised in plaintiff's complaint, we hold that the Court of Appeals erred in partially affirming the trial court's order of summary judgment in favor of plaintiff and remand the cause to the Court of Appeals for further proceedings consistent with this opinion.

The facts show that on 26 October 1984, the plaintiff, Dr. Deidre V. Batch, purchased a tract of land containing 20.16 acres on Old Lystra Road in Orange County within the extraterritorial planning jurisdiction of the Town of Chapel Hill. Dr. Batch is not a professional land developer and purchased this acreage with the intent of building her personal residence thereon. Sometime after purchasing this property, Dr. Batch decided to subdivide the land while retaining a portion of it for her own use.

Several months prior to Dr. Batch's purchase of this property, the Town of Chapel Hill had adopted the 1983 Chapel Hill/Carrboro Thoroughfare Plan. The Thoroughfare Plan, which is part of the Comprehensive Plan developed by the town pursuant to N.C.G.S. § 160A-174 (1987), includes plans to construct a limited access two-lane highway, the Laurel Hill Parkway, in the southern section of Orange County to alleviate traffic congestion resulting from population growth in that area. This parkway, as planned, will pass through the northeast section of Dr. Batch's twenty-acre tract of land.

In pursuit of her goal to subdivide her property, Dr. Batch initially submitted an application to the Town of Chapel Hill for a minor subdivision on 20 June 1986. Dr. Batch submitted a new proposal to the town on 16 September 1986. This new application, which is the subject of the current controversy before this Court, sought permission to subdivide the property into eleven lots. As

indicated by the following illustration, the eleven lots as developed would surround two cul-de-sacs to be built on the property, and construction of the proposed Laurel Hill Parkway by the town would significantly interfere with the use of at least four of the anticipated building sites:



Internal communications between planning staff members and members of the advisory Planning Board indicated that some staff and advisory board members wanted Dr. Batch to reserve or dedicate space for the proposed Laurel Hill Parkway as a condition of approval of her permit application. Dr. Batch consistently resisted what she perceived to be efforts by the town to compel dedication of her land for the proposed parkway. Dr. Batch's development representative suggested that the town redesign the Thoroughfare Plan to move the parkway. In addition to her concerns about dedication, Dr. Batch further explained her resistance to the parkway's anticipated location on her property in an affidavit submitted to the trial court as part of her summary judgment motion:

> I object to the Laurel Hill Parkway running through my property in part because it would take a substantial portion of my property as well as lower the value of the remaining property. More importantly, however, I object because it would destroy much of the beauty and seclusion that motivated me to purchase the property in the first place.

As part of the major subdivison review process set out in the Chapel Hill Development Ordinance at § 7.6.1.5, Dr. Batch's subdivision permit application was submitted for review by the Chapel Hill Planning Board prior to review by the Town Council itself. The Planning Board conducted a hearing on 6 January 1987 at which Dr. Batch was represented by counsel. Following that hearing, the Planning Board unanimously adopted a resolution recommending denial of the submitted subdivision application. In its resolution, the Planning Board stated that the subdivision "would not comply with the standards of the Town." Among the reasons cited by the Planning Board as grounds for the subdivision's failure to comply with the town's standards was that "[t]he type and arrangement of streets within the development are not in compliance with nor coordinate with Chapel Hill's Thoroughfare Plan."

Following the decision of the Planning Board, the Chapel Hill Town Manager, David R. Taylor, prepared a memorandum and recommendation to the Town Council dated 25 February 1987. Regarding the proposed Laurel Hill Parkway as it would impact on Dr. Batch's development design, Mr. Taylor stated in this memorandum:

> The applicant's proposed subdivision fails to take into account this future street and would substantially disrupt the adopted

> Thoroughfare Plan. . . . Laurel Hill Parkway as it is now called was part of the adopted Thoroughfare Plan for several years prior to the most recent update in 1984. . . . The adopted plan and, in particular, this proposed parkway has been taken into account by both Chapel Hill and Carrboro in review of other proposed developments. . . . We believe that the applicant's proposal does not meet requirements of having streets which coordinate with existing and planned streets as authorized by statute and ordinance.

A hearing was held on 9 March 1987 before the Chapel Hill Town Council. At the request of Dr. Batch's counsel, all evidence was received under oath and cross-examination was allowed.

At the hearing, the Town Manager's recommendation was presented by Planning Director Roger Waldon who was cross-examined by Dr. Batch's attorney. Dr. Batch's developer testified on her behalf, and plats of the proposed development, as well as maps illustrating the relationship of the proposed parkway to the proposed subdivision, were submitted into evidence. There was no evidence in the record before the Town Council of any efforts on behalf of the town to require plaintiff to dedicate land for the right-of-way of Laurel Hill Parkway as a condition for approval of plaintiff's proposed subdivision.

At the conclusion of the hearing, the council voted unanimously to deny the subdivision application and adopted the following resolution:

> BE IT RESOLVED that the Council of the Town of Chapel Hill finds that the subdivision proposed by Dr. Deidre V. Batch, on property identified as Chapel Hill Township Tax Map 122, Block B, Lot 2, if developed according to the plat dated September 1986 would not comply with all applicable regulations of the Town. The Council finds that the development, as proposed:
>
> 1. Is not consistent with the orderly growth and development of the Town as outlined in the Comprehensive Plan of the Town and, in particular the Land Use Plan, as required by Section 6.5.1 of the Development Ordinance.
>
> 2. Does not have streets which coordinate with existing and planned streets and highways as required by Sections 7.7.1 and 6.5.1 of the Development Ordinance.

3. Does not create conditions essential to the present and future public health, safety and general welfare as required by the Development Ordinance.

4. Does not provide for the construction of Community service facilities in accordance with municipal policies and standards as set out in the Comprehensive Plan and as required by Section 7.7.1 of the Development Ordinance.

BE IT FURTHER RESOLVED that the Council hereby denies the application for preliminary plat approval for Old Lystra Subdivision.

Nowhere in the council's resolution, the Planning Board's resolution, the Manager's memorandum to the council, or the testimony of the town's Planning Director at the hearing is there any reference to a requirement that Dr. Batch dedicate any of her property to the town. Rather, these memoranda, resolutions, and testimony consistently refer to the subdivision's failure to coordinate with existing and planned streets or to incorporate the alignment of the parkway right-of-way in its design as one of the reasons for the permit denial. However, the Planning Staff Report of 6 January 1987, indicating that the proposed subdivision failed to "incorporate the alignment of the Laurel Hill Parkway right-of-way into the proposed preliminary plan" and recommending that the plan not be approved because "it does not incorporate the extension of Laurel Hill Parkway," was included in the package of material forwarded to the Town Council members by the Town Manager in preparation for the 9 March 1987 hearing.

Following denial of her subdivision permit application, Dr. Batch filed a combined complaint and petition for writ of certiorari in Orange County Superior Court on 8 April 1987 seeking a declaration that the denial of her application was unlawful and unconstitutional, praying for an injunction to compel the town to approve her application, asking for damages for an unconstitutional taking of her property and for denial of equal protection, seeking compensation for the temporary taking of her property, and requesting an award of costs and attorney's fees. In its answer, the town denied that any unconstitutional violations had occurred and further took the position that the complaint and petition for writ of certiorari should not be combined in one proceeding. On 4 September 1987, the trial court determined that the claims were properly joined and issued a writ of certiorari on 20 October 1987

with respect to the decision of the Town Council denying approval of the subdivision application.

On 21 October 1987, Dr. Batch moved for summary judgment on every count of the complaint and the petition for writ of certiorari as to liability, reserving the issues of damages for later determination. Both parties filed affidavits from a number of potential witnesses with the trial court prior to a 15 December 1987 hearing on Dr. Batch's motion for summary judgment. The trial court heard argument and reviewed the pleadings and affidavits presented at the summary judgment hearing, together with the record of the 9 March 1987 permit hearing before the Town Council pursuant to the writ of certiorari, and determined that there was no genuine issue of material fact concerning the questions raised in Dr. Batch's complaint and writ proceeding. Most significantly, in finding of fact number two the trial court concluded that there was no genuine issue of material fact concerning the town's rationale for denying Dr. Batch's subdivision permit. Rather than accepting the Town Council's statement in its resolution that the subdivision "does not have streets which coordinate with existing and planned streets and highways," the trial court ruled that:

> On March 9th, 1987, the Chapel Hill Town Council adopted its staff's recommendation and denied Plaintiff's application for the following three reasons: (1) Plaintiff failed to indicate on her subdivision an intent to dedicate to the Town of Chapel Hill a right of way for the proposed Laurel Hill Parkway; (2) Plaintiff failed to indicate on her subdivision plat an intent to dedicate to the Town an additional 10 feet of right of way along Old Lystra Road and to improve Old Lystra Road by adding 12 feet of pavement width as well as curb and gutter along the property's approximately 973 feet frontage on that road; (3) Plaintiff failed to indicate in her subdivision application an intent to extend public water and sewer lines to the property.

Based on its factual finding that the town was requiring dedication of land for the Laurel Hill Parkway, the trial court concluded that such a requirement amounted to an unconstitutional taking. The trial court similarly concluded that denial of the permit for plaintiff's failure to dedicate space for or make improvements to Old Lystra Road amounted to an unconstitutional taking. Finally, the trial court reasoned that the defendant had no statutory authority

to deny use of individual well and septic tank systems and its denial of the subdivision application was *ultra vires* and unconstitutional.

At the conclusion of its order resulting from plaintiff's motion for summary judgment, the trial court ordered the Town of Chapel Hill to approve Dr. Batch's preliminary plat as submitted with a minor exception permitting the town to relocate the proposed recreation area; reserved for trial the amount of damages to which plaintiff would be entitled, and assessed costs and attorney's fees against the town.

The town appealed to the Court of Appeals which filed its decision on 7 February 1989. In that opinion, *Batch v. Town of Chapel Hill*, 92 N.C. App. 601, 376 S.E.2d 22 (1989), the Court of Appeals unanimously concluded that it was not error for the trial court to have joined the proceeding pursuant to the writ of certiorari with the complaint and that plaintiff's motion for summary judgment was therefore properly before the trial court. Having determined that the summary judgment motion was properly before the trial court, the Court of Appeals examined the trial court's conclusion that there was no genuine issue of material fact in the case and that plaintiff was therefore entitled to judgment as a matter of law. The Court of Appeals found that one undisputed reason for denial of the subdivision permit was Dr. Batch's failure to dedicate land for the Laurel Hill Parkway:

> Careful review of the affidavits in support of summary judgment, the record of the Town Council meeting of 9 March 1987, other documents properly before the court, and the transcript of the summary judgment hearing, support the Superior Court's conclusions as to why the application was denied. Defendant came forward with no evidence that the denial was for any other reason. We affirm the portion of the trial court's order which identifies the reasons for denial of the subdivision application.

Batch v. Town of Chapel Hill, 92 N.C. App. 601, 609-10, 376 S.E.2d 22, 28.

The Court of Appeals next examined the conclusions of law reached by the trial court. The Court of Appeals held that the town's denial of Dr. Batch's permit amounted to an unconstitutional taking. The Court of Appeals further concluded that the imposition

of the "Parkway condition," i.e., what it found to be a compulsory dedication requirement, exceeded the statutory authority granted to the Town of Chapel Hill in N.C.G.S. § 160A-174. Additionally, the Court of Appeals' opinion stated that plaintiff's substantive due process rights were violated both because the town's action was *ultra vires* and because the reasons set out by the town for its decision were unconstitutionally vague.

Turning to the "Lystra Road condition," the Court of Appeals reversed the trial court's summary judgment order and remanded the question for further proceedings. Finally, the Court of Appeals affirmed the trial court's decision to invalidate the water and sewer condition as a basis for the town's denial of plaintiff's permit application, while refusing to recognize plaintiff's argument on cross-appeal that the town's denial of the permit on these grounds amounted to an unconstitutional taking of Dr. Batch's entire tract.

[1] Addressing first the question of joinder of the proceeding pursuant to the writ of certiorari with the cause of action alleged in the plaintiff's complaint, we hold that it was error to join them. However, despite the error in joining the two proceedings, we elect not to remand the entire case but rather choose to consider separately the questions raised by the entry of summary judgment as to the respective proceedings in this appeal.

[2] In reviewing the errors raised by plaintiff's petition for writ of certiorari, the superior court was sitting as a court of appellate review pursuant to the procedures set out in the Town of Chapel Hill's Development Ordinance at § 7.6.1.11. 1 Strong's N.C. Index 3d *Administrative Law* § 6 (1976). In its capacity as an appellate court reviewing the town's quasi-judicial subdivision permit hearing, the superior court could not properly grant summary judgment. Motions for summary judgment are properly heard in the trial courts. *Britt v. Allen*, 12 N.C. App. 399, 183 S.E.2d 303 (1971); W. Shuford, *N. C. Civil Practice and Procedure* § 56-5 (2d ed. 1981). Here, the superior court judge was sitting as an appellate court, not a trial court. Review pursuant to writ of certiorari of an administrative decision is based solely upon the record as certified. The superior court judge may not make additional findings. *Paving Co. v. Highway Commission*, 258 N.C. 691, 129 S.E.2d 245 (1963). The test is whether the findings of fact are supported by competent evidence in the record; if so, they are conclusive upon review. *Jamison v. Kyles*, 271 N.C. 722, 157 S.E.2d 550 (1967).

The court may not substitute its findings of fact for those of the agency. *Id.* The sole question before the trial court regarding this administrative proceeding was whether the decision of the Town Council of Chapel Hill was based upon findings of fact supported by competent evidence and whether such findings support the conclusion reached by the town. If even one of the reasons articulated by the town for denial of the subdivision permit is supported by valid enabling legislation and competent evidence on the record, the town's decision must be affirmed. *Jennewein v. City Council of Wilmington*, 62 N.C. App. 89, 93, 302 S.E.2d 7, 9, *disc. rev. denied*, 309 N.C. 461, 307 S.E.2d 365 (1983).

[3] An examination of the administrative record which was correctly before the trial court on review reveals the four reasons set out by the Town Council in its resolution denying Dr. Batch's subdivision application. Again, these four reasons are that (1) the development is inconsistent with the orderly growth and development of the town; (2) the development does not have streets which coordinate with existing and planned streets and highways; (3) the development does not create conditions essential to the present and future public health, safety and general welfare; and (4) the development does not provide for the construction of community service facilities. These are the findings which were properly before the trial court for review under plaintiff's writ of certiorari challenging the permit denial. The three reasons listed by the trial court for the town's decision are facts found by the trial court, not the Town Council. Not only did the trial court lack authority to make such findings, they are not supported by the evidence. The record contains no evidence before the Town Council to support the trial court's findings.

After careful examination of the proper administrative record on appeal, we hold that there was competent, material and substantial evidence before the Chapel Hill Town Council at its 9 March 1987 hearing to support its second finding that Dr. Batch's subdivision application failed to take into account present and future road plans as set forth in the town's Thoroughfare Plan. At the 9 March 1987 council meeting, the council members were presented with a map of Dr. Batch's proposed subdivision overlaid with a map of the proposed Laurel Hill Parkway. Placed in juxtaposition with one another, these maps clearly illustrate that Dr. Batch's subdivision proposal would place four of eleven large residential building sites directly in the path of the proposed parkway. This evidence

alone is sufficient to support the findings contained in the second reason for the town's denial of the permit.

Further, we find no evidence in the record before the Town Council which would support any inference that the findings and decision of the council were not made in good faith. *Jamison v. Kyles*, 271 N.C. 722, 157 S.E.2d 550.

The Chapel Hill ordinance expressly requires that subdivision plans for streets and driveways shall be in compliance with and coordinate to Chapel Hill's transportation plan. Development Ordinance, § 6.5.1. We hold that failure to comply with this ordinance is a sufficient basis to support the council's refusal to approve plaintiff's subdivision plan. *See Liles v. City of Gresham*, 66 Or. App. 59, 672 P.2d 1229 (1983); *Board of Cty. Com'rs, Etc. v. Gaster*, 285 Md. 233, 401 A.2d 666 (1979); *Seal v. Mapleton City*, 598 P.2d 1346 (Utah 1979). *See generally* Mandelker, *Land Use Law* § 9.09 (2d ed. 1988).

In view of our decision upholding the town's denial of approval of plaintiff's proposed subdivision for the reasons discussed above, we find it unnecessary to review the other three reasons relied upon by the town in refusing to approve plaintiff's subdivision, and express no opinion as to the validity of these findings by the Town Council.

We hold that the Town Council properly denied plaintiff's petition for approval of her subdivision. The decision of the Court of Appeals contrary to this holding is reversed.

[4] Having determined that there is sufficient evidence on the administrative record to support the Town Council's conclusion that Dr. Batch's proposed subdivision failed to coordinate with existing and planned streets, we next turn to the related questions of whether the town had the authority to impose such a requirement and whether the town's resolution supporting the permit denial was unconstitutionally vague. Under N.C.G.S. § 160A-372, a town is clearly authorized to require a developer to take future as well as present road development into account when designing a subdivision. *See* N.C.G.S. § 153A-331 for parallel authority for counties. A requirement that a subdivision design accommodate future road plans is not necessarily tantamount to compulsory dedication. Rather, such a requirement might legitimately compel a developer to anticipate planned road development in some logical manner when designing a proposed subdivision.

We hold that in the case before us, the Town of Chapel Hill had authority under its Development Ordinance as authorized by N.C.G.S. § 160A-372 to require Dr. Batch to take future road plans into account in designing her subdivision and further find that denial of her permit for her failure to do so was neither *ultra vires* nor unconstitutionally vague.

[5] We next turn to the question of the propriety of the trial court's decision to grant summary judgment in favor of the plaintiff on the issues raised in her complaint. While the decision to consider a summary judgment motion on the writ of certiorari was improper, it was proper for the motion for summary judgment to come before the trial court on the questions raised in the complaint.

However, in this case the Court of Appeals erred in affirming in part the trial court's granting of summary judgment for the plaintiff upon the causes of action alleged in her complaint. Plaintiff's complaint is based solely upon the alleged improper refusal by the Town Council to approve her subdivision plans. As a result of this alleged improper action, plaintiff alleges that her property has been taken without just compensation, and without due process of law, and that she is entitled to equitable relief and damages. We do not find it necessary to review or decide any of plaintiff's constitutional claims or other issues arising upon her complaint.

It having been determined in this opinion that the Town Council of Chapel Hill properly denied approval of plaintiff's subdivision plan, plaintiff is not as a matter of law entitled to partial summary judgment on her constitutional statutory claims. To the contrary, summary judgment should have been entered for the defendant. The foundation of plaintiff's alleged causes of action having been determined against plaintiff, defendant is entitled to summary judgment in its favor, and plaintiff's complaint should be dismissed. The doctrine of res judicata treats a final judgment as the full measure of relief to be accorded between the same parties on the same claim. To apply the doctrine, there must be a final judgment on the merits in another suit with an identity of issues and parties in the two cases. *State ex rel. Utilities Comm. v. Public Staff*, 322 N.C. 689, 370 S.E.2d 567 (1988). Applying this law to the plaintiff's cause of action alleged in her complaint, we conclude that she is barred by the doctrine of res judicata from reasserting her claim that the town unlawfully denied approval of her subdivision plan. The fact that the original claim arose in a quasi-judicial

administrative hearing does not affect this result. A final judicial determination of the claim has been rendered by this Court. Furthermore, the fact that plaintiff's complaint alleges violations of 42 U.S.C. § 1983 does not affect our holding. *See University of Tennessee v. Elliott*, 478 U.S. 788, 92 L. Ed. 2d 635 (1986) (State court judgments must be given both issue and claim preclusive effect in subsequent 42 U.S.C. § 1983 actions). The decision of the Court of Appeals to the contrary is reversed.

Our decision is based solely upon adequate and independent state grounds. *Michigan v. Long*, 463 U.S. 1032, 77 L. Ed. 2d 1201 (1983).

We note that plaintiff is not foreclosed from filing another petition with the Town of Chapel Hill for the development of her property as a subdivision or for other use of it.

The case is remanded to the Court of Appeals for further remand to the Superior Court, Orange County for further proceedings not inconsistent with this opinion.

Reversed and remanded.

JOHN F. CLARK, CHIEF BUILDING INSPECTOR OF THE CITY OF NEW BERN, AND CITY OF NEW BERN, A NORTH CAROLINA MUNICIPAL CORPORATION v. CRAVEN REGIONAL MEDICAL AUTHORITY, A PUBLIC BODY AND A BODY CORPORATE AND POLITIC WHICH HAS ITS PRINCIPAL OFFICE AND PLACE OF BUSINESS IN THE CITY OF NEW BERN, CRAVEN COUNTY, NORTH CAROLINA; S. T. WOOTEN CONSTRUCTION CO., INC., A NORTH CAROLINA CORPORATION WHICH HAS ITS PRINCIPAL OFFICE AND PLACE OF BUSINESS IN WILSON COUNTY, NORTH CAROLINA; JAMES L. CAYTON ASSOCIATES, INC., A NORTH CAROLINA CORPORATION WHICH HAS ITS PRINCIPAL OFFICE AND PLACE OF BUSINESS IN NEW BERN, NORTH CAROLINA; ELECTRICON, INC., A DELAWARE CORPORATION WHICH IS AUTHORIZED TO DO BUSINESS IN THE STATE OF NORTH CAROLINA; AND SOUTHERN PIPING COMPANY, A NORTH CAROLINA CORPORATION WHICH HAS ITS PRINCIPAL OFFICE AND PLACE OF BUSINESS IN WILSON COUNTY, NORTH CAROLINA

No. 343PA89

(Filed 18 January 1990)

1. Abatement and Revival § 3 (NCI3d)— plea in abatement— prior action pending on appeal

A prior action which is pending in the appellate division may serve as a prior action pending for the purpose of basing

a judgment of abatement in a subsequent action between the same parties upon the same issues.

Am Jur 2d, Appeal and Error § 279.

2. Abatement and Revival § 3 (NCI3d)— order of abatement— similar parties, subject matter, issues and relief

The parties, subject matter, issues and relief requested in two actions involving the validity of legislation giving authority to enforce building and other safety codes for a medical center to Craven County rather than to cities located therein were sufficiently similar to warrant issuance of an order of abatement where the City of New Bern is a plaintiff common to both cases and an agent of the City was added as a plaintiff in the second suit; the principal defendant in both suits was the Craven Regional Medical Authority; the redundancy of the second suit as to the principal defendant was not affected by the exclusion from the second suit of two defendants who had been named in the first suit or by the addition to the second suit of two defendants who did not move to abate plaintiffs' action; while the first action requested a declaratory judgment that the legislation in question is unconstitutional and the second case asked for an injunction to prevent construction because of the alleged unconstitutionality of the same legislation, plaintiffs sought in both cases an equitable remedy which would have the effect of compelling defendant medical center to obtain a building permit from and pay fees to plaintiff City of New Bern rather than to Craven County; and the addition of plaintiffs' claim in the second action that the legislation in question applies only to Craven Regional Medical Center rather than to Craven Regional Medical Authority did not preclude abatement since these two entities are in fact one and the same.

Am Jur 2d, Abatement, Survival, and Revival §§ 20-22.

3. Appeal and Error § 6.2 (NCI3d)— preliminary injunction— nonappealable interlocutory order

The issuance of a preliminary injunction restraining plaintiffs from enforcing stop work orders against defendants could not be appealed prior to final judgment where defendants' counterclaim for damages resulting from plaintiffs' alleged negligent issuance of the stop work order has yet to be decided

on the merits, and plaintiffs have not argued and the record does not show that they will be deprived of a substantial right if the order is permitted to stand pending final resolution by the trial court.

Am Jur 2d, Appeal and Error § 864.

ON plaintiffs' petition pursuant to N.C.G.S. § 7A-31(b) for discretionary review prior to determination by the Court of Appeals of an order by *Strickland, J.* dismissing plaintiffs' action and enjoining plaintiffs from enforcing stop work orders against the defendants. Order entered on 15 June 1989, *nunc pro tunc* for 15 May 1989, in Superior Court, CRAVEN County. Heard in the Supreme Court 16 November 1989.

Ward, Ward, Willey & Ward, by Elizabeth Williams and A.D. Ward, for plaintiff-appellants.

Sumrell, Sugg, Carmichael & Ashton, P.A., by Fred M. Carmichael and Rudolph A. Ashton, III, for defendant-appellee, Craven Regional Medical Authority.

MARTIN, Justice.

The dispositive issue on this appeal is whether the trial court erred in entering an order of abatement of this action. Additionally, a subordinate issue concerning the court's issuance of a preliminary injunction against plaintiffs will be discussed. We find that the trial court's granting of the plea in abatement was proper and that the issue concerning the preliminary injunction is not properly before this Court for review. Therefore, the order of the trial court is affirmed and the case remanded for further proceedings. Only a brief recitation of the facts is necessary for the disposition of this appeal.

In June of 1988 the General Assembly adopted 1987 N.C. Sess. Laws ch. 934 for the purpose of delegating the authority for enforcing state and local building and other safety codes relevant to the Craven Regional Medical Center (currently operating as the Craven Regional Medical Authority) to the County of Craven rather than to any cities located within the county. Plaintiff City of New Bern is a North Carolina municipal corporation located in Craven County. Chapter 934 states in relevant part:

> 1. Craven County shall have the exclusive jurisdiction as against any city as defined by G.S. 160A-1 for the administration and enforcement of all laws, statutes, code requirements and all other applicable regulations promulgated by the State or any city respecting building, construction, fire and safety codes as the same relate to or are legally applicable to any property owned or leased by the Craven Regional Medical Center.

1987 N.C. Sess. Laws ch. 934. 1986 N.C. Sess. Laws ch. 805 and 1987 N.C. Sess. Laws ch. 341 establish parallel authority with the county as to the New Bern-Craven Board of Education and Craven Community College, respectively.

On 9 November 1988, the City of New Bern initiated an action against Craven Regional Medical Authority, the New Bern-Craven Board of Education, and the Trustees of Craven Community College requesting a declaratory judgment pursuant to N.C.G.S. §§ 1-253 to 1-267. The city based that action on its assertion that the named acts violate article II, section 24 and article XIV, section 3 of the North Carolina Constitution and requested a declaration that they were unconstitutional, null and void. In that case, *City of New Bern v. Board of Education*, docketed in Craven County as 88 CVS 1780 [hereinafter *City of New Bern v. Board of Education*], the trial judge ordered a dismissal on the grounds that the City of New Bern lacked standing to bring the suit. The plaintiff, City of New Bern, appealed directly to this Court on discretionary review prior to determination by the Court of Appeals. Oral argument was heard immediately prior to argument in the case presented here.

The case before us, hereinafter *Clark v. Craven Regional Medical Authority*, was initiated by the plaintiffs following the trial court's decision to dismiss *City of New Bern v. Board of Education*, despite the city's decision to pursue that first case on appeal. In the present case, plaintiffs sought an injunction to halt construction of an addition to and internal renovations of the hospital operated under the auspices of the defendant Craven Regional Medical Authority and located within the corporate limits of the City of New Bern. On the day the complaint was filed, plaintiffs served a stop work order on Craven Regional Medical Authority and all contractors and subcontractors on the construction project, all of whom were also named as defendants in the instant suit. The contractors and subcontractors on site complied with the stop work order and Craven Regional Medical Authority obtained a temporary restraining order

on the following day enjoining enforcement of the stop work order and construction resumed on the hospital addition. Of the named defendants, only Craven Regional Medical Authority answered plaintiffs' complaint or pursued this appeal. Consequently, use of the term "defendant" in this opinion refers only to Craven Regional Medical Authority.

As with the claim in the first case, *City of New Bern v. Board of Education*, plaintiffs in this case alleged that 1987 N.C. Sess. Laws ch. 934 was unconstitutional, null and void. In the original complaint filed in the instant case, plaintiffs asserted that the defendants therefore were obligated to obtain requisite building permits from and pay appropriate fees to the City of New Bern, rather than Craven County, prior to beginning construction of their project. Plaintiffs later amended the complaint to include a charge that even if chapter 934 was constitutional, a point plaintiffs did not concede, that statute did not protect defendant Craven Regional Medical *Authority* in this case but rather addressed Craven Regional Medical *Center*, an entity which plaintiffs alleged to be wholly separate. Under this additional claim, plaintiffs asserted that the *Authority* was responsible for obtaining permits from the city regardless of the constitutionality of chapter 934. Since defendant failed to obtain said permits from the city or to pay the requisite fees to the city, plaintiffs sought an injunction to halt construction on the hospital addition and interior renovations.

In its answer, defendant asserted the affirmative defense of abatement. Defendant also counterclaimed for damages resulting from plaintiffs' alleged negligence in issuing the stop work order when "plaintiffs knew or reasonably should have known the stop work order was void." The defendant asserted that these two cases turned on the same fundamental legal question, the constitutionality of 1987 Sess. Laws ch. 934, and that plaintiffs should not be permitted to relitigate the same issue in the present case while final resolution of the prior case was still pending. The trial court adopted the defendant's reasoning, and allowed defendant's plea in abatement on the grounds "[t]hat the subject matter of 88 CVS 1780 [*City of New Bern v. Board of Education*] and that of this action is substantially the same in that the essence of both actions involve the constitutionality of Chapter 934 of the 1987 Session Laws of the North Carolina General Assembly and that the parties are substantially the same[.]"

On this appeal, plaintiffs have urged this Court to find that the plea in abatement should not have been granted either (1) because the parties, subject matter, issues, and remedies sought in the two cases are not sufficiently similar, or (2) because the pendency on appeal of a prior action dismissed for lack of subject matter jurisdiction should not be grounds for abating a subsequent action brought on similar grounds. We decline to adopt either argument of plaintiffs and find that the plaintiffs' complaint in the present case was correctly dismissed.

[1] At the outset, we must determine whether a prior action which has been dismissed in the trial court and is pending appeal in this Court is a "prior action pending" upon which a plea in abatement can be based. The pendency of a prior action between the same parties for the same cause in a state court of competent jurisdiction works an abatement of a subsequent action either in the same court or in another court of the state having like jurisdiction. *McDowell v. Blythe Brothers Co.*, 236 N.C. 396, 72 S.E.2d 860 (1952); *Cameron v. Cameron*, 235 N.C. 82, 68 S.E.2d 796 (1952). This is so because the court can dispose of the entire controversy in the prior action and in consequence the subsequent action is wholly unnecessary. By abating the second action, a multiplicity of actions is prevented. An action is pending for the purpose of abating a subsequent action between the same parties for the same cause from the time of the issuance of the summons until its final determination by judgment. *McDowell v. Blythe Brothers Co.*, 236 N.C. 396, 72 S.E.2d 860. A plea in abatement based upon a prior action pending is an affirmative defense and is waived unless pleaded by the party relying upon the same. *Id.*; N.C.R. Civ. P. 8(c).

As stated, a prior action is pending until its determination by final judgment. Here, no final judgment has been entered in the prior case of *City of New Bern v. Board of Education*. That case is presently pending before this Court. Although there are decisions in other jurisdictions to the contrary, the better rule appears to be that a plea of abatement may be sustained by a prior action pending while it is on appeal. This is reasonable because otherwise a multiplicity of actions would result, and contrary results could be rendered between the same parties upon the same issues. *See generally* 1 Am. Jur. 2d, *Abatement, Survival, and Revival* § 15 (1962).

This Court sub silentio approved the entry of a judgment of abatement in an action in which the prior action was pending on appeal before this Court. In *Shore v. Brown*, 324 N.C. 427, 378 S.E.2d 778 (1989), this Court affirmed a summary judgment upon the theory that the second action was subject to a plea in abatement because of the pending of a prior action between the same parties involving the same subject matter. In *Shore*, a prior action had been instituted, *Brown v. Lumbermens Mutual Casualty Company*, 90 N.C. App. 464, 369 S.E.2d 367, *disc. rev. allowed*, 323 N.C. 363, 373 S.E.2d 542 (1988), which alleged the same issue pending between the same parties in the *Shore* case. The case of *Brown v. Lumbermens*, 90 N.C. App. 464, 369 S.E.2d 367, was on appeal before this Court and argued at the same session of this Court as the case of *Shore v. Brown*, 324 N.C. 427, 378 S.E.2d 778. Although the Court in *Shore* did not discuss the question of whether a prior action on appeal could serve as the basis for a plea in abatement, the judgment in abatement entered by the trial court in the *Shore* case was approved by this Court. We now expressly hold that a prior action which is pending in the appellate division may serve as a prior action pending for the purpose of basing a judgment of abatement in a subsequent action between the same parties upon the same issues.

[2] We now turn to the issue of whether the judgment of abatement was proper. "The ordinary test for determining whether or not the parties and causes are the same for the purpose of abatement by reason of the pendency of the prior action is this: Do the two actions present a substantial identity as to parties, subject matter, issues involved, and relief demanded?" *Cameron v. Cameron*, 235 N.C. at 85, 68 S.E.2d at 798. *See also Products Co. v. Christy*, 262 N.C. 579, 138 S.E.2d 218 (1964). In the present case, while the parties are not identical we find that they are substantially similar. The City of New Bern is a plaintiff common to both cases, while the Chief Building Inspector of New Bern, an agent of the city, has been added as a plaintiff in this second suit. The first suit named the primary defendant of this suit, Craven Regional Medical Authority, and two additional defendants, New Bern-Craven Board of Education and Craven Community College. The exclusion of two defendants who had been named in the first suit from this second suit has no bearing on the redundancy of this second suit as to the named defendant, Craven Regional Medical Authority. However, plaintiffs added the contractors and subcontractors as

defendants in this second suit. In this regard, we note that only Craven Regional Medical Authority moved to abate plaintiffs' action. The other defendants have not filed responsive pleadings nor are they parties to this appeal. Because a plea of abatement is an affirmative defense, plaintiffs' rights against these additional defendants are not affected by the judgment of abatement. Hence, as to the question of similarity of parties, we find on the facts of this case that the parties are substantially similar.

The subject matter and legal issues involved in the two cases are substantially similar as well. The controversy in both cases arose as a result of the General Assembly's passage of 1987 N.C. Sess. Laws ch. 934. The fact that the earlier suit also challenges the constitutionality of 1986 N.C. Sess. Laws ch. 850 and 1987 N.C. Sess. Laws ch. 341 as they pertain to the institutions named therein should not be allowed to camouflage the fact that as to this defendant the controlling legal issue is the same. Plaintiffs urge the Court to find that the addition of its third claim, assertion of the fact that chapter 934 applies only to Craven Regional Medical Center rather than Craven Regional Medical Authority, should preclude abatement because this second case could be resolved on issues not raised in the first. While we agree that the addition of a substantially different claim would preclude abatement as to that claim, we find that plaintiffs' third claim involves mere technical changes in name and the entities alluded to under both names are in fact one and the same. Hence, we find that plaintiffs' third claim for relief does not constitute grounds for avoiding abatement and that the controlling legal question involved in both cases is the same.

Finally, in examining the similarity in remedies sought in these two actions, we note that the first action requested a declaratory judgment that the laws in question were unconstitutional while the present case asked for injunctive relief to prevent construction because of the alleged unconstitutionality of those same laws. While these remedies are procedurally distinct, as applied in these cases the intended result would be the same. In both cases, plaintiffs have sought an equitable remedy which would have the effect of compelling defendant to obtain a building permit and pay fees to plaintiff City of New Bern rather than to the County of Craven. Under these circumstances, we find that the remedies requested by plaintiffs, while technically distinct from one another, are substantially similar in the result sought. Furthermore, we note that where

an action is pending between the parties, a plaintiff cannot bring another action involving the same subject matter and the same defendant even where the first suit demanded remedies clearly distinct from the second. In examining this question as long ago as 1936 in a case where the plaintiff sought damages in the first suit and injunctive relief in a second suit against the same defendant on the same grounds, this Court concluded "this is not only taking two bites at the cherry, but biting in two places at the same time." *Vinson v. O'Berry*, 209 N.C. 289, 290, 183 S.E. 424, 424-25 (1936). In summary, we find the parties, subject matter, issues involved and relief requested are sufficiently similar to warrant issuance of the order of abatement in this case.

[3] For the reasons set forth above, we find the plea in abatement was properly granted in this case and that plaintiffs' complaint was properly dismissed. We turn now to the section of the trial judge's order which stated, "the Plaintiffs are preliminarily enjoined from enforcing Stop Work Orders against Craven Regional Medical Authority or its contractors and subcontractors thereof until the trial of this matter on the merits." Plaintiffs raise a number of questions regarding the propriety of the issuance of this preliminary injunction and urge us to find that the defendant is not entitled to this relief.

A preliminary injunction is interlocutory in nature. *A.E.P. Industries v. McClure*, 308 N.C. 393, 302 S.E.2d 754 (1983); *State v. School*, 299 N.C. 351, 261 S.E.2d 908 (1980). As a result, issuance of a preliminary injunction cannot be appealed prior to final judgment absent a showing that the appellant has been deprived of a substantial right which will be lost should the order "escape appellate review before final judgment." *State v. School*, 299 N.C. at 358, 261 S.E.2d at 913. In the case before us, defendant's counterclaim for damages resulting from plaintiffs' alleged negligent issuance of the stop work order has yet to be decided on the merits by the trial court. Plaintiffs have not argued that they will be deprived of a substantial right if the order is permitted to stand pending final resolution by the trial court and there is no evidence on the record before us to indicate that they will be so harmed. Thus, upon examining the issue, we find that the issuance of the preliminary injunction is not properly before this Court for review and therefore decline to rule on plaintiffs' arguments at this time.

Based on the reasoning set forth above, we affirm the judgment and order of the trial court and remand this case to Superior Court, Craven County, for further proceedings not inconsistent with this opinion.

Affirmed and remanded.

REBECCA FOARD v. WAYNE JARMAN, M.D.

No. 223A89

(Filed 18 January 1990)

1. **Physicians, Surgeons, and Allied Professions § 17.1 (NCI3d)—informed consent—summary judgment for surgeon**

The trial court properly entered summary judgment for defendant surgeon on the issue of plaintiff's informed consent to gastroplasty surgery where opinion testimony by another surgeon and by defendant that defendant's treatment of plaintiff satisfied the applicable standard of care was sufficient to encompass the issue of informed consent and to satisfy the requirements of N.C.G.S. § 90-21.13(a)(1); and the record established without contradiction that defendant discussed the gastroplasty procedure generally with plaintiff and provided her with written information on the surgery and its risks, and that plaintiff did in fact read the information provided and accepted the risks described therein.

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 187-192, 194, 195.

2. **Physicians, Surgeons, and Allied Professions § 17.1 (NCI3d)—informed consent statute—compliance with all subsections not required**

The informed consent statute, N.C.G.S. § 90-21.13(a), does not require the health care provider to establish compliance with all three subsections; it is sufficient if the provider can demonstrate that no genuine issue of fact exists under subsections (1) and (2).

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 187-192, 194, 195.

3. Physicians, Surgeons, and Allied Professions § 17.1 (NCI3d)—informed consent—experience of surgeon

The informed consent statute imposes no duty on a health care provider to discuss his or her experience, and such a duty will not be imposed in a case where plaintiff's allegations about defendant surgeon's lack of experience in performing gastroplasty surgery are founded on her speculative and erroneous assumptions about the location of defendant's surgical experience.

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 187-192, 194, 195.

APPEAL by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, reported at 93 N.C. App. 515, 378 S.E.2d 571 (1989), affirming in part and vacating in part an order of summary judgment in favor of defendant entered by *Collier, J.*, on 5 January 1988 in Superior Court, IREDELL County. Heard in the Supreme Court 12 December 1989.

Hall and Brooks, by John E. Hall, William F. Brooks, and W. Andrew Jennings, for plaintiff-appellee.

R. C. Carmichael, Jr. for defendant-appellant.

WHICHARD, Justice.

The sole issue is whether the Court of Appeals erred in holding that the trial court erroneously granted defendant's motion for summary judgment on the issue of whether defendant obtained plaintiff's informed consent before performing surgery upon plaintiff. We hold that defendant made a sufficient showing of informed consent to prevail on summary judgment, and we accordingly reverse the Court of Appeals.

Plaintiff weighed 331 pounds in May 1982 when she consulted defendant about surgical treatments for obesity. She testified on deposition that she had heard of a surgical procedure which enabled people to lose weight, and she consulted defendant to learn whether he could perform the surgery. Defendant discussed with plaintiff gastric reduction or gastroplasty surgery, a technique which uses surgical staples to create a small pouch in the stomach. This limits the amount of food a patient may consume and leads to early satiety or fullness for the patient. On plaintiff's first visit to defend-

ant, he gave her a booklet entitled, "What You and Your Family Should Know about Gastric Operations for the Treatment of Obesity." Defendant asked plaintiff to read the booklet and discuss the operation with her family before seeing him again in two weeks. Plaintiff testified that she read the booklet several times, including the section that discussed the risks posed by the surgery. Plaintiff was undeterred from her initial decision to undergo the gastroplasty surgery despite its attendant risks. Following the gastroplasty, plaintiff became very ill and suffered complications resulting from a perforation in the stomach wall.

N.C.G.S. § 90-21.13(a) provides the standard of care for informed consent causes:

> (a) No recovery shall be allowed against any health care provider upon the grounds that the health care treatment was rendered without the informed consent of the patient or the patient's spouse, parent, guardian, nearest relative or other person authorized to give consent for the patient where:
>
> (1) The action of the health care provider in obtaining the consent of the patient or other person authorized to give consent for the patient was in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities; and
>
> (2) A reasonable person, from the information provided by the health care provider under the circumstances, would have a general understanding of the procedures or treatments and of the usual and most frequent risks and hazards inherent in the proposed procedures or treatments which are recognized and followed by other health care providers engaged in the same field of practice in the same or similar communities; or
>
> (3) A reasonable person, under all the surrounding circumstances, would have undergone such treatment or procedure had he been advised by the health care provider in accordance with the provisions of subdivisions (1) and (2) of this subsection.

N.C.G.S. § 90-21.13(a) (1985). To meet this statutory standard, the health care provider must provide the patient with sufficient information about the proposed treatment and its attendant risks to

conform to the customary practice of members of the same profession with similar training and experience situated in the same or similar communities. In addition, the health care provider must impart enough information to permit a reasonable person to gain a "general understanding" of both the treatment or procedure and the "usual and most frequent risks and hazards" associated with the treatment. "The provider may not be held liable, however, if a reasonable person, under the surrounding circumstances, would have undergone the treatment or procedure had he or she been advised in accordance with G.S. 90-21.13(a)(1) and (2). G.S. 90-21.13(a)(3)." *Nelson v. Patrick*, 73 N.C. App. 1, 11, 326 S.E.2d 45, 52 (1985).

In considering whether defendant was entitled to summary judgment on the informed consent claim, we are mindful of the movant's burden of proof at the pretrial stage. Summary judgment is a device

> whereby a party may in effect force his opponent to produce a forecast of evidence which he has available for presentation at trial to support his claim or defense. A party forces his opponent to give this forecast by moving for summary judgment. Moving involves giving a forecast of his own which is sufficient, if considered alone, to compel a verdict or finding in his favor on the claim or defense. In order to compel the opponent's forecast, the movant's forecast, considered alone, must be such as to establish his right to judgment as a matter of law.

Vassey v. Burch, 301 N.C. 68, 72, 269 S.E.2d 137, 140 (1980) (quoting 2 McIntosh, N.C. Practice & Procedure § 1660.5 (2d ed. Phillips Supp. 1970)).

[1] Defendant's forecast of evidence included an affidavit from Dr. Walter J. Pories, a general surgeon and chairman of the Department of Surgery at East Carolina University. Dr. Pories stated that he had reviewed plaintiff's hospital records and defendant's office records "regarding and arising out of the gastroplasty surgery" performed by defendant on plaintiff. Dr. Pories stated that he knew

> the standard of care in the practice of general surgery in Statesville, North Carolina, and similar communities in August, 1982, and based upon my review of these records, it is my opinion that the treatment, surgery and procedures used and

performed by Dr. Jarman were in full compliance with and met the standard of care.

Dr. Pories further stated:

> Based upon my examination of the hospital chart and Dr. Jarman's records, and based upon my knowledge of the standard of care in the practice of general surgery in Statesville, North Carolina, and similar communities in August, 1982, it is my opinion that the surgery, care and treatment given the plaintiff by Dr. Jarman was, in every respect, consistent and in accordance with the standard of care.

This testimony neither specifically mentions informed consent nor specifically describes the standard of care for obtaining it. This was the basis on which the Court of Appeals vacated the summary judgment for defendant on the informed consent claim. *Foard v. Jarman*, 93 N.C. App. 515, 523-24, 378 S.E.2d 571, 575 (1989). When this testimony is combined with the remaining forecast of evidence set forth herein, however, it is clear that the measures taken by defendant to inform plaintiff of the risks attendant to her surgery accorded with the standard of care in the community at the time. Dr. Pories testified that defendant's care and treatment of plaintiff conformed with this standard *in every respect*. Plaintiff tendered no evidence to controvert Dr. Pories' sworn statement.

The parties dispute whether defendant verbally discussed the risks of gastroplasty surgery with plaintiff during her office visits. It is undisputed, however, that defendant gave plaintiff a booklet, included in the record as Defendant's Exhibit #1, entitled "What You and Your Family Should Know about Gastric Operations for the Treatment of Obesity." The booklet provides a detailed description of the gastroplasty procedure in readily comprehensible lay terms. The booklet includes diagrams of the anatomical change created by the surgery, and details the lifestyle changes the patient must make to ensure successful weight loss. A section entitled "Potential Risks" reads:

> The "risks" that must be considered before making your decision are based on problems that have occurred in some of the patients that have had surgery before you. They are:
>
> __ Wound infection 12%
> __ Leaks or perforations causing intestinal infection and the need for reoperation 5%
> __ Death 2%

Defendant also testified that in his opinion his treatment and care of plaintiff was consistent with the standard of practice for general surgery in Iredell County in 1982. Again, while this testimony is conclusory and does not expressly describe the standard of care, it clearly states that the measures defendant took—which are clearly shown by other evidence—complied with the standard, and it stands uncontradicted by any testimony in plaintiff's forecast of evidence.

Plaintiff testified on deposition that during her first visit to defendant's office she and defendant had a general discussion regarding gastroplasty surgery, and defendant demonstrated a facsimile of the procedure with a sponge model. Plaintiff testified she took the booklet provided by defendant home and read it several times, including the section detailing potential risks. Plaintiff agreed that she was aware of the risks set out in the booklet.

We hold that this forecast of evidence, uncontradicted by plaintiff, was sufficient to allow the trial court to enter summary judgment in defendant's favor. No genuine question of material fact exists regarding whether the written information provided plaintiff, which plaintiff read, would allow a reasonable person to gain a general understanding of the surgical procedure and its inherent risks. *See* N.C.G.S. § 90-21.13(a)(2) (1985). Plaintiff did not forecast evidence that she was incapable of reading or understanding the booklet; instead, she admitted that she did read the booklet and was aware of the risks of infection, perforation, and death. One of the complications listed in the booklet—perforation—did in fact cause plaintiff to suffer complications from the gastroplasty surgery, as described by both Dr. Pories and defendant in their depositions.

After scrutinizing both parties' forecast of evidence, we hold that the testimony of Dr. Pories and defendant, uncontroverted by plaintiff, that defendant's treatment of plaintiff satisfied the standard of care, is sufficient to encompass the issue of informed consent and satisfy the requirements of N.C.G.S. § 90-21.13(a)(1). Because the record establishes without question or contradiction that defendant discussed the procedure generally with the patient and provided her with detailed written information on the surgery and its risks, that plaintiff did in fact read the information provided and accepted the risks described therein, and that defendant's treatment of plaintiff accorded with the standard of care "in every

respect," we hold that the trial court properly entered summary judgment for defendant on the informed consent claim.

[2] In vacating the summary judgment in part, the Court of Appeals stated that "there has been no determination as to what a reasonable person would have done had he been advised in accordance with the statute." *Foard*, 93 N.C. App. at 524, 378 S.E.2d at 575 (referring to N.C.G.S. § 90-21.13(a)(3)). However, N.C.G.S. § 90-21.13(a) is in the disjunctive and does not require the health care provider to establish compliance with all three subsections; it is sufficient if the provider can demonstrate that no genuine issue of fact exists under subsections (1) and (2). In cases of purely elective surgery, including cosmetic or weight reduction surgery, it would be most difficult for a provider to prove that a reasonable person "*would have undergone* such treatment . . ." upon receipt of proper advice. N.C.G.S. § 90-21.13(a)(3) (emphasis added). The most that can be shown in such cases is that some reasonable persons choose to undergo elective surgical procedures when advised in accordance with the statute. Neither the plain language of the statute nor the legislative purpose in enacting it requires that compliance with all three subsections be shown in every case.

[3] Plaintiff alleged in her complaint that defendant misrepresented to her the extent of his experience in performing gastroplasty surgery. She bottomed her claim of fraud on this alleged misrepresentation. The Court of Appeals upheld summary judgment for defendant on the fraud claim on the ground that the claim was barred by the statute of limitations. Plaintiff now argues that defendant's experience in performing this type of operation was material to the issue of informed consent.

Assuming arguendo that the provider's experience is a substantive matter to be covered when the provider obtains the patient's informed consent, the record does not support plaintiff's allegation that defendant "had performed only one other such operation." In her deposition plaintiff stated she had asked defendant if he had done this type of surgery before "and he told me that he had done several and I assumed that he meant there in Statesville at Iredell that he had done more than mine." This assumption was incorrect, as plaintiff's surgery was the first defendant had performed while in private practice in Iredell County. However, as defendant stated in his deposition, without contradiction in the record, his training following medical school involved a five-year

internship and residency in general surgery at North Carolina Baptist Hospital. During this time, he performed approximately thirty gastroplasty surgeries. Initially, defendant assisted in the operation, with his responsibility gradually increasing until the attending surgeon assisted him in performing the operation. Under these facts, we discern no genuine issue regarding defendant's experience which bears on the issue of informed consent. The statute imposes no affirmative duty on the health care provider to discuss his or her experience, and we will not impose such a duty in a case where plaintiff's allegations are founded on her speculative and erroneous assumptions about the location of defendant's surgical experience.

The opinion of the Court of Appeals is reversed as to the sole issue presented by this appeal. The case is remanded to the Court of Appeals for entry of an order affirming the order of summary judgment entered by the trial court.

Reversed and remanded.

STATE OF NORTH CAROLINA v. SHAWN ODELL BLAKE

No. 193A89

(Filed 18 January 1990)

1. **Robbery § 4.4 (NCI3d)— felony murder—attempted armed robbery—evidence sufficient**

There was sufficient evidence of an attempted armed robbery as the underlying felony for a felony murder, even though defendant contended that the robbery was completed, where defendant testified at trial that he went into a house to rob two men and shot one; the other then asked defendant not to shoot him and threw his wallet toward defendant; and defendant left without taking the wallet. This was evidence from which the jury could find all the elements of attempted armed robbery.

Am Jur 2d, Homicide §§ 72-75.

2. Criminal Law § 754 (NCI4th)— multiple counts—instructions—no error

There was no error in a prosecution for two counts of first degree murder and two counts of armed robbery where the trial court's instruction to the jury on independent consideration of the charges was substantially as requested by the defendant except that the court did not charge that the fact that the jury found the defendant guilty or not guilty on one charge should not affect the verdict on another charge. This would not keep the jury from understanding that it was required to consider each charge separately as instructed by the court.

Am Jur 2d, Homicide §§ 277, 529-535.

3. Criminal Law § 926 (NCI4th)— felony murder—attempted armed robbery—multiple counts

There was no prejudicial error in a prosecution for two counts of armed robbery and two counts of murder, even though defendant contended that the court's charge to the jury allowed the jury to convict defendant on two counts of felony murder without requiring the jury to find which of the two felonies was the basis for the finding of guilty of murder, because any error was cured by verdicts finding defendant guilty of both attempted armed robberies. It was obvious that the jury based its verdicts for felony murder on both the attempted armed robberies.

Am Jur 2d, Homicide § 79.

4. Criminal Law § 989 (NCI4th)— felony murder—sufficient evidence of underlying felony—motion to arrest judgment properly denied

The trial court properly denied defendant's motion to arrest judgment on a felony murder conviction where defendant contended that the court allowed the jury to convict him of felony murder based on either of two attempted armed robberies, that there was not sufficient evidence of one of the attempted armed robberies, and that it could not be determined upon which of the two felonies the jury based its verdict. There was sufficient evidence to convict defendant of the attempted armed robbery disputed by defendant.

Am Jur 2d, Homicide § 442.

APPEAL of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing two consecutive life sentences entered by *Britt (Joe Freeman), J.*, at the 9 January 1989 Criminal Session of Superior Court, CUMBERLAND County. Heard in the Supreme Court 14 December 1989.

The defendant was tried on two counts of first degree murder and two counts of armed robbery. The State sought the death penalty. Ralph William Houser testified for the State that he had lived in Fayetteville in a house with George McNeill and Charles Newton. On the night of 8 January 1988 Mr. Newton was not at home and Mr. Houser was there with George McNeill. At approximately 9:00 p.m. the two men heard a knock on the door and Mr. McNeill said "come in." The defendant entered carrying a shotgun. The defendant asked Mr. McNeill if he wanted to buy a gun and Mr. McNeill said he did not want to do so. Mr. Houser then testified that the defendant said, "[g]ive me your money." The defendant then shot Mr. McNeill and took Mr. McNeill's wallet from his pocket.

Mr. Houser testified further that after the defendant shot Mr. McNeill he pointed the gun at Mr. Houser and said, "[g]ive me your money." Mr. Houser testified he gave the defendant his billfold. The defendant then started to leave and met Charles Newton who was coming through the door. He shot Mr. Newton. Mr. McNeill and Mr. Newton died of the gunshot wounds.

The defendant testified that he went into the house and saw two men, one of whom was seated on a couch and the other in a chair. He said, "I was there to rob them. I was there for them to give me their money." He testified that he said "I'm here to get paid" and Mr. McNeill said, "Don't point that gun at me." The defendant testified that Mr. McNeill reached for his back pocket and started to get up, at which time he shot Mr. McNeill. The defendant testified further, "I started turning around. The gentlemen on my left, the first man that was—that I seen when I came in the door, he was—He said, 'Don't shoot me. Don't shoot me.' He picked up—He took out his wallet and threw it under the coffee table. I told him, I said, you know, 'Shut up,' you know. 'I'm not going to hurt you. Shut up.' I was trying to get out of the door." The defendant testified as he started out the door Mr. Newton started to enter the house through the door. The defendant then shot Mr. Newton.

The jury returned verdicts of guilty of attempted armed robbery in each of the two armed robbery cases and guilty of first degree murder based on felony murder in each of the two murder cases. In one murder case the jury recommended life in prison. In the other murder case the jury could not agree as to the sentence. The court arrested judgment in the two attempted armed robbery convictions and sentenced the defendant to consecutive life sentences in the murder cases. The defendant appealed.

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

James R. Parish for the defendant appellant.

WEBB, Justice.

The defendant brings forward several assignments of error. One assignment of error deals with the jury charge as to the attempted armed robbery convictions. The court arrested judgment on these two counts and any error in the charge was harmless. We shall address the defendant's other assignments of error.

[1] The defendant argues that there was not sufficient evidence to support a finding of the attempted armed robbery of Ralph Houser. He says that because this is so he was convicted of felony murder based on the erroneous finding of the underlying felony and he must have a new trial. The defendant argues that all the evidence shows the robbery was completed. We have held in *State v. White*, 322 N.C. 506, 369 S.E.2d 813 (1988), that armed robbery and attempted armed robbery are two separate crimes.

We believe there was sufficient evidence for the jury to find an attempted armed robbery by the defendant of Mr. Houser. It is true that Mr. Houser testified to a completed armed robbery. The defendant testified, however, that when he went into the house he intended to rob both men. After he shot Mr. McNeill, Mr. Houser asked the defendant not to shoot him and threw his wallet toward the defendant. The defendant left without taking the wallet. This is evidence from which the jury could find all the elements of attempted armed robbery. *State v. Allison*, 319 N.C. 92, 352 S.E.2d 420 (1987). It was not error for the court to submit attempted armed robbery of Ralph Houser to the jury and this evidence supports a verdict of felony murder based on the attempted armed robbery.

[2] The defendant next assigns error to the charge. He says, "The instructions, taken as a whole, failed to sufficiently separate the four cases and fail to insure separate consideration by the jury of the Defendant's guilt or innocence on each count." He says first that the court did not give an adequate instruction that the charges must be considered separately. He says further that the court in other parts of the charge "served to cloud the issue of individual treatment of the charges and victims." He says that a charge susceptible to the interpretation that the four distinct charges should be determined together on the issue of guilt unconstitutionally lessens the burden of the State. *See Francis v. Franklin*, 471 U.S. 307, 85 L.Ed.2d 344 (1985); *In re Winship*, 397 U.S. 358, 25 L.Ed.2d 368 (1970).

The defendant asked the court to charge as follows:

> The defendant, Shawn Odell Blake, is charged with four independent offenses. Each charge and the evidence pertaining to it should and must be considered separately. The fact that you may find the Defendant guilty or not guilty as to one of the offenses charged should not control your verdict as to any other offenses charged.

The court declined this charge and the defendant requested the following charge in the alternative:

> The Defendant, Shawn Odell Blake, is charged with four independent offenses. Each charge and the evidence pertaining to it must be considered separately. The fact that you may find the defendant guilty or not guilty as to one of the offenses charged with respect to a particular alleged victim should not control the question of guilt or innocence as to any other offense charged relating to another particular alleged victim.

The court declined this charge as well, but instructed as follows:

> Now, the Defendant, Shawn Odell Blake, is charged with four independent offenses. Each charge and the evidence pertaining to it should and must be considered separately.

The court charged the jury substantially as requested by the defendant except that the court did not charge that the fact that the jury found the defendant guilty or not guilty on one charge should not affect the verdict on another charge. We do not believe

this would keep the jury from understanding it was required to consider each charge separately as instructed by the court.

[3] In the court's charge to the jury on the felony murder counts the court instructed the jury it could find the defendant guilty of felony murder if it found beyond a reasonable doubt, among other things, "that the defendant intended to rob George McNeill or Ralph Houser" and "that he used the firearm in such a way as to endanger or threaten the life of George McNeill or Ralph Houser." The defendant contends this charge allowed the jury to convict the defendant on two counts of felony murder without requiring the jury to find which of the two felonies was the basis for finding the defendant guilty of murder. The defendant also says this charge did not require a unanimous verdict because some members of the jury could have based their murder verdicts on one of the attempted armed robberies and the other members could have based their verdicts on the other attempted armed robbery. We hold that any error on this portion of the charge was cured by the verdicts of the jury. The jury found the defendant guilty of both the attempted armed robberies. We believe it is obvious that the jury based its verdicts for felony murder on both the attempted armed robberies. Both killings took place during the attempted armed robberies.

[4] The defendant argues under his last assignment of error that the court erred in overruling his motion to arrest judgment on the conviction of the murder of Charles Newton. He says the court allowed the jury to convict him of felony murder based on the felony of attempted armed robbery of George McNeill or the attempted armed robbery of Ralph Houser. The defendant argues that there was not sufficient evidence to convict him of the attempted armed robbery of Ralph Houser and because we cannot tell upon which of the two felonies the jury based its verdict, the verdict should have been arrested. We have held there was sufficient evidence to convict the defendant of the attempted armed robbery of Ralph Houser. This assignment of error is overruled.

No error.

STATE OF NORTH CAROLINA v. CORNELIUS CANNON AND DAVID LEE REDMOND (REDMAN)

No. 21A89

(Filed 18 January 1990)

Criminal Law § 150 (NCI4th)— sentencing—defendants' refusal to accept plea bargain—consideration by court—new sentencing hearing

Defendants' constitutional right to a jury trial was abridged and they are entitled to a new sentencing hearing in an armed robbery case where the trial court, upon being advised that defendants had refused to accept a plea bargain and demanded a jury trial, told counsel in no uncertain terms that if defendants were convicted he would give them the maximum sentence. The Fair Sentencing Act did not insulate the pretrial remarks of the trial court from the sentencing process since it cannot be concluded that the sentences imposed were based solely upon the evidence, the argument of counsel, the aggravating and mitigating factors found by the trial court, and the balancing of those factors.

Am Jur 2d, Criminal Law §§ 481, 483, 504.

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 in 92 N.C. App. 246, 374 S.E.2d 604 (1988), which found no error in the judgment entered by *Llewellyn, J.*, at the 14 December 1987 Criminal Session of Superior Court, LENOIR County. Heard in the Supreme Court 13 September 1989.

Lacy H. Thornburg, Attorney General, by Robert G. Webb, Special Deputy Attorney General, and E. Burke Haywood, Associate Attorney General, for the state.

Malcolm Ray Hunter, Appellate Defender, by Teresa A. McHugh, Assistant Appellate Defender, for the defendant-appellant Cannon.

William D. Spence for the defendant-appellant Redmond (Redman).

MARTIN, Justice.

Upon the single issue raised on this appeal, we hold that the trial judge erred and defendants are entitled to a new sentencing hearing.

At the commencement of this trial on armed robbery charges, a lengthy voir dire hearing was conducted to determine the admissibility of identification evidence—not only were there two eyewitnesses, the robbery was also recorded by a video camera and defendants were apprehended hiding under a house shortly after the robbery. After ruling that the identification evidence was admissible, the trial judge held an unrecorded bench conference about the possibility of a negotiated plea of guilty. Upon being advised that defendants demanded a jury trial, the trial judge told counsel in no uncertain terms that if defendants were convicted he would give them the maximum sentence. Both defendants were so advised by their attorneys.

The following appears in the record:

> Mr. Wooten: I wanted to put in the record for perhaps future reference that Mr. Cannon has been offered a plea bargain for less than the maximum term that could be imposed for robbery with a dangerous weapon. I have advised him that considering the evidence it is my personal recommendation that he would probably want to consider and accept that offer and he has advised me he does not want to accept it. He wants to maintain the entry of his plea of not guilty and to be tried by a jury.
>
> Mr. Turner: Your Honor, on December 14th I had several conferences with the defendant Redman concerning all of the evidence that was available to us at that time and that we felt like that would be presented. I advised him that in my opinion that I felt the likelihood of a conviction was very likely in my professional opinion.
>
> He also has been offered a plea bargain whereby he would receive fourteen years and he also has been advised that if he is convicted he could receive an active sentence of considerably more than that.

On December the 14th he advised me in writing that he wished to proceed with the trial and even though that is contrary to my advice.

. . . .

Court: They've been put on notice and I hope that both of you gentlemen have indicated to your clients what I have indicated to you would be the penalty in the event of a conviction in this case.

Mr. Turner: I have done so numerous times.

Mr. Wooten: I wrote it out on one occasion and he signed it and I told him that he would receive the maximum of forty (40) years.

Defendant Cannon was sentenced to thirty-five years imprisonment and Redmond to thirty years imprisonment. The trial judge found the prior conviction aggravating factor as to both defendants and a mitigating factor of being impaired by a drug as to defendant Cannon.

We conclude that the principles of *State v. Boone*, 293 N.C. 702, 293 S.E.2d 459 (1977) control this appeal. Where it can reasonably be inferred from the language of the trial judge that the sentence was imposed at least in part because defendant did not agree to a plea offer by the state and insisted on a trial by jury, defendant's constitutional right to trial by jury has been abridged, and a new sentencing hearing must result.

"No person shall be convicted of any crime but by the unanimous verdict of a jury in open court." N.C. Const. art. I, § 24. A criminal defendant may not be punished at sentencing for exercising this constitutional right to trial by jury. *State v. Boone*, 293 N.C. 702, 293 S.E.2d 459. *See State v. Benfield*, 264 N.C. 75, 140 S.E.2d 706 (1965).

The state contends that the Fair Sentencing Act insulates the pretrial remarks of the trial judge from the sentencing process. We do not agree. The Act does enable an appellate court to make a meaningful determination of whether the trial judge could properly sentence a defendant to more than the presumptive term. But it is only after all possible aggravating and mitigating factors are considered that the trial judge should determine the appropriate sentence. N.C.G.S. § 15A-1340.4 (1988). Here, the trial judge stated

his intended sentence even before the evidence was presented to the jury on the issue of guilt. We cannot conclude that the sentences imposed were based solely upon the evidence, the argument of counsel and the aggravating and mitigating factors found by the trial judge and the balancing of those factors.

It is true that defendants in this case are undeniably guilty, and the jury so found. Nevertheless, constitutional rights extend to the guilty, and when they are violated the constitutional protections of all citizens are weakened.

We further note that such remarks by judges may cut both ways: if defendants had pleaded guilty *after* they heard the trial judge's remarks, serious constitutional questions would have arisen as to the voluntariness of the pleas. *State v. Benfield*, 264 N.C. 75, 140 S.E.2d 706 (defendants' change of not guilty plea to guilty following the judge's statement that if convicted defendants could expect "a long sentence," held on appeal to be an involuntary plea of guilty).

The decision of the Court of Appeals is reversed and this cause is remanded to that court for further remand to the Superior Court, Lenoir County, for a new sentencing hearing as to both defendants.

Reversed and remanded.

STATE OF NORTH CAROLINA v. KENNETH FREEMAN

No. 300A88

(Filed 18 January 1990)

Homicide § 18.1 (NCI3d) — murder — evidence of premeditation and deliberation — sufficient

There was sufficient evidence of premeditation and deliberation to submit to the jury where defendant entered the yard of the victim, placed a bucket under a window of the victim's house, stood on the bucket, aimed a .22 rifle through a window at the victim, fired the rifle at the victim, and killed him. Although the State introduced an exculpatory statement by defendant to an accomplice that might be interpreted to say

that they might have to wound the victim but not kill him, the statement was made approximately one week before the commission of the crime and the way the crime was committed contradicted the statement. The introduction by the State of exculpatory statements by the defendant does not prevent the State from introducing evidence which shows facts concerning the crime to be different from the incident as described by the exculpatory statements.

Am Jur 2d, Homicide §§ 340, 342, 438, 439.

APPEAL of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a life sentence entered by *Hobgood (Robert H.)*, *J.*, at the 7 March 1988 Criminal Session of Superior Court, CUMBERLAND County. The defendant's motion to bypass the Court of Appeals as to sentences imposed on burglary and larceny convictions was allowed. Heard in the Supreme Court 11 December 1989.

The defendant was tried for first degree murder, first degree burglary and felonious larceny. The State sought the death penalty. The State's evidence showed that the body of Jonas Buxton was found on 25 November 1986 in his home. He had died from bleeding caused by a gunshot wound to his head.

Elton Crocker testified for the State pursuant to a plea bargain under which he was allowed to plead guilty to first degree burglary and second degree murder for which he would receive no more than life in prison. Crocker testified that approximately one week before the incident he and the defendant discussed robbing Mr. Buxton. The defendant said it might be necessary to shoot Mr. Buxton to keep him "under control." Crocker testified further that on 24 November 1986 he was driven to Mr. Buxton's home by the defendant. He testified that the defendant placed a bucket under a window of Mr. Buxton's home, stood on the bucket and fired a .22 rifle through the window. The defendant then kicked the door in and the two men entered Mr. Buxton's home. Crocker then testified that he could hear a wheezing sound and saw Mr. Buxton lying on the bedroom floor. The defendant then went into the bedroom, turned Mr. Buxton over, and covered him with clothes and other objects. The two men then took several items from the house and left.

The court submitted to the jury the issue of the defendant's guilt of first degree murder on two separate theories, that the

murder was premeditated and deliberated and that it was committed pursuant to the felony of burglary. The jury found the defendant guilty of all three charges and based the verdict as to first degree murder on both theories submitted. The jury recommended that defendant be sentenced to life in prison on the murder charge. The court imposed sentences of life in prison for the murder, forty years for the burglary, and eight years for the larceny with all sentences to be served consecutively. The defendant appealed.

Lacy H. Thornburg, Attorney General, by Ellen B. Scouten, 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 argues to this Court that there was insufficient evidence of premeditation and deliberation to submit to the jury. He says this is so because there is no evidence the defendant intended to kill the victim. For this reason, says the defendant, the only theory upon which the murder conviction can stand is felony murder, which means the conviction of burglary must be arrested. *See State v. Small*, 293 N.C. 646, 239 S.E.2d 429 (1977). The question brought forward by the defendant in this appeal is whether there is substantial evidence that the defendant intended to kill Jonas Buxton.

It would seem that evidence that the defendant entered the yard of Mr. Buxton, placed a bucket under a window of Mr. Buxton's house, stood on the bucket, aimed a .22 rifle through the window at Mr. Buxton, and fired the rifle at Mr. Buxton, killing him, should be substantial evidence from which the jury could find beyond a reasonable doubt that the defendant intended to kill Mr. Buxton and that he did so with premeditation and deliberation. *State v. Jackson*, 317 N.C. 1, 343 S.E.2d 814 (1986). The defendant, however, says this is not so. He says that the State's evidence, which is uncontradicted, shows the defendant did not intend to kill Mr. Buxton. He bases this argument primarily on the statements made by defendant to Crocker before the shooting that they might have to shoot Mr. Buxton in the shoulder to keep him "under control." The defendant says this shows the defendant did not intend to kill Mr. Buxton and the State is bound by this uncontradicted exculpatory statement. When the State introduces exculpatory

statements of a defendant which are not contradicted or shown to be false by any other facts or circumstances, the State is bound by these statements. *State v. Carter*, 254 N.C. 475, 119 S.E.2d 461 (1961). The introduction by the State of exculpatory statements by the defendant, however, does not prevent the State from introducing evidence which shows facts concerning the crime to be different from the incident as described by the exculpatory statements. *State v. Rook*, 304 N.C. 201, 283 S.E.2d 732 (1981).

In this case the State has introduced evidence which shows the facts to be different from those described in the exculpatory statement of the defendant. The statement was made approximately one week before the commission of the crime. In the light most favorable to the defendant it might be interpreted to say that they might have to wound the victim but not kill him. The way the crime was committed contradicted this statement. The defendant did not shoot the victim so as to wound him. He aimed the gun at the victim at short range and shot him in the head. This showed an intent to kill. The defendant's conduct after the shooting also showed an intent to kill. He did not try to aid the victim but covered Mr. Buxton with clothes and other objects so that he could not be seen and left him to die. This also showed an intent to kill. *State v. Jackson*, 317 N.C. 1, 343 S.E.2d 814. We hold there was sufficient evidence for the jury to find the defendant intentionally killed Mr. Buxton with premeditation and deliberation.

No error.

MANEOLA S. JENNINGS v. HELOISA JESSEN

No. 247A89

(Filed 18 January 1990)

APPEAL of right by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 93 N.C. App. 731, 379 S.E.2d 53 (1989), affirming the judgment of *Friday, J.*, at the 15 September 1987 Session of Superior Court, FORSYTH County. Heard in the Supreme Court 11 December 1989.

Molitoris & Connolly, by Theodore M. Molitoris, for plaintiff-appellee.

William L. Durham for defendant-appellant.

PER CURIAM.

For the reasons stated in the dissenting opinion of Greene, J., the decision of the Court of Appeals is reversed. The judgment of the trial court is vacated. The cause is remanded to the Court of Appeals for further remand to the Superior Court, Forsyth County, for new findings, new conclusions, and the entry of a new order.

Reversed and remanded.

WALTERIA M. SPAULDING v. R. J. REYNOLDS TOBACCO COMPANY, INC.

No. 254A89

(Filed 18 January 1990)

APPEAL by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 93 N.C. App. 770, 379 S.E.2d 49 (1989), affirming an order of summary judgment for defendant entered by *DeRamus, J.*, on 28 January 1988 in Superior Court, FORSYTH County. Heard in the Supreme Court 12 December 1989.

Kennedy, Kennedy, Kennedy and Kennedy, by Harold L. Kennedy, III and Harvey L. Kennedy, for plaintiff-appellant.

Womble, Carlyle, Sandridge & Rice, by W. Andrew Copenhaver, M. Ann Anderson and Richard L. Rainey, for defendant-appellee.

PER CURIAM.

Affirmed.

STATE OF NORTH CAROLINA v. KENNETH DUANE FARRIS

No. 225PA89

(Filed 18 January 1990)

ON the State of North Carolina's petition for discretionary review of the decision of the Court of Appeals, 93 N.C. App. 757, 379 S.E.2d 283 (1989), which overruled the judgment of *Cornelius, J.*, at the 28 March 1988 session of Superior Court, YADKIN County, and granted a new trial to defendant. Heard in the Supreme Court 13 December 1989.

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

Malcolm Ray Hunter, Appellate Defender, by Teresa A. McHugh, Assistant Appellate Defender, for the defendant-appellee.

PER CURIAM.

Discretionary review improvidently allowed.

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

ADAMS v. MOORE

No. 565P89

Case below: 96 N.C.App. 359

Petition by defendants for discretionary review pursuant to G.S 7A-31 denied 18 January 1990.

ALBERTI v. MANUFACTURED HOMES, INC.

No. 371PA89

Case below: 94 N.C.App. 754

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 18 January 1990.

AMERICAN MULTIMEDIA, INC. v.
FREEDOM DISTRIBUTING, INC.

No. 486P89

Case below: 95 N.C.App. 750

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 18 January 1990.

BARKER v. AGEE

No. 479P89

Case below: 95 N.C.App. 661

Petition by third-party defendant for discretionary review pursuant to G.S. 7A-31 denied 18 January 1990.

BARROW v. MURPHREY

No. 500P89

Case below: 95 N.C.App. 738

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 18 January 1990.

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

BOLTON CORP. v. STATE OF NORTH CAROLINA

No. 476P89

Case below: 95 N.C.App. 596

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 18 January 1990.

CITY FINANCE CO. v. MASSEY MOTOR CO.

No. 461P89

Case below: 95 N.C.App. 623

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 18 January 1990.

DAILY v. MANN MEDIA, INC.

No. 503P89

Case below: 95 N.C.App. 746

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 18 January 1990.

FISHER v. MELTON

No. 480A89

Case below: 95 N.C.App. 729

Petition by defendant, Lillie P. Melton, pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues allowed 18 January 1990. Petition by defendant Lassiter for discretionary review pursuant to G.S. 7A-31 allowed 18 January 1990. Petition by defendants Batts for discretionary review pursuant to G.S. 7A-31 allowed 18 January 1990.

FLOTO v. PIED PIPER RESORT

No. 538P89

Case below: 96 N.C.App. 241

Petition by plaintiffs for writ of supersedeas and temporary stay denied 28 December 1989. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 18 January 1990.

IN RE ESTATE OF BRYANT

No. 501P89

Case below: 95 N.C.App. 782

Petition by George A. Bryant for discretionary review pursuant to G.S. 7A-31 denied 18 January 1990.

IN RE WILL OF PENLEY

NO. 454P89

Case below: 95 N.C.App. 655

Petition by propounders for discretionary review pursuant to G.S. 7A-31 denied 18 January 1990.

JENKINS v. CITY OF KINGS MOUNTAIN

No. 511P89

Case below: 95 N.C.App. 661

Motion by defendants to dismiss appeal for lack of substantial constitutional question allowed 18 January 1990. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 18 January 1990.

LORMIC DEVELOPMENT CORP. v.
NORTH AMERICAN ROOFING CO.

No. 498P89

Case below: 95 N.C.App. 705

Petition by defendant (Diversitech General) for discretionary review pursuant to G.S. 7A-31 denied 18 January 1990.

LYNCH v. NEWSOM

No. 527P89

Case below: 96 N.C.App. 53

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 18 January 1990.

McLAUGHLIN v. MARTIN

No. 492P89

Case below: 95 N.C.App. 782

Petition by defendant (IRFFNC) for discretionary review pursuant to G.S. 7A-31 denied 18 January 1990.

McMAHAN v. STOGNER

No. 491P89

Case below: 95 N.C.App. 764

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 18 January 1990.

OWENS v. PEPSI COLA BOTTLING CO.

No. 440PA89

Case below: 95 N.C.App. 47

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 18 January 1990.

PARKS CHEVROLET v. McILWAINE

No. 468P89

Case below: 95 N.C.App. 661

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 18 January 1990.

PIEDMONT & WESTERN INVESTMENT CORP. v. CARNES-MILLER GEAR CO.

No. 507P89

Case below: 96 N.C.App. 105

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 18 January 1990. Motion by plaintiff to amend petition allowed 18 January 1990.

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

POORE v. SWAN QUARTER FARMS

No. 430P89

Case below: 95 N.C.App. 449

Petition by defendant (Mary H. Van Dorp) for discretionary review pursuant to G.S. 7A-31 denied 18 January 1990. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 18 January 1990.

RICH v. WRIGHT

No. 470P89

Case below: 95 N.C.App. 661

Petition by defendant (Wright) for discretionary review pursuant to G.S. 7A-31 denied 18 January 1990.

SHOOK v. SHOOK

No. 473P89

Case below: 95 N.C.App. 578

Appeal by plaintiff dismissed 18 January 1990. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 18 January 1990.

SISTARE v. HOISINGTON

No. 499P89

Case below: 96 N.C.App. 121

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 18 January 1990.

SNEAD v. FOXX

No. 490PA89

Case below: 95 N.C.App. 723

Petition by defendant (Foxx) for discretionary review pursuant to G.S. 7A-31 allowed 18 January 1990.

SNOW v. EAST

No. 526P89

Case below: 96 N.C.App. 59

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 18 January 1990.

STATE v. AVERY

No. 475P89

Case below: 95 N.C.App. 572

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 18 January 1990. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 18 January 1990.

STATE v. BAKER

No. 441P89

Case below: 92 N.C.App. 755

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 18 January 1990.

STATE v. BURNETTE

No. 525P89

Case below: 96 N.C.App. 122

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 18 January 1990.

STATE v. CARROLL

No. 535P89

Case below: 90 N.C.App. 771

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals dismissed 18 January 1990.

STATE v. EVERHARDT

No. 515PA89

Case below: 96 N.C.App. 1

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 18 January 1990 with review limited to questions as to (1) whether mental injury will support the element of "serious injury" required for a conviction under G.S. 14-31; and, if not, (2) whether the evidence was sufficient to support a finding of physical injury.

STATE v. HATCHER

No. 556P89

Case below -- N.C.App. ---

Petition by defendant for a writ of certiorari to review the order of the North Carolina Court of Appeals allowed 18 January 1990 for the limited purpose of entering the following order: The order of Judge Brooks entered 7 July 1989 and the order of Judge Farmer entered 5 September 1989 are hereby vacated in the exercise of this Court's supervisory powers over the trial division; the case is remanded for further proceedings not inconsistent with this order, without prejudice to defendant's right to file further motions for pro hac vice appearances of counsel which meet the requirements of NCGS Section 84-4.1. Any such motions shall be determined in the trial court's discretion.

STATE v. HOFFMAN

No. 474P89

Case below: 95 N.C.App. 647

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 18 January 1990.

STATE v. LEE

No. 516P89

Case below: 96 N.C.App. 122

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 18 January 1990.

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

STATE v. McKOY

No. 449P89

Case below: 92 N.C.App. 115

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 18 January 1990.

STATE v. MANNING

No. 563P89

Case below: 96 N.C.App. 502

Petition by the Attorney General for temporary stay allowed 28 December 1989.

STATE v. MAXWELL

No. 466P89

Case below: 96 N.C.App. 19

Petition by the Attorney General for discretionary review pursuant to G.S. 7A-31 denied and stay dissolved 18 January 1990.

STATE v. MOORE

No. 502PA89

Case below: 95 N.C.App. 718

Petition by the Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 18 January 1990.

STATE v. SUMLIN

No. 513P89

Case below: 96 N.C.App. 123

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 18 January 1990.

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

STATE v. THOMAS

No. 3P90

Case below: 96 N.C.App. 515

Petition by defendant for temporary stay allowed 12 January 1990.

STEVE DICKSON BUILDERS v. WHITTINGTON

No. 463P89

Case below: 95 N.C.App. 783

Petition by the Whittingtons for discretionary review pursuant to G.S. 7A-31 denied 18 January 1990.

TATE v. ACTION MOVING & STORAGE

No. 472P89

Case below: 95 N.C.App. 541

Petition by defendant (Action Moving & Storage) for discretionary review pursuant to G.S. 7A-31 denied 18 January 1990.

THRASH v. CITY OF ASHEVILLE

No. 455A89

Case below: 95 N.C.App. 649

Petition for discretionary review filed by plaintiffs (Thrash) pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues denied 18 January 1990. Petition by plaintiffs (Tyndall, et al.) for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues denied 18 January 1990. Petition by plaintiff (BASF) for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues denied 18 January 1990.

WATERHOUSE v. CAROLINA LIMOUSINE MANUFACTURING

No. 532P89

Case below: 96 N.C.App. 109

Petition by intervenors for writ of certiorari to the North Carolina Court of Appeals denied 18 January 1990.

WEBBER v. ITHACA INDUSTRIES

No. 497P89

Case below: 95 N.C.App. 783

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 18 January 1990.

STATE OF NORTH CAROLINA v. RICKY LEE PRICE

No. 585A87

(Filed 7 February 1990)

1. **Jury § 6.4 (NCI3d)— first degree murder—jury selection—questions concerning death penalty**

The trial court did not err in a first degree murder prosecution by sustaining the State's objection during jury selection to the question of whether a potential juror felt it would be necessary for the State to show additional aggravating factors before he would vote to impose the death penalty. Although it is proper to inquire whether jurors can follow the law as charged, it is neither analogous nor proper to ask questions designed to gauge jurors' approval or to test their comprehension of the law. Moreover, inquiry into a juror's fitness to serve is within the discretion of the trial court.

Am Jur 2d, Jury §§ 289, 290.

2. **Jury § 7.14 (NCI3d)— first degree murder—jury selection—use of peremptory challenges—jurors opposed to death penalty**

The constitutional rights of a defendant in a first degree murder prosecution were not violated by the State's use of peremptory challenges to purge the jury of prospective jurors expressing reservations about the death penalty. Amendments Six and Fourteen of the U. S. Constitution, Article I, § 19 of the North Carolina Constitution.

Am Jur 2d, Jury § 237.

3. **Jury § 7.12 (NCI3d)— first degree murder—jury selection—reservations about death penalty—excusal for cause**

The trial court did not err in a first degree murder prosecution by excusing for cause two jurors who expressed reservations about the death penalty without asking whether they could conscientiously apply the law as charged by the court despite their objections. The trial court did not err in concluding that those jurors fit the profile of jurors appropriately excludable for cause as described in *Adams v. Texas*, 448 U.S. 38, and its progeny; furthermore, it is apparent from the response of both prospective jurors here that they could

not have considered the death penalty objectively under any circumstances.

Am Jur 2d, Jury §§ 289, 290.

4. Criminal Law § 34.8 (NCI3d)— first degree murder—other offenses—admissible

The trial court did not err in a first degree murder prosecution by admitting testimony describing two instances of prior misconduct involving a prior murder and a hostage taking. Testimony regarding a "virtually identical murder" committed less than seventy-two hours before the murder for which defendant was on trial lends more ballast to the act than to the character of the actor, and testimony regarding an incident occurring less than forty-eight hours after the second murder in which defendant admitted having killed more than once was similarly of substantive value and patently tipped the scales away from any unfair prejudicial effect. Moreover, the trial court was careful to divert the jury's attention away from character and towards purposes for which the evidence was deemed admissible by N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Homicide §§ 310-313.

5. Criminal Law § 34.8 (NCI3d)— first degree murder—prior misconduct—admissible

The trial court did not err in a first degree murder prosecution by admitting testimony from a woman with whom defendant had previously lived that she had heard defendant call her name outside the bedroom of her mobile home, that this had frightened her, and that she had discovered the next morning that the screens had been removed from the two bedroom windows. The temporal proximity of the incident to the crime charged, to another murder, and to a hostage-holding, plus the fact that it was an intrusion upon the privacy of a former girlfriend, clearly demonstrate its admissibility for several purposes cited in N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Homicide §§ 310-313.

6. Criminal Law § 357 (NCI4th)— first degree murder—witness embraced by victim's family member—motion to strike testimony—denied

The trial court did not err in a first degree murder prosecution by denying defendant's motion to strike identification

testimony from a witness who was embraced by a member of the victim's family after testifying. The embrace shared no similarities with the victim impact statements condemned in *Booth v. Maryland*, 482 U.S. 496; the only reference in the record to the embrace indicates that it occurred after court was over and there is no indication that it was viewed by members of the jury. The trial court concluded in denying defendant's motion to strike that the witness and the family member were not acquainted and that the embrace was no more than a display of encouragement and gratitude.

Am Jur 2d, Homicide §§ 536, 537.

7. Criminal Law § 66.9 (NCI3d)— first degree murder—photographic identification—no substantial likelihood of misidentification

The photographic identification procedure used by officers in a first degree murder prosecution was unnecessarily suggestive but did not lead to a substantial likelihood of misidentification where the procedure entailed a random display of two sets of photographs; the first set depicted six wedding groups or couples; the second was a pair of black and white photographs, one of which was a blowup of defendant's face from his wedding photograph; all but the photograph of defendant and his bride in the first set measured eight-by-ten inches; defendant's photo measured only four-by-six inches; and the appearance of each male other than defendant differed from the general description given to officers. The conditions were amply beneficial for two witnesses to have had an excellent opportunity to view defendant's profile and physique; both were concentrating acutely on what they were seeing; both described in remarkable detail salient facial and general physical features of the man they had seen; both were so certain that they had identified the right man that each testified that defendant was he unless he had a double or an identical look-alike; and less than thirty hours passed between their seeing the man in the woods and selecting defendant's photographs. A third witness was not permitted to identify defendant in court but was allowed only to describe the man he saw on the morning of the murder, and that description was not tainted because the witness was shown only the wedding photographs and did not experience the duplication of defendant's face into black and white. The witness's description of the man he saw

was general enough to be perfectly consistent with the viewpoint of one driving past and none of the characteristics described by the witness were so noteworthy that it was more likely to have originated in a view of the photographs than a view of defendant on the morning of the crime.

Am Jur 2d, Evidence §§ 371.4-371.8, 372.

8. **Homicide § 15.2 (NCI3d)— first degree murder—defendant's history of mental illness—excluded—no error**

The trial court did not err in a first degree murder prosecution by restricting defendant's attempts to cross-examine two witnesses about what they knew or had observed of defendant's history of mental illness and aberrant behavior. When a defendant has made a tactical choice not to exercise his right to call witnesses or to present a defense, it is well within the trial court's discretion to require that all of a document be offered into evidence rather than merely those self-serving portions reflecting upon defendant's mental balance, and to exclude hearsay testimony of defendant's hospitalization for mental problems.

Am Jur 2d, Homicide §§ 292, 293.

9. **Criminal Law §§ 69, 80 (NCI3d)— first degree murder—telephone conversation with victim—admission not prejudicial error**

There was no prejudicial error in a first degree murder prosecution from the admission of testimony by the victim's parents that she had called them collect around 8:45 a.m. on the morning that she was killed; an officer's testimony that he had traced the number of the telephone from which the call was made to a telephone booth in Chapel Hill, twenty-two miles from where the victim's body was found; or from a statement by defendant that he was with the victim when she called her parents, which the court ruled had been freely, voluntarily, and understandingly made. It is well established that the identity of a caller may be established by testimony that the witness recognized the caller's voice; the testimony could have had no possible prejudicial impact on the outcome of defendant's trial when defendant admitted that he was with the victim when she called her parents; the officer's testimony was utterly insignificant; the telephone bill was admissible to corroborate the testimony of the victim's parents about

when they received the call from their daughter; the bill was not properly admitted for substantive purposes under the business records exception to the hearsay rule because there was no foundation; and admission of the bill for substantive purposes was not prejudicial in the face of the quantum of other evidence. N.C.G.S. § 8C-1, Rule 803(6); N.C.G.S. § 15A-1443(a).

Am Jur 2d, Homicide § 331.

10. Criminal Law § 43.4 (NCI3d)— first degree murder—photographs—admission no error

The trial court did not err in a first degree murder prosecution by admitting into evidence seven photographs where it was not apparent that the photographs were limited to illustrative use when they were introduced and defendant arguably waived his objection, and defendant's contentions were baseless not only with regard to the unobjectionable content of the photographs but also to their restrained use.

Am Jur 2d, Homicide § 416.

11. Criminal Law § 1361 (NCI4th)— first degree murder—sentencing—defendant's drug use—consideration limited for corroborative or impeachment purposes

The trial court did not err during the sentencing phase of a first degree murder prosecution by limiting testimony about defendant's drug use for corroborative or impeachment purposes where defendant's admission to the witness that he had used drugs in the indefinite past bore no relevance to the possibility that he was affected by drugs throughout the five-day period that included two murders. Moreover, the witness was permitted to testify to a demeanor that suggested drug use by defendant, and defendant's periodic use of drugs was described on the stand by defendant himself, by his mother, by a childhood friend, and by his psychiatrist.

Am Jur 2d, Criminal Law §§ 527, 598, 599, 628.

12. Criminal Law §§ 1337, 1347 (NCI4th)— first degree murder—aggravating circumstances—prior convictions involving violence—course of conduct

The evidence in the sentencing phase of a first degree murder prosecution supported the aggravating circumstances

of a previous conviction involving the use of violence to the person and that this murder was part of a course of conduct that included the commission of other crimes of violence. Although arson is arguably not an offense that inherently involves violence against another person or persons in the absence of inhabitants, when inhabitants are present and the perpetrator is aware of this fact, the act of igniting their dwelling is indisputably an act of violence. It is apparent from a review of the chronology of events that defendant's actions were all elements of a five-day rampage fueled by defendant's overcommitment to women.

Am Jur 2d, Criminal Law §§ 527, 598, 599, 628.

13. Criminal Law § 458 (NCI4th)— first degree murder—sentencing—argument concerning parole—not permitted

The trial court did not err during the sentencing portion of a first degree murder prosecution by not permitting defense counsel to argue to the jury anything concerning the possibility of parole or that the judge would be empowered to require a life sentence to commence at the termination of a life sentence defendant was then serving in Virginia. A criminal defendant's status under the parole laws is irrelevant to a determination of his sentence and an argument concerning the effect of consecutive life sentences upon the period of defendant's incarceration is equally irrelevant.

Am Jur 2d, Criminal Law §§ 627, 630; Trial §§ 229, 231.

14. Criminal Law § 436 (NCI4th)— first degree murder—sentencing—prosecutor's argument—lack of remorse

The trial court did not err during the sentencing portion of a first degree murder prosecution by failing to intervene ex mero motu when the prosecutor called the jury's attention to defendant's lack of remorse and his unwillingness to admit guilt. The State never cited remorselessness to the jury as aggravating conduct and urging jurors to focus on their observation that defendant showed no remorse relates to the demeanor displayed by defendant throughout the trial. Remarks rooted in observable evidence are not improper.

Am Jur 2d, Trial § 234.

15. Criminal Law § 447 (NCI4th)— first degree murder—sentencing—prosecutor's argument on rights of victim

The trial court did not err in the sentencing portion of a first degree murder prosecution by not intervening ex mero motu when the prosecutor referred in his closing statement to the rights of the victim and her family. The personal qualities of the victim and the devastation wrought upon her family by her death were not invoked by the prosecutor's words in this case; these issues were the subject of mere allusion by the prosecutor; if improper, the error was de minimis; and it was well within the court's discretion not to intervene ex mero motu.

Am Jur 2d, Trial §§ 296-299.

16. Criminal Law § 442 (NCI4th)— first degree murder—sentencing—prosecutor's argument on sympathy

The trial court did not err in the sentencing phase of a first degree murder prosecution by not intervening ex mero motu where the prosecutor admonished the jury not to allow sympathy to inform their recommendation as to defendant's sentence. The prosecutor was plainly and properly admonishing the jurors that feelings of sympathy and forgiveness rooted in their hearts and not also in the evidence may not be permitted to affect their verdict, and the prosecutor made absolutely no reference to evidence offered by defendant in mitigation.

Am Jur 2d, Trial §§ 280, 281.

17. Criminal Law § 1323 (NCI4th)— first degree murder—sentencing—instructions on weighing aggravating and mitigating factors—no error

The trial court in its instructions in the sentencing portion of a first degree murder prosecution did not improperly emphasize the significance and weight of aggravating circumstances or tilt the scales toward aggravating circumstances with its definition of mitigating circumstances.

Am Jur 2d, Criminal Law §§ 598, 599, 628; Trial §§ 888, 892-894.

18. Criminal Law § 1323 (NCI4th)— first degree murder—sentencing—aggravating and mitigating circumstances—instructions

The trial court did not err during the sentencing portion of a first degree murder prosecution in its instructions on

weighing aggravating and mitigating factors where, read as a whole, the trial court's charge indicates no perceptible emphasis on aggravating over mitigating circumstances.

Am Jur 2d, Criminal Law §§ 598, 599, 628; Trial §§ 888, 892-894.

19. Criminal Law § 881 (NCI4th)— first degree murder—sentencing—jury hung—additional instructions—no abuse of discretion

The trial court did not abuse its discretion during the sentencing phase of a first degree murder prosecution by instructing the jury and giving it additional time for deliberations after the foreman indicated that the jury was hung. The jurors had before them two aggravating circumstances and ten mitigating circumstances; they deliberated for nearly four hours over two days; the trial judge heard all of the evidence in support of aggravating and mitigating factors, observed the jurors' demeanor, and instructed them according to the law as he determined it necessary to their comprehension of their duty as jurors; and the trial judge was then in the best position to determine how much time was reasonable for the jurors' deliberations regarding a recommendation for punishment under the facts of the case.

Am Jur 2d, Criminal Law § 303; Trial § 1109.

20. Criminal Law § 1325 (NCI4th)— first degree murder—sentencing—mitigating factors—requirement of unanimity

Requiring a jury to unanimously find mitigating circumstances in the sentencing portion of a first degree murder prosecution does not violate a defendant's rights under the Eighth Amendment to the U. S. Constitution.

Am Jur 2d, Homicide §§ 548, 553-555; Trial §§ 888, 892, 894.

21. Criminal Law § 1327 (NCI4th)— first degree murder—sentencing—instruction on duty to return death penalty

It is constitutional to inform a jury of its duty to return a recommendation of death when it finds mitigating circumstances insufficient to outweigh aggravating circumstances and the latter sufficiently substantial to call for the death penalty.

Am Jur 2d, Homicide §§ 548, 553-555; Trial §§ 888, 892, 894.

22. Constitutional Law § 63 (NCI3d)— death penalty—excusing for cause jurors opposed—constitutional

Excusing for cause jurors who have stated their opposition to the death penalty is constitutionally permissible.

Am Jur 2d, Jury §§ 289, 290.

23. Criminal Law § 1326 (NCI4th)— first degree murder—sentencing—mitigating circumstances—burden of proof

It is constitutional when sentencing defendant for first degree murder to place on defendant the burden of proving each mitigating circumstance by a preponderance of the evidence and to not require the State to prove the nonexistence of each proffered mitigating circumstance.

Am Jur 2d, Criminal Law §§ 598, 599.

24. Constitutional Law § 80 (NCI3d)— death penalty—constitutional

The North Carolina death penalty statutes, N.C.G.S. § 15A-2000 through -2003, are constitutional.

Am Jur 2d, Criminal Law §§ 628, 631; Homicide §§ 556, 557.

25. Criminal Law § 1373 (NCI4th)— first degree murder—sentencing—more than one murder—death not disproportionate

The death penalty for a first degree murder was not imposed arbitrarily or capriciously and was not disproportionate where defendant had killed more than once.

Am Jur 2d, Homicide §§ 552-554.

Justice FRYE concurring in result.

APPEAL of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing the sentence of death entered by *Hobgood, J.*, at the 8 September 1987 Criminal Session of Superior Court, PERSON County. Heard in the Supreme Court 14 December 1989.

Lacy H. Thornburg, Attorney General, by Barry S. McNeill, Assistant Attorney General, for the State.

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

WHICHARD, Justice.

Defendant was tried on a true bill of indictment charging him with murder in the first degree. The jury found him guilty as charged and recommended a sentence of death. Our scrutiny of the record of the guilt and sentencing phases of his trial reveals that both were conducted without prejudicial error.

At approximately 10:00 a.m. on Sunday, 21 October 1984, a man later identified as defendant was spotted squatting in the woods near Hurdle Mills by Anne and Tony Wrenn, who had been walking with their son. The couple later testified that the man had jumped up suddenly, snatched a shirt from the ground, and fled. Ray Farrish, a passenger in a car travelling on State Road 1001 near the same woods, testified that at about the same hour he saw a shirtless, white male, whom he later identified as defendant, running towards a light blue car parked on the roadside. Mr. Farrish saw the man fumble with keys and attempt to unlock the car door. When the car in which Mr. Farrish was riding returned twenty minutes later, the blue car was gone.

The Wrenns discovered that the man had been crouched over the body of Brenda Smith, who a forensic pathologist later testified had died of ligature strangulation with "something broad." The victim's hands were tied behind her body with a brown shoestring.

Evidence was introduced at defendant's trial tending to show that he had been responsible for the death by ligature strangulation of Joan Brady in Danville, Virginia, on October 19th, less than three days before Brenda Smith's body was found. The hands and feet of Ms. Brady had been bound similarly with shoelaces. The State's evidence also revealed that defendant had had romantic liaisons with each victim and that he had told a recent female acquaintance that he wanted to move in with her, partly to get away from Joan Brady.

In addition, witnesses for the State who had been in contact with defendant the day after Brenda Smith's body was found described an episode at the house of defendant's uncle, James Hardy, which resulted in defendant's arrest. Around 5:00 p.m. on Monday, 22 October 1984, defendant's cousin Darryl Gammon went to James Hardy's house. Gammon testified that he followed noises to the basement and there found Hardy bound and gagged. Defendant was behind a curtain with a flashlight and a knife. Gammon at-

tempted to restrain defendant with a gun, but defendant threatened him with the knife, then forced Gammon to release the gun by holding the knife to the throat of a fourth man. Police officers arrived, but defendant held them at bay for approximately five and one-half hours before he was arrested. In the interim, he uttered a number of incriminating statements, including the admissions that he had killed two people and would kill again, and that he was good with shoelaces. Both a class ring and a key chain belonging to Brenda Smith were found on defendant's person.

An inmate with whom defendant had been incarcerated pending his trial testified that defendant had admitted to killing Brenda Smith and Joan Brady. Defendant confided that he had been dating too many women, that he had been suffering from too much pressure, and that he had felt he had to eliminate somebody.

JURY SELECTION ISSUES

[1] Defendant's first assignments of error concern the selection of a jury for his trial. Defendant initially complains that the trial court erroneously sustained the State's objection to the question whether a potential juror "[felt] it should be necessary for the State to show additional aggravating circumstances before [he] would vote to impose the death penalty." Defendant argues that his question was proper because its intent was merely to plumb the potential juror's attitudes or prejudices; it did not impermissibly "stake out" the juror as to what his position might be under a given state of facts. *State v. Vinson*, 287 N.C. 326, 336, 215 S.E.2d 60, 68 (1975), *death penalty vacated*, 428 U.S. 902, 49 L. Ed. 2d 1206 (1976). He contends that the trial court's action thwarted his statutory right to conduct a voir dire examination of jurors in order "to ascertain whether there exist grounds for challenge for cause; and . . . to enable counsel to exercise intelligently the peremptory challenges allowed by law." *State v. Allred*, 275 N.C. 554, 558-59, 169 S.E.2d 833, 835 (1969) (quoting *State v. Brooks*, 57 Mont. 480, 486, 188 P. 942, 943 (1920)). We disagree.

Although it is proper under appropriate circumstances to inquire of jurors whether they can follow the law as charged by the court, *Adams v. Texas*, 448 U.S. 38, 45, 65 L. Ed. 2d 581, 589 (1980), it is neither analogous nor proper to ask questions designed to gauge jurors' approval or to test their comprehension of the law. Moreover, while counsel may inquire diligently into a juror's fitness to serve, the extent and manner of that inquiry rests within

the sound discretion of the trial court. *State v. Parks*, 324 N.C. 420, 423, 378 S.E.2d 785, 787 (1989). Defendant has failed to show either a clear abuse of discretion on the part of the trial court or resulting prejudice.

[2] Defendant next raises the issue that his constitutional rights under the sixth and fourteenth amendments to the United States Constitution and under article I, section 19 of the Constitution of North Carolina were violated by the State's use of peremptory challenges to purge the jury of prospective jurors expressing reservations about the death penalty. This Court, cognizant of arguments to the contrary, such as that articulated in *Brown v. Rice*, 693 F. Supp. 381 (W.D.N.C. 1988), has consistently rejected this position. *See, e.g., State v. Quesinberry*, 325 N.C. 125, 142-43, 381 S.E.2d 681, 692 (1989). Defendant presents no new reason for this Court now to question the soundness of its prior holdings in this regard.

[3] Defendant also contends that his right to conduct a voir dire of potential jurors was abridged when two jurors who had expressed reservations about the death penalty were excused for cause without being asked whether, despite such objections, they could "conscientiously apply the law as charged by the court." *Adams v. Texas*, 448 U.S. at 45, 65 L. Ed. 2d at 589. Both jurors expressed their opposition to the death sentence in unequivocal terms, even after defendant's attempt to rehabilitate them. In both instances the jurors answered in the affirmative to the State's question whether the jurors' feelings about the death penalty "would prevent or substantially impair" their ability to vote for or to impose the death penalty.

In *State v. Quesinberry*, 325 N.C. at 139, 381 S.E.2d at 690, we held that there was no error in asking prospective jurors whether their views about the death penalty would "prevent or substantially impair" their "ability to sit on [the jury.]" This inquiry effectively mirrored the words of the United States Supreme Court in *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52 (quoting *Adams v. Texas*, 448 U.S. at 45, 65 L. Ed. 2d at 589), that such a juror may be removed for cause if his views about the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."

In this case the State's similar narrowing of the *Wainwright* inquiry in order to determine whether jurors' reservations might

inhibit their consideration of the death penalty reiterates the essential language set out in *Adams* and *Wainwright*. Further, it is apparent from the responses of both prospective jurors here that they could not have considered the death penalty objectively under any circumstances, even under the guidance of the trial court's instructions. The trial court did not err in concluding that these jurors fit the profile of jurors appropriately excludable for cause as described in *Adams* and its progeny.

GUILT PHASE ISSUES

[4] Defendant assigns error to the admission of witnesses' testimony describing two instances of defendant's prior misconduct—the murder of Joan Brady and the incident of holding his uncle hostage. The first offense was recounted through the testimony of Joan Brady's sister, who discovered the body, and that of an investigating officer. This testimony was admitted, accompanied by the trial court's repeated instruction to the jury that such evidence was before it for the sole purpose of showing defendant's knowledge. Each witness described the appearance of the victim's body, found on Friday, 19 October 1984, face-down in bed, her limbs bound with shoelaces. The admission of the pathologist's testimony, which added that the victim had died as the result of a "soft ligature," like the handkerchief found knotted around her neck, was similarly restricted to the purpose of showing preparation, plan, or knowledge of the defendant. Defendant contends that this testimony was only "minimally relevant" and that its prejudicial effect outweighed any probative value.

Defendant restates this contention with regard to the testimony of his cousin Darryl Gammon and others, who recounted the details of defendant's act of holding his uncle hostage the day after Brenda Smith's death. Defendant assigns error as well to the admission of statements he made in the presence of officers who were summoned to the scene. These statements included defendant's admission that he was "good with shoelaces" and that he had "already killed two and one or two more wouldn't make any difference."

Upon defendant's motion to suppress evidence of both occurrences, the trial court conducted extensive voir dire, after which it concluded that testimony regarding the ligature strangulation of Joan Brady was "virtually identical prior misconduct" taking place only two and one-half days before the murder of Brenda Smith. The trial court held the pathologist's testimony admissible

under N.C.R. Evid. 404(b) for the purpose of showing preparation, plan or knowledge, as its charge to the jury later reflected.

Voir dire testimony reiterating statements defendant had made during the hostage-holding incident also was ruled relevant and admissible under Rule 404(b) for the limited purpose of showing motive, intent, preparation, plan, knowledge or identity. In addition, the trial court reported in its order that it had applied the balancing test stated in Rule 403 and found that the probative value of these statements substantially outweighed any prejudicial effect they might have.

Our appraisal of the testimony of which defendant complains convinces us that the trial court's assessment of its admissibility was accurate. This Court recently noted that Rule 404(b) was inspired by the observation in *State v. Young*, 317 N.C. 396, 346 S.E.2d 626 (1986), that evidence of prior offenses by a defendant is "inadmissible on the issue of guilt if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged." *State v. Artis*, 325 N.C. 278, 299, 384 S.E.2d 470, 481 (1989) (quoting *Young*, 317 N.C. at 412, 346 S.E.2d at 635). Rule 404(b), a codification of the *Young* rule, provides specific guidance as to how prior offenses might otherwise be relevant. The probative weight of such evidence and its "use . . . as permitted under Rule 404(b) is guided by two constraints: similarity and temporal proximity." *Id.* Factual disparity or the stretch of time dilute commonalities, and "the probative value of the analogy attaches less to the acts than to the character of the actor." *Id.* Conversely, testimony regarding a murder that was "virtually identical" committed less than seventy-two hours before the murder for which the defendant is on trial lends more ballast to the act than to the character of the actor. Under these circumstances, the probative value of such evidence is unassailable.

Testimony regarding an incident occurring less than forty-eight hours after the second murder, in which defendant admitted to having killed more than once, was similarly of substantial probative value and patently tipped the scales away from any unfair prejudicial effect. *See* N.C.G.S. § 8C-1, Rule 403 (1988). Following a voir dire, the trial court carefully assessed the admissibility of the testimony in accordance with statutory mandate and was careful to divert the jury's attention away from character and towards

the purposes for which evidence is deemed admissible by Rule 404(b). We hold that it did not err in doing so.

[5] We draw the same conclusion with regard to testimony by Janice Bates, a woman with whom defendant had lived from June 1983 to September 1984, which defendant contends was admitted despite its irrelevance and its tendency to serve only as evidence of his bad character. Ms. Bates testified that she heard defendant call her name outside the bedroom of her mobile home between 12:00 and 2:00 a.m. Monday, 22 October 1984, and that this had "frightened" her. The next morning she discovered that the screens had been removed from the two bedroom windows. In response to defendant's objection, the trial court again conducted voir dire and limited the witness' proffered testimony, ruling that what remained was relevant and that its probative value was not substantially outweighed by the danger of unfair prejudice, confusing the issues or misleading the jury.

Although the trial court did not assess the admissibility of Ms. Bates' testimony in terms of Rule 404(b) as it had for the Brady murder and the hostage-holding, it is clear this act was similarly offered to prove preparation, plan or knowledge. The temporal proximity of the incident recounted by Ms. Bates, not only to the crime charged, but also to the Brady murder and the hostage-holding, plus the fact that it was an intrusion upon the privacy of a former girlfriend, clearly demonstrate its admissibility for several of the purposes cited in Rule 404(b). Its fit into this pattern of incidents lends it probative value far exceeding any tendency to prejudice the jury, for the latter is at best negligible where the conduct exhibited by defendant was so much less blameworthy than that of the other two incidents. Although there was little if any probative value to Ms. Bates' admission that defendant's approach "frightened" her,[1] its prejudicial impact, if any, was *de minimis*, and could not possibly have had any effect on the jury's ultimate verdict. N.C.G.S. § 15A-1443(a) (1988).

[6] Defendant also contends that the trial court erroneously denied his motion to suppress in-court identification or other identification testimony by the Wrenns and by Ray Farrish. His objections to

1. The trial court admonished the witness in its ruling on the admissibility of her testimony that she was not to indicate to the jury the reason for that fear—that police officers had visited her home that afternoon in their search for defendant and had divulged that defendant was suspected in two murders.

the testimony of Ms. Wrenn are twofold. First he notes the fact that after testifying, Ms. Wrenn was embraced by a member of the victim's family, and he argues that this act violates proscriptions stated in *Booth v. Maryland*, 482 U.S. 496, 96 L. Ed. 2d 440, *reh'g denied*, 483 U.S. 1056, 97 L. Ed. 2d 820 (1987), against putting before the jury written commentary on the loss felt by the victim's family. This application of the precepts stated in *Booth* distorts its rationale. A spontaneous embrace shares no similarities with the presentation to the jury of "victim impact statements" condemned in *Booth*. Moreover, the only reference in the record to this embrace indicates that it occurred "after court was over"; there is no indication of record that it was viewed by members of the jury. In denying defendant's motion to strike Ms. Wrenn's identification testimony on these grounds, the trial court concluded that Ms. Wrenn and the family member were not acquainted and that the embrace was no more than a display of encouragement and gratitude.

We conclude that the trial court ruled correctly. Further, it was only after the voir dire of Tony Wrenn, rather than at the time of the alleged embrace, that defendant objected or made a motion to strike Ms. Wrenn's earlier identification testimony. A display that made so little impression upon the defendant at the time of its occurrence could have had no conceivable prejudicial effect on the jury.

[7] Second, defendant contends that the photographic identification procedure used by officers for the benefit of Ray Farrish and the Wrenns was impermissibly suggestive and tainted the Wrenns' in-court identification of defendant as the man they had seen run from the vicinity of Brenda Smith's body the morning of 21 October 1984.[2] The procedure to which defendant objected entailed a random display of two sets of photographs. The first set depicted six wedding groups or couples; the second was a pair of black-and-white photographs, one of which was a blow-up of defendant's face from his wedding photograph. Of the first set, all but the photograph of defendant and his bride measured eight-by-ten inches; defendant's wedding photograph measured only four-by-six. In addition, the appearance of each male depicted, other than defendant, differed from the general description Ms. Wrenn

2. The trial court sustained defendant's objection to the in-court identification by Ray Farrish.

initially had given the officers. Defendant contends that this meager field of comparison and the size discrepancy of the photographs predisposed the Wrenns to select defendant's photograph from both sets.

The trial court conducted voir dire of Anne Wrenn, of the officer who heard her description shortly after seeing the man flee from the woods, and of the officer who conducted the photo-identification procedure. After making extensive findings of fact, the trial court concluded that Ms. Wrenn had had "ample opportunity to gain a reliable impression" of the man she viewed in the woods, that her attention on the man was "strong and focussed," that her description to officers of the man she had seen was accurate and matched the physical characteristics of defendant, and that the time lapse between Ms. Wrenn's observation of the man Sunday morning was not so long as to significantly diminish her ability to make a strong and reliable identification the following afternoon. With regard to the identification procedure, the trial court concluded that, given the high degree of certainty of Ms. Wrenn's identification, the pretrial identification procedure had not been "so impermissibly suggestive and conducive to irreparable mistaken identification as to constitute a denial of due process of law."

The pretrial identification procedure experienced independently by Tony Wrenn was virtually identical to that of his wife. Following voir dire of Tony Wrenn, the trial court recognized the striking specificity of Mr. Wrenn's initial observation of the man in the woods, including Mr. Wrenn's awareness of the man's size, weight, notable musculature, the color and neat cut of his hair and beard, and a prominent nasal bridge, all of which were similar to defendant's physical characteristics. Based upon Tony Wrenn's excellent opportunity to observe the man in the woods, the high degree of his attention, and the minimal time lapse between that occurrence and the pretrial photo identification, the trial court again concluded that the pretrial procedure was reliable and that Mr. Wrenn's subsequent in-court identification was not tainted by anything impermissibly suggestive in the pretrial procedure.

On the evening of 22 October 1984, Mr. Farrish was shown only the group of wedding photographs. Although at that time he identified the photograph of defendant as the one most resembling the man he had seen the morning before, in court Mr. Farrish misidentified the photograph he previously had selected. Based

upon Mr. Farrish's voir dire testimony, the trial court concluded that although the misidentification went to the credibility of the witness rather than to the admissibility of his testimony, the in-court identification by Mr. Farrish was not admissible because it did not appear to be of independent origin. However, Mr. Farrish was permitted to describe for the jury the appearance of the man he had seen that morning, for the trial court did not find that this observation had been tainted by any pretrial procedure.

The test to be applied when the admissibility of identification evidence is challenged is to seek facts that "reveal a pretrial identification procedure so impermissibly suggestive that there is a very substantial likelihood of irreparable misidentification." *State v. Pigott*, 320 N.C. 96, 99, 357 S.E.2d 631, 633 (1987) (quoting *State v. Harris*, 308 N.C. 159, 162, 301 S.E.2d 91, 94 (1983)). Assuming arguendo that the use of defendant's photograph in both of two very limited sets and the discrepancy in size of his wedding photograph from the remaining five eight-by-tens presented the Wrenns with photographic groups that were "unnecessarily suggestive," *id.*, their identification of defendant based upon their view of these photographs was not inadmissible unless the procedure led to a "substantial likelihood of misidentification." This possibility is tested by weighing the following factors against the corrupting effect of the suggestive procedure itself:

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

2) the witness' degree of attention;

3) the accuracy of the witness' prior description;

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

5) the time between the crime and the confrontation.

Id. at 99-100, 357 S.E.2d at 634 (quoting *Manson v. Brathwaite*, 432 U.S. 98, 114, 53 L. Ed. 2d 140, 154 (1977)).

As the trial court observed in its findings of fact following voir dire of the Wrenns, the conditions were amply beneficial for each to have had an excellent opportunity to view the defendant's profile and physique, both were concentrating acutely on what they were seeing, both described in remarkable detail salient facial and general physical features of the man they had seen, and both were so certain that they had identified the right man that each

testified defendant was he, "unless he had a double" or an "identical look-alike." That less than thirty hours had passed between their seeing the man in the woods and selecting defendant's photographs also buttresses the trial court's conclusion that there was scant likelihood that any suggestiveness in the pretrial identification procedure could have led to a misidentification of defendant by the Wrenns.

Because Mr. Farrish was not permitted to identify defendant in court but was allowed only to describe the man he saw the morning of 22 October 1984, only that description arguably was tainted by a suggestive pretrial procedure. We reject this possibility for two reasons. First, Mr. Farrish was shown only the wedding photographs. He thus did not experience the suggestiveness in the duplication of defendant's face into black-and-white, which defendant argues affected the Wrenns. Second, the record reflects that Mr. Farrish's description of the shirtless man he saw fumbling with keys was general enough to be perfectly consistent with the viewpoint of one driving past: Mr. Farrish described the man's height and approximate weight, his race, the color of his hair, the fact he was shirtless, and his actions. None of these characteristics is so noteworthy that it is likely to have originated in a view of the photographs rather than in the view of defendant on the morning of the crime.

[8] Defendant next contends that the trial court improperly restricted his attempts to cross-examine witnesses Janice Bates and Detective Holley about what they knew or had observed of defendant's history of mental illness and aberrant behavior. Janice Bates was prevented from testifying that defendant had told her of previous hospitalizations for mental illness, and Detective Holley was precluded from reading from the transcript of audio tapes made during the hostage-holding incident at the Hardy house. Detective Holley was permitted to testify as to his recollection of defendant's statements made at that time and to refresh that recollection from the transcript, but the trial court sustained the State's objection to reading from the transcript unless it was introduced in its entirety. The court added that it would permit defendant to offer the transcript into evidence at that time, but defendant's counsel deferred, stating that he had made "a tactical choice and that choice probably will be not to put on evidence."

Relying upon this Court's language in *State v. Helms*, 322 N.C. 315, 367 S.E.2d 644 (1988), and in *State v. McElrath*, 322 N.C.

1, 366 S.E.2d 442 (1988), which stresses the "relatively lax" standard of relevant evidence, *McElrath*, 322 N.C. at 13, 366 S.E.2d at 449, defendant argues that testimony tending to show his mental imbalance was relevant on the issue of whether he could have formed the specific intent to kill. Under a standard allowing "any evidence calculated to throw light upon the crime charged," *id.* (quoting *State v. Huffstetler*, 312 N.C. 92, 104, 322 S.E.2d 110, 118 (1984), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985)), defendant accurately argues that evidence of his limited or impaired mental capacity was relevant to the issue of whether he had the capacity to premeditate or deliberate, *State v. Shank*, 322 N.C. 243, 248, 367 S.E.2d 639, 643 (1988).

Not all relevant evidence, however, is admissible. Even relevant evidence may be excluded if its probative value is outweighed by the danger that it may confuse or mislead the jury. *State v. Knox*, 78 N.C. App. 493, 495, 337 S.E.2d 154, 156 (1985). Although an accused is assured the right to cross-examine adverse witnesses, the trial court is granted broad discretion in controlling its scope. Absent a showing of abuse of that discretion, such rulings will not be disturbed on appeal. *E.g.*, *State v. Herring*, 322 N.C. 733, 743, 370 S.E.2d 363, 368 (1988). When a defendant has made a tactical choice not to exercise his right to call witnesses or to present a defense, it is well within the trial court's discretion to require that all of a document be offered into evidence, rather than merely those self-serving portions reflecting upon a defendant's mental imbalance. It is likewise well within the trial court's discretion to exclude hearsay testimony of defendant's hospitalization for mental problems when defendant has made a tactical choice not to proffer evidence of impaired mental capacity and its possible effect on his ability to premeditate and deliberate. Absent a context to which such evidence might relate, its relevance is considerably diluted, and its potential for confusion correspondingly enhanced. Under such circumstances, it is both proper and within the trial court's discretion to bar the admission of such evidence through cross-examination.

[9] Defendant next assigns error to the admission of testimony by the victim's parents that she had called them collect around 8:45 a.m. on 21 October 1984, and of a telephone bill corroborating that fact. Although the trial court prohibited the victim's parents from testifying as to the contents of the phone call, it ruled that testimony that their daughter had called collect was material and

relevant to show that she was alive at the time. An officer subsequently was permitted to testify that he had traced the number of the telephone from which the call had been made to a phone booth in Chapel Hill, twenty-two miles from where the victim's body was found later the same morning. In the same order the trial court ruled defendant's statement to police officers that he was with Brenda at the time she called her parents had been freely, voluntarily, and understandingly made. This conclusion is soundly supported by competent evidence in the record.

Defendant's contentions that the court erred in admitting the testimony of the victim's parents are wholly without merit. It is well established that the identity of a caller may be established by testimony that the witness recognized the caller's voice. *State v. Rinck*, 303 N.C. 551, 568, 280 S.E.2d 912, 924 (1981); *State v. Williams*, 288 N.C. 680, 698, 220 S.E.2d 558, 571 (1975). A witness' identification of the speaker by voice is not hearsay because there is no "assertion" implied or intended in that communication. *See* N.C.G.S. § 8C-1, Rule 801(c) (1988). *See also State v. Peek*, 89 N.C. App. 123, 125, 365 S.E.2d 320, 322 (1988) (defendant's name and address inscribed or printed on envelope or its contents not an assertion). The fact that the telephone call was collect was within the first-hand knowledge of Mr. Smith, who testified that he had accepted it. *See* N.C.G.S. § 8C-1, Rule 602 (1988). Even assuming erroneous admission of this evidence, the testimony regarding the call can have had no possible prejudicial impact on the outcome of defendant's trial when defendant admitted that he was with the victim when she called her parents; the officer's testimony can have had none by virtue of its utter insignificance.

The telephone bill was admissible to corroborate the Smiths' testimony about when they received the call from their daughter. *See* 1 Brandis on North Carolina Evidence 3d § 142 at 648; § 155 at 713 (1988). However, the State also offered the Smiths' bill substantively: the number recorded as coinciding with the victim's call to her parents led an officer to the booth from which the call had originated. The trial court, relying upon the "business records exception" to the hearsay rule, N.C.G.S. § 8C-1, Rule 803(6) (1988), determined that the information contained in the telephone bill was inherently reliable because of the routine manner in which such records are universally prepared.

A telephone bill is a "data compilation . . . kept in the course of a regularly conducted business activity" within the meaning

of the business records exception to the hearsay rule. N.C.G.S. § 8C-1, Rule 803(6) (1988). As such, it is admissible when "a proper foundation . . . is laid by testimony of a witness who is familiar with the . . . records and the methods under which they were made so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy." *State v. Springer*, 283 N.C. 627, 636, 197 S.E.2d 530, 536 (1973). No such witness testified in this case, and absent the laying of a foundation for its admission, the Smiths' telephone bill was not properly admitted for substantive purposes.

Data included in the bill enabled an officer to trace the victim's call and to testify that it had been generated from a location only twenty-two miles from where her body was found one and one-half hours later. This fact did nothing to support defendant's averred innocence. However, in the face of the quantum of other evidence, including defendant's inculpatory statements made in the presence of police officers and his admission that he was with the victim when the phone call was made, evidence of their location at the time was of little moment. We thus hold that the error of admitting the telephone bill without a foundation is not so prejudicial that there is any reasonable possibility that a different verdict would have been reached had the trial court barred the bill's admission. N.C.G.S. § 15A-1443(a) (1988).

[10] Defendant next takes issue with the admission into evidence of seven photographs, charging that their use was excessive and repetitious and their effect inflammatory and unfairly prejudicial. When the photographs were initially introduced into evidence to illustrate the testimony of Anne Wrenn, the trial court specifically asked defense counsel if he had any objection to the tender of the photographs into evidence. He replied that he had none. Defendant did not fail to object, however, when the photographs subsequently were made the subject of the testimony of the photographer who took them and tendered "for all purposes." The trial court balanced the probative value of the photographs against their tendency to inflame the emotions of the jury in accordance with N.C.G.S. § 8C-1, Rule 403 and overruled defendant's objection.

The trial court did not err in its conclusions. It is not apparent from the record that when the photographs were first introduced into evidence, their purpose was limited to their illustrative use. Defendant thus arguably waived his objection to subsequent substan-

tive use. *See State v. Gladden*, 315 N.C. 398, 414-15, 340 S.E.2d 673, 684, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986). However, even if defendant's subsequent objection is understood to focus upon prejudicial repetition, a review of the subject matter of the photographs and the occasions for their use reveals that defendant's assignment of error nevertheless lacks merit.

Although there is no bright line test for gauging at what point the use of photographs becomes excessive, *see State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988), the illustrative and substantive use of the seven photographic exhibits in this case falls well within noninflammatory limits. Only two photographs of the victim at the crime scene were before the jury—one a shot of her body from the back, the other a shot of her bound hands only—and these were neither gory nor otherwise gruesome. The five remaining photographs of the crime scene were primarily of the physical setting itself, in which the victim's body figured only incidentally. The photographs were later reintroduced for substantive purposes when they were authenticated by the photographer, but his testimony did not include a description of their contents, and the record does not reflect that they were used illustratively or exhibited to the jury for any other reason at that time. Exhibit 1, which depicted the victim's full body, was used on two other occasions for illustrative purposes—once to accompany the testimony of the forensic pathologist who performed the autopsy,[3] and once to accompany the testimony of the officer who responded to a call from the Wrenns. These facts reveal defendant's contentions to have been baseless with regard not only to the unobjectionable content of the photographs, but also to their restrained use. Defendant's assignments of error pertaining to this issue are thus overruled.

SENTENCING PHASE

[11] During the sentencing phase of his trial defendant called Janice Bates to the stand to testify about defendant's use of drugs throughout the period they had cohabited. Ms. Bates admitted that she had no personal knowledge of defendant's use of drugs, but

3. Defendant did not object to admitting autopsy photographs into evidence to illustrate the pathologist's testimony, but he did object to their being exhibited to the jury. The trial court ruled accordingly, prohibiting the jury from viewing them at that time. It is not apparent from the record that these photographs were ever given to the jury to view, even during its deliberations.

testified that defendant had told her that he had used drugs in the past.

Upon the State's objection, the trial court instructed the jury that it could consider this testimony only for the purpose of corroborating or impeaching defendant's testimony. This limitation on the substantive use of defendant's statements was reiterated during the trial court's final charge to the jury. Defendant argues that restricting this portion of Ms. Bates' testimony to its use as corroboration or impeachment denied him his constitutional right to offer mitigating evidence in a sentencing proceeding. *See Eddings v. Oklahoma*, 455 U.S. 104, 113-14, 71 L. Ed. 2d 1, 11 (1982).

This Court has held that in a capital sentencing proceeding a hearsay statement by a defendant or by a witness for the defense that is relevant to a sentencing issue and that bears "suitable indicia of reliability under a due process standard" must be admitted. *State v. Barts*, 321 N.C. 170, 181-82, 362 S.E.2d 235, 241 (1987). In this case, however, defendant's statements to Ms. Bates need not be analyzed for their trustworthiness, for defendant's admission to the use of drugs in the indefinite past bore no relevance to the possibility that he was affected by drugs throughout the five-day period that included two murders. The suggestion that past use might indicate inebriation during the period at issue is tenuous at best, and the trial court properly restricted its consideration by the jury to corroboration.

Moreover, assuming relevance arguendo, any error in the restriction of Ms. Bates' testimony was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988). Following the trial court's limiting instruction, Ms. Bates was permitted to testify that on the day in September 1984 when she asked defendant to move out, his demeanor differed from when he was either sober or drunk—that his speech was slurred and "he acted silly, smiled a lot." Not only did this testimony suggest drug use, but defendant's periodic use of drugs was described on the stand by defendant himself, by his mother, by a childhood friend and by his psychiatrist.

[12] Ten mitigating circumstances were submitted for the jury's consideration in recommending a penalty for defendant's murder of Brenda Smith. The jury found only one—that defendant's family had a history of mental illness and emotional distress. Only two aggravating circumstances were submitted and found unanimously by the jury: in reference to his conviction for the murder of Joan

Brady, that defendant previously had been convicted of a felony involving the use of violence to the person, N.C.G.S. § 15A-2000(e)(3) (1988); and, in reference to offenses committed against Elaine Clay, Robbie Davis, James Hardy, and Tony Gammons, that the murder of Brenda Smith was part of a course of conduct that included the commission of other crimes of violence, N.C.G.S. § 15A-2000(e)(11) (1988). Defendant argues that the evidence fails to support the latter circumstance. A review of the evidence presented to the jury in the penalty phase proves the error of defendant's perception.

Elaine Clay, who had testified during the guilt-innocence phase of defendant's trial that defendant had asked to move in with her in order to "get away from" Joan Brady, was recalled in the penalty phase to recount the events of the early morning hours of 22 October 1984. She testified that she and her nine-year-old son were awakened by the sound of the smoke detector. They left the burning house and returned the next morning after the fire had been extinguished to find structural damage, including charred floor joists beneath her bedroom. The fire marshall who investigated the fire determined that it had originated from a pile of boxes. He also testified that he had "smelled something like gasoline." An experienced agent for the State Bureau of Investigation who also investigated the fire testified that in his opinion it had been set intentionally.

In addition to this evidence the State introduced the testimony of a police officer who was present at defendant's forceful occupation of his uncle's house the next evening. The officer related that defendant had "started talking about a house burning down, and he stated it was Elaine Clay's house . . . and stated that a friend had done it, and . . . that he should have just killed her himself." Asked by the witness if he knew whether Ms. Clay was in the house at the time, defendant had responded "yes, she was." Another officer present at James Hardy's house testified that defendant had said earlier that he had burned Ms. Clay's house to the ground and that her little boy was in it with her at the time. Only later did defendant say that "a friend had set the fire" and that Ms. Clay "got what she deserved."

The trial court instructed the jury that if it found beyond a reasonable doubt that defendant had committed arson at a time when Elaine Clay and her son were in bed, it would find the aggravating circumstance that defendant had killed Brenda Smith

as part of the same course of conduct. Defendant argues that these instructions were erroneous because they did not require the jury to find that this crime involved "violence against another person or persons." N.C.G.S. § 15A-2000(e)(11) (1988). He reasons that arson is not an inherently violent crime and that it was error to submit this circumstance to the jury when the State failed to present substantial evidence of the use or threat of violence in addition to the fact of the fire's occurrence.

Arson is "the wilful and malicious burning of the dwelling house of another person." *State v. Vickers*, 306 N.C. 90, 100, 291 S.E.2d 599, 606 (1982). This definition presupposes that the dwelling is inhabited, even if its inhabitants are absent at the time of the offense. *See id.* In their absence, arson is arguably not an offense that inherently involves "violence against another person or persons." However, when inhabitants are present and the perpetrator is aware of this fact, his act of igniting their dwelling is indisputably an act of violence, its force intended not only to damage the house but also to injure its inhabitants.

We hold that the trial court's charge to the jury was sufficient: by coupling the fact that the dwelling was occupied with the fact of a "wilful and malicious" burning, the instruction comprehended the threat to human well-being that the statute's aggravating circumstance contemplates. *Cf. State v. Hunt*, 323 N.C. 407, 429-30, 373 S.E.2d 400, 414-15 (1988) (absence of evidence that the house was occupied at the time of dynamiting provided basis for trial court's striking convictions on grounds that these did not involve the use or threat of violence to a person).

Whether the burning of Elaine Clay's house early Monday morning and the events at the home of James Hardy on Monday evening were part of the same course of conduct that included the murder of Brenda Smith depends upon a number of factors, among them the temporal proximity of the events to one another, a recurrent *modus operandi*, and motivation by the same reasons. *See State v. Robbins*, 319 N.C. 465, 528, 356 S.E.2d 279, 316, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987). Although the jury was properly admonished not to consider the murder of Joan Brady as part of this course of conduct, *see State v. Goodman*, 298 N.C. 1, 29, 257 S.E.2d 569, 587 (1979), it is apparent from a review of the chronology of events beginning Thursday, 18 October 1984, and culminating Monday evening, 22 October 1984, that defendant's

actions with regard to Elaine Clay and James Hardy were all elements of a five-day rampage fueled by defendant's overcommitment to women.

On Thursday afternoon, defendant stopped at Elaine Clay's house and asked to move in with her in order to "get away from Joan . . . Brady." He was at Joan Brady's house at 9:00 p.m. and at Brenda Smith's by 11:30 p.m. Joan Brady was found dead in her apartment the afternoon of Friday, October 19th. On Saturday afternoon defendant drove Brenda Smith from her house in Danville, Virginia to Greensboro. Later that evening defendant appeared alone at the Statesville home of a former girlfriend, whom he had not seen in four years, to tell her that he wanted her "to meet his fiancee." Defendant later picked up Brenda at a nearby convenience store where she had been waiting for him, and they drove back towards Greensboro, pulling off the road around 9:00 p.m. and spending Saturday night in her car. Brenda Smith called her parents at 8:42 a.m. and was found dead little more than an hour later. Defendant returned in Brenda's car to Danville, where he was seen walking down the street and greeted by Elaine Clay. Sometime after midnight Sunday, he appeared at Janice Bates' mobile home, calling her name. Around 1:45 a.m. Monday he ignited the boxes under Ms. Clay's bedroom. Monday evening defendant arrived at the home of his uncle James Hardy, bound and gagged his uncle, poured lighter fluid on his head and attempted to ignite it, and held a knife to the throat of Tony Gammon. The police arrived at 7:05 p.m. and were held at bay for five and one-half hours.

Not all of these occurrences were violent, but all occurred over a five-day span and involved either contact with a former girlfriend or, in the case of the hostage-holding, admissions about their fates. In addition to their proximity in time, all demonstrated the common subject matter of defendant's romantic liaisons and his mood of intense anxiety about juggling these relationships. Comments about being "good with shoelaces" made during the hostage-holding and the role of shoelaces in the murders of Brenda Smith and Joan Brady evoke a common *modus operandi*. The arson of Elaine Clay's house coupled with the attempt to ignite his uncle with lighter fluid and comments made at the time about his (or a friend's) setting fire to the Clay house also reveal commonalities. Defendant's activities from Thursday, 18 October 1984, through Monday, 22 October 1984, describe an increasingly frenzied pattern of both inconsequential and violent contacts, all apparently motivated

at least in part by the "pressure" brought upon defendant by his overinvolvement with women. We hold that these facts firmly support the submission to the jury of the aggravating circumstance that the murder of Brenda Smith on Thursday, 18 October 1984, was part of a course of conduct involving the commission of other crimes of violence, to wit: the arson of Elaine Clay's house and the hostage-holding on Monday, 22 October 1984.

[13] Defendant next assigns error to several issues arising out of the parties' closing arguments. He first contends there was error pertaining to the closing remarks of his own counsel, who was barred by the trial court from arguing "anything concerning the possibility of parole." He also asserts that the trial court erred in disallowing his proffered argument that if the jury returned a recommendation of a life sentence, the trial court was empowered to require the sentence to commence at the termination of the life sentence he was presently serving in Virginia.

Defendant argues that informing the jury of the legal effect of a life sentence upon parole eligibility in North Carolina and assuring jurors that the trial court was empowered to impose a life sentence consecutive to another would have mitigating value. Thus, even though such evidence would relate to neither defendant's culpability for the crime nor the circumstances of its commission, defendant perceives his license to present these matters to the jury as comprehended in his constitutional right to put before the jury "any relevant mitigating evidence." *Skipper v. South Carolina*, 476 U.S. 1, 4, 90 L. Ed. 2d 1, 6 (1986) (quoting *Eddings v. Oklahoma*, 455 U.S. at 110, 71 L. Ed. 2d at 9). Defendant also perceives his entitlement to argue these issues under N.C.G.S. § 84-14 (1985), which regulates the practice of law in this State and provides: "In jury trials the whole case as well of law as of fact may be argued to the jury."

While it is generally true that counsel's argument should not be impaired without good reason, *Watson v. White*, 309 N.C. 498, 507, 308 S.E.2d 268, 274 (1983), one "good reason" to limit argument is its irrelevance. "[C]ounsel [may not] argue principles of law not relevant to the case." *State v. Monk*, 286 N.C. 509, 515, 212 S.E.2d 125, 131 (1975). This Court has noted many times that a criminal defendant's status under the parole laws is irrelevant to a determination of his sentence and that it cannot be considered by the jury during sentencing. *E.g.*, *State v. Robbins*, 319 N.C. at 518,

356 S.E.2d at 310. That this holding passes muster under the United States Constitution is implicit in the United States Supreme Court's recognition that "[m]any state courts have held it improper for the jury to consider or to be informed—through argument or instruction—of the possibility of commutation, pardon or parole." *California v. Ramos*, 463 U.S. 992, 1013 n.30, 77 L. Ed. 2d 1171, 1188 n.30 (1983) (quoted in *Robbins*, 319 N.C. at 520, 356 S.E.2d at 311). In other words, the Constitution *permits* such argument or instruction, but it is not constitutionally *required. Robbins*, 319 N.C. at 519, 356 S.E.2d at 311.

Argument concerning the effect of consecutive life sentences upon the period of a defendant's incarceration is, in another guise, argument about the legal effect of parole upon defendant's sentence. It is equally irrelevant to a determination of his sentence. The trial court acted correctly in disallowing both arguments.

[14] Defendant also contends that the trial court erred on three occasions during the prosecutor's closing argument by its failure to intervene *ex mero motu* and rectify improprieties to which defendant failed to object. Counsel are allowed wide latitude in arguing hotly contested cases, *State v. Huffstetler*, 312 N.C. at 112, 322 S.E.2d at 123, and the scope of this privilege is left to the sound discretion of the trial court, *id.* Although the appellate court may review an alleged error or impropriety in the State's argument notwithstanding the defendant's failure to flag the error for the trial court, "the impropriety . . . must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it." *State v. Artis*, 325 N.C. at 323, 384 S.E.2d at 496 (quoting *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979)).

On the first occasion of which defendant complains, the prosecutor called the jury's attention to defendant's lack of remorse and his unwillingness to admit guilt: "He shows no remorse. He gives no confession. He asks no repentance. He is a stone-cold killer." Defendant contends that because the aggravating circumstance that the murder was heinous, atrocious or cruel was not before the jury, and because defendant had not opened the door to the issue of remorselessness by asserting he felt otherwise, the issue was irrelevant and its mention "exploited" his constitutional right to remain silent or to stand by his plea of not guilty.

An identical argument was proffered by the defendant in *State v. Brown*, 320 N.C. 179, 199-200, 358 S.E.2d 1, 15-16, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987). Although remorselessness is not a statutory aggravating circumstance and may not be argued as such, *see, e.g., Brown*, 320 N.C. at 199, 358 S.E.2d at 15, we noted in that case and we note again here that the State never cited this characteristic as an aggravating circumstance to the jury either verbally or on the verdict sheet. *Id.* Moreover, we specifically held in *State v. Artis* that calling the jury's attention to an absence of perceptible remorse does not unconstitutionally "exploit" a defendant's silence at trial or his unwillingness to admit guilt. *Artis*, 325 N.C. at 327, 384 S.E.2d at 498. Urging the jurors to focus on their observation that defendant "shows no remorse" relates to the demeanor displayed by the defendant throughout the trial. Thus " 'rooted in' observable evidence," such remarks are not improper. *Id.* at 328, 384 S.E.2d at 498 (quoting *State v. Myers*, 299 N.C. 671, 680, 263 S.E.2d 768, 774 (1980)).

[15] Defendant also maintains that the trial court erred in failing to intervene *ex mero motu* on a second occasion—when the prosecution referred in his closing statement to the rights of the victim and those of her family:

> What about the victim's rights? What about the rights of Brenda Smith? We weren't allowed to bring in a lot of her family and a lot of her friends and show you pictures of Brenda Smith while she was alive or to tell you about her background and what type of person she was and what the value to be placed on her life to society was.

Defendant contends that these words rendered his sentence unconstitutionally unreliable in the same way that victim impact statements introduced to the jury during capital sentencing in *Booth v. Maryland*, 482 U.S. 496, 96 L. Ed. 2d 440, were held to be irrelevant to the sentencing decision and their admission to create "a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." *Id.* at 503, 96 L. Ed. 2d at 448. The United States Supreme Court has come to similar conclusions regarding a prosecutor's remarks characterizing the victim's personal qualities. *South Carolina v. Gathers*, 490 U.S. ---, 104 L. Ed. 2d 876, *reh'g denied*, --- U.S. ---, 106 L. Ed. 2d 636 (1989).

Unlike evidence placed before the jury in *Booth* and *Gathers*, however, the personal qualities of the victim and the devastation wrought upon her family by her death simply were not invoked by the prosecutor's words in this case. It is true that the "rights of the victim" and those of her family are not relevant to the proper focus of sentencing arguments upon the character of the criminal or the circumstances of the crime. *See, e.g., State v. Brown*, 320 N.C. at 202-03, 358 S.E.2d at 17. *See also South Carolina v. Gathers*, 490 U.S. at ---, 104 L. Ed. 2d at 883. But these issues were the subject of mere allusion by the prosecutor: if improper, the error was *de minimis*. It was well within the trial court's discretion not to intervene and recognize the error *ex mero motu*. *Brown*, 320 N.C. at 203, 358 S.E.2d at 18. Nor does the trial court's failure to intervene imply an abrogation of defendant's constitutional rights, for as we have held in *State v. Artis*, such "mere allusion to the loss the victim's family feels does not threaten to sweep juror ruminations into the realm of the arbitrary and capricious." *Artis*, 325 N.C. at 327, 384 S.E.2d at 498. Given the solid evidentiary foundation for the two aggravating circumstances found by the jury, we hold that any arguable error in the trial court's failure to intervene was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988); *Artis*, 325 N.C. at 327, 384 S.E.2d at 498.

[16] The third occasion upon which defendant alleges the trial court erroneously failed to intervene was during the following portion of the prosecutor's argument:

> Jesus says in the Lord's prayer, "Forgive us our trespasses as we forgive those who trespass against us," but you have no right under the law. And you may forgive trespasses in your personal life, you may forgive those trespasses, but you have no right as a sworn juror in the State of North Carolina to forgive the trespasses against the State of North Carolina. That is to have no part in your deliberations. You cannot forgive the defendant for what he did to Brenda Smith. And your verdict, be it life or be it death, should be no reflection on any sympathy or forgiveness or any religious feelings you have about this case.

Defendant rests his argument solely upon the prosecutor's admonition in the last sentence above that jurors must not allow sympathy to inform their recommendation as to defendant's sentence. These words were not the subject of an objection at trial nor were they

included amongst defendant's designated exceptions comprising his assignments of error. Despite his failure to object, defendant contends that the trial court's failure to intervene constituted plain error. N.C.R. App. P. 10(c)(4) (1989); *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). This Court may review such alleged errors when their gravity "amounts to a denial of a fundamental right of the accused." *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)).

The scope of this Court's review on appeal, however, "is confined to a consideration of those assignments of error set out in the record on appeal." N.C.R. App. P. 10(a) (1989). Such assignments of error are sufficient only when they "direct the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references." N.C.R. App. P. 10(c)(1) (1989). The assignment of error addressing this argument in defendant's brief does not contain an exception or reference to the transcript or record, and the question raised therefore is not properly before this Court.

Nonetheless, "[i]n capital cases, . . . an appellate court may review the prosecution's argument, even though defendant raised no objection at trial," *State v. Brown*, 320 N.C. 179, 194, 358 S.E.2d 1, 13 (1987) (quoting *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979)), and even though an assignment of error may be presented improperly on appeal. *See State v. Chance*, 279 N.C. 643, 657, 185 S.E.2d 227, 236 (1971) ("in capital cases we review the record and *ex mero motu* take notice of prejudicial error"). We thus consider defendant's argument.

Defendant asserts that urging the jury not to rest its verdict upon feeling violates the prohibition in the eighth amendment against cruel and unusual punishment. In *California v. Brown*, 479 U.S. 538, 542, 93 L. Ed. 2d 934, 940 (1987), the United States Supreme Court held that it was constitutionally permissible for a trial court to admonish the jury not to be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." The Court reasoned that "mere" indicated to the jury that it was to avoid responding to emotional appeals divorced from an evidentiary basis. According to *Brown*, a defendant's eighth amendment rights are jeopardized only when the jury is urged to ignore such feelings that are supported by facts in the record.

In *State v. Artis* the prosecutor similarly urged the jurors "to try this case without . . . prejudice and without sympathy; strictly on the facts of this lawsuit." *Artis*, 325 N.C. at 325, 384 S.E.2d at 497. This Court held that because the apparent import of the prosecutor's words was that "[m]itigating circumstances are to be supported by the evidence, not by emotion," such language did not contravene defendant's rights under the eighth amendment to the United States Constitution. *Id.* at 326, 384 S.E.2d at 497. In the case now before us, the import of the prosecutor's words is even more clear and their propriety thus more apparent than the meaning of the same prosecutorial argument in *Artis*. The context cited by the prosecutor is blatantly not evidence but religious predisposition: the prosecutor was plainly and properly admonishing the jurors that feelings of sympathy and forgiveness rooted in their hearts and not also in the evidence may not be permitted to affect their verdict. In the above argument the prosecutor made absolutely no reference to evidence offered by defendant in mitigation, about which a sympathetic appraisal by jurors may be appropriate. *See State v. Oliver*, 309 N.C. 326, 360, 307 S.E.2d 304, 326 (1981). The prosecutor actually thus avoided the very error of which he is now accused by defendant.

[17] Defendant next contends that the trial court erroneously instructed the jury on the law, improperly emphasizing the significance and weight of the aggravating circumstances. In describing for the jury the significance of aggravating circumstances, the trial court defined such a circumstance as "a fact or group of facts which tend to make a specific murder particularly deserving of the maximum punishment prescribed by law." Defendant terms this definition a gratuitous and prejudicial misstatement of the law because, in his view, it suggests that finding a single aggravating circumstance makes a murder "particularly deserving" of the death penalty, and it does not make clear that the jury must determine that the aggravating circumstance substantially outweighs any mitigating circumstances.

Defendant's strained reading of this portion of the charge is fallacious for several reasons. First, the trial court instructed the jury according to the pattern jury instruction, N.C.P.I.—Crim. 150.10 (1983), in words virtually identical to those used by the trial court and found proper in *State v. Hutchins*, 303 N.C. 321, 351, 279 S.E.2d 788, 806 (1981). Second, the court did not state an absolute, as defendant suggests, but qualified the statement with the word

"tend," which means "to have a leaning, [to] serve, contribute, or conduce in some way or other." Black's Law Dictionary 1315 (rev. 5th ed. 1979). Third, we repeatedly have stated that a jury charge must be construed contextually and that isolated portions of it will not be held prejudicial when the charge as a whole is correct. *E.g., State v. Lee*, 277 N.C. 205, 214, 176 S.E.2d 765, 770 (1970). Finally, the very next sentence in the trial court's charge reiterated and emphasized the qualification, stating: "Our law identifies the aggravating circumstances which may—which might justify a sentence of death." Heard as a whole, these two sentences could not possibly have misled the jury as to the significance of finding an aggravating circumstance.

Defendant adds that the trial court defined a mitigating circumstance as "a fact or group of facts . . . which may be considered as extenuating or reducing the moral culpability of the killing or making it less deserving [of] extreme punishment." To say facts "may" be considered in mitigation, defendant avers, is not the equivalent of the trial court's allegedly prejudicial definition of an aggravating circumstance as one that "tends" to make a murder particularly deserving of the death penalty. Thus, defendant insists, the trial court's instruction is a thumb pressing the scales upon which the aggravating circumstances rest. Here defendant tortures syntax to shore an oversubtle argument. We see no distinction of any significance between the two qualifiers; there can be no question that any such nuance was similarly lost on the jury.

[18] Defendant also complains of the following language in the trial court's charge illustrating the process of weighing aggravating against mitigating circumstances in deciding upon recommending the imposition of the death penalty:

> After considering the totality of the aggravating 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 the 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 circumstance outweighs others or 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.

Defendant asserts that the trial court's example reinforced the emphasis upon aggravating circumstances that he perceives in other portions of the charge. Again, we disagree. These words are taken directly from the pattern jury instructions, N.C.P.I.—Crim. 150.10 (1983), and mirror the language set out by this Court in *State v. McDougall*, 308 N.C. 1, 34-35, 301 S.E.2d 308, 327-28, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983), as "an example of appropriate instructions" on the issue of according weight to aggravating and mitigating circumstances. Read as a whole, the trial court's charge indicates perceptible emphasis on aggravating over mitigating circumstances. We hold that defendant's contentions otherwise are meritless.

[19] The last of the errors alleged to have occurred during the penalty phase of defendant's trial concerns the period of the jury's deliberations. The trial court noted that the jury had deliberated from 2:55 until 5:00 p.m. the first day, and from 9:30 until 11:20 a.m. the next. At this point the foreman informed the trial court: "We're hung." The court then stated that after a recess it would instruct the jury from N.C.G.S. § 15A-1235 and allow the jury some additional time for deliberations. Defendant's subsequent objection was overruled, and his motion that the trial court recognize the jury's inability to reach a verdict and impose a life sentence as permitted by N.C.G.S. § 15A-2000(b) was denied. After a brief recess the trial court instructed the jury as follows:

> Members of the jury, I am going to ask that you resume your deliberations in an attempt to return a recommendation. I have already instructed you that your recommendation must be unanimous, that is, each of you must agree on the recommendation. I shall give you these additional instructions.
>
> First, it is your duty to consult with one another and to deliberate with a view to reaching a recommendation if it can be done without violence to individual judgment.
>
> Second, each of you must decide the case and your recommendation for yourself, but only after an impartial consideration of the evidence with your fellow jurors.

Third, in the course of your deliberations you should not hesitate to reexamine your own views and change your opinion if you become convinced it is erroneous. On the other hand, you should not hesitate to hold to your own views and opinions if you remain convinced they are correct.

Fourth, none of you should surrender an honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a recommendation.

Please be mindful that I am in no way trying to force or coerce you to reach a recommendation. I recognize the fact that there are sometimes reasons why jurors cannot agree. Through these additional instructions I have just given you, I merely want to emphasize that it is your duty to do whatever you can to reason the matter over together as reasonable people and to reconcile your differences if such is possible without the surrender of conscien[t]ious conviction to reach a recommendation.

The jury resumed its deliberations at 11:47 a.m. and returned to the courtroom at 12:45 p.m. with the unanimous recommendation that the trial court sentence the defendant to death. The jury's recommendation was based upon its finding a single mitigating circumstance, which it concluded was not sufficiently substantial to outweigh the two aggravating circumstances it found. Defendant contends that, despite the trial court's stated effort not to force the jurors to a verdict, the effect of its requiring them to resume deliberations after what defendant avers was a "reasonable time" was coercive.

Defendant apprehends a similarity between the trial court's reiterated admonition that the jury's verdict must be unanimous here and a charge in *State v. Smith*, 320 N.C. 404, 358 S.E.2d 329 (1987), which this Court concluded had the probable effect of coercing a recommendation of death. Defendant is mistaken: the circumstances of this charge suggest no parallel with the unique facts in *Smith*. In that case the jury, having been instructed previously that a unanimous recommendation of death would result in a sentence of death and a unanimous recommendation of life in prison would result in a sentence of life imprisonment, returned after three hours of deliberations and asked: "If the jurors' decision is not unanimous, is this automatic life imprisonment or does the

jury have to reach a unanimous decision regardless?" *Smith*, 320 N.C. at 420, 358 S.E.2d at 338. This Court stressed that *"[i]n the context of the jury's inquiry,* the instructions probably were misleading and probably resulted in coerced unanimity." *Id.* at 422, 358 S.E.2d at 339.

The context of the trial court's instructions in the case *sub judice*, however, differs radically from that in *Smith*. The instructions were not prompted by a question concerned with the requisite of unanimity. The trial court deliberately stated that it was "in no way trying to force or coerce [the jurors] to reach a recommendation," and urged them to "reconcile [their] differences *if such is possible* without the surrender of [their] conscien[t]ious conviction[s]" (emphasis added). The lesson in *Smith* is that, in telling a jury that its recommendation as to punishment must be unanimous, the trial court must be vigilant to inform the jurors that whatever recommendation they *do* make must be unanimous and not to imply that a recommendation *must* be reached. The context of the trial court's instruction in this case patently falls within the former category, and in such a context, reminding the jury that its findings and recommendations must be unanimous is perfectly proper.

The provisions governing capital punishment state: "If a jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment." N.C.G.S. § 15A-2000(b) (1988). This Court has noted frequently that "what constitutes a 'reasonable time' for jury deliberation in the sentencing phase should be left to the trial court's discretion." *E.g., State v. Johnson*, 298 N.C. at 370, 259 S.E.2d at 762. This is so because "the trial judge is in the best position to determine how much time is reasonable under the facts of a specific case." *State v. Kirkley*, 308 N.C. 196, 221, 302 S.E.2d 144, 158 (1983). In *Kirkley* the jury's deliberations spanned seven and one-half hours, during which time it was interrupted twice for meals and twice for further instructions. Its deliberations included the contemplation of fourteen mitigating circumstances and one aggravating circumstance, and it was required to make sentencing recommendations for two separate murder convictions. This Court concluded that requiring the jury to resume deliberations was within the trial court's discretion under the circumstances: "We cannot say from the facts of this case that the trial judge abused his discretion by refusing to impose a life sentence in each capital case on the basis that the jury could not reach a unanimous sentence

recommendation within a reasonable time period." *Kirkley*, 308 N.C. at 221, 302 S.E.2d at 158. In *Johnson* the jury deliberated for three hours and thirty-nine minutes before it announced that it could not reach a verdict. This Court held that it could not agree with the defendant that this period was unreasonable and held that the trial court had not abused its discretion in coming to the same conclusion.

Here the jurors had before them two aggravating circumstances and ten mitigating circumstances. They had deliberated these issues and the question of a sentencing recommendation for nearly four hours over a period of two days. The trial judge heard all the evidence in support of mitigating and aggravating circumstances, observed the jurors' demeanor, and instructed them according to the law as he determined necessary to their comprehension of their duty as jurors. He was thus "in the best position to determine how much time [was] reasonable" for the jurors' deliberations regarding a recommendation for punishment under the facts of this case. *State v. Kirkley*, 308 N.C. at 221, 302 S.E.2d at 158. We hold that in the context of these facts, the trial court did not abuse its discretion in instructing the jury according to the law and in requesting it to resume its deliberations.

PRESERVATION ISSUES

Defendant attempts to resuscitate several issues upon which this Court recently has ruled. As defendant proffers no new or convincing reason to question these holdings, we reject the following contentions on the authority of the cited case law:

[20] Requiring a jury unanimously to find mitigating circumstances does not violate a defendant's eighth amendment rights. *State v. McKoy*, 323 N.C. 1, 30-42, 372 S.E.2d 12, 27-36 (1988), *cert. granted*, --- U.S. ---, 103 L. Ed. 2d 180 (1989).

[21] Informing the jury of its "duty" to return a recommendation of death when it finds mitigating circumstances insufficient to outweigh aggravating circumstances and the latter sufficiently substantial to call for the death penalty passes constitutional muster. *E.g., State v. Artis*, 325 N.C. at 336, 384 S.E.2d at 503; *State v. McDougall*, 308 N.C. at 34, 301 S.E.2d at 327-28.

[22] Excusing for cause jurors who have stated opposition to the death penalty was held constitutionally permissible in *Lockhart v. McCree*, 476 U.S. 162, 90 L. Ed. 2d 137 (1986), and by this

Court in *State v. Oliver*, 309 N.C. at 337, 307 S.E.2d at 313, and more recently in *State v. Artis*, 324 N.C. at 336, 384 S.E.2d at 503-04, and *State v. McNeil*, 324 N.C. 33, 57, 375 S.E.2d 909, 923 (1989).

[23] Placing the burden on defendant to prove each mitigating circumstance by a preponderance of the evidence and not conversely requiring the State to prove the nonexistence of each proffered mitigating circumstance beyond a reasonable doubt was held constitutional in, *e.g.*, *State v. Barfield*, 298 N.C. 306, 354, 259 S.E.2d 510, 544 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137, *reh'g denied*, 448 U.S. 918, 65 L. Ed. 2d 1181 (1980).

[24] Finally, defendant urges this Court to reverse its holding, stated in, *e.g.*, *State v. Barfield*, 298 N.C. at 354, 259 S.E.2d at 544, that the present death penalty statutes, N.C.G.S. § 15A-2000 through -2003, are constitutional. We again decline this invitation for the reasons stated in that case and its progeny.

PROPORTIONALITY REVIEW

[25] Having concluded that no prejudicial error marred the guilt or sentencing phase of defendant's trial, it is this Court's statutory responsibility to ascertain that the death penalty in this case was imposed neither arbitrarily nor capriciously. N.C.G.S. § 15A-2000(d)(2) (1988). This assessment entails determining (1) whether the record supports the aggravating circumstances found by the jury, (2) whether the sentence was imposed under the influence of passion, prejudice, or some other arbitrary factor, and (3) whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. *State v. Artis*, 325 N.C. at 337, 384 S.E.2d at 504; *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).

Cognizant that this statutory responsibility is as serious as any an appellate court must shoulder, *e.g.*, *State v. Jackson*, 309 N.C. 26, 46, 305 S.E.2d 703, 717 (1983), we have undertaken a sober and scrupulous review of the record, transcripts, exhibits and arguments presented in the briefs and orally. This scrutiny has revealed to us that the record fully supports the jury's finding of the two aggravating circumstances submitted. It has further revealed no prejudicial, impermissibly emotional or other arbitrary influence upon the jury's recommendation or upon the trial court's imposition of the sentence of death.

Proportionality review entails comparing this case to all cases arising since 1 June 1977 that have been tried as capital cases and that have been affirmed as to both phases of the trial by this Court after appellate review. *Jackson*, 309 N.C. at 45, 305 S.E.2d at 717 (quoting *State v. Williams*, 308 N.C. at 79, 301 S.E.2d at 355). This includes not only a reappraisal of the relative weight of aggravating and mitigating circumstances, but also a scrutiny of the entire record for all the circumstances of the case, including the manner of the commission of the crime and the defendant's character, background, and mental and physical condition. *State v. Artis*, 325 N.C. at 338, 384 S.E.2d at 505; *State v. McLaughlin*, 323 N.C. 68, 109, 372 S.E.2d 49, 75 (1988). We do not feel compelled to cite every case consulted. *E.g.*, *State v. Artis*, 325 N.C. at 338, 384 S.E.2d at 505.

The two aggravating circumstances submitted to and found by the jury were that 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), and that the murder of Brenda Smith had occurred as part of a course of violent conduct by defendant, N.C.G.S. § 15A-2000(e)(11). Ten mitigating circumstances were submitted to the jury, but it found only one to exist—that defendant's family had a history of mental illness. The jury specifically rejected mitigating circumstances that defendant was under the influence of mental illness or emotional disturbance and that his capacity to conform his conduct to the requirements of the law was impaired by manic depression, schizophrenic illness, emotional instability, drug abuse, drug-induced mental illness, or mixed personality disorder. The testimony of certain witnesses for the defense supported the submission of these mitigating circumstances to the consideration of the jury, but it was "the jury's duty to decide what to believe," *State v. McKoy*, 323 N.C. at 29, 372 S.E.2d at 27 (quoting *State v. Smith*, 305 N.C. 691, 705-06, 292 S.E.2d 264, 273-74, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982)); it is not the duty of this Court. "Determining the credibility of evidence is at the heart of the fact-finding function." *Id.* (quoting *State v. Jones*, 309 N.C. 214, 220, 306 S.E.2d 451, 456 (1983)).

It is useful in proportionality review to compare the case under scrutiny to three clusters of cases in the pool—those cases resulting in a sentence of life imprisonment in which the same aggravating circumstances occurred, those "death affirmed" cases in which the same aggravating circumstances occurred, and those cases in which

this Court has found the death sentence disproportionate. In so doing, it becomes apparent whether the sentence imposed in the case *sub judice* is disproportionate or excessive, or whether it appears to be appropriate given the general parameters of cases to which it is factually akin.

The single characteristic distinguishing the first two classes of cases from the last is the fact that the defendant has killed more than once. We have remarked before, and it bears repeating, that this Court has never found disproportionality in a case in which the defendant was found guilty for the death of more than one victim.

> 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.

State v. McNeil, 324 N.C. at 59-60, 375 S.E.2d at 925.

There are, however, a number of cases in the group of those where death sentences were affirmed on appellate review, in which the defendant has taken the life of more than one victim. Many of these appear distinguishable from the case before us by the presence of the aggravating circumstance that the murder committed was especially heinous, atrocious or cruel. N.C.G.S. § 15A-2000(e)(9) (1988). *See, e.g., State v. Huff*, 325 N.C. 1, 381 S.E.2d 635 (1989); *State v. McNeil*, 324 N.C. 33, 375 S.E.2d 909; *State v. McLaughlin*, 323 N.C. 68, 372 S.E.2d 49; *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).

Nevertheless, a number of other cases in the pool share the characteristic of a multiple murder with the case before us. In *State v. Robbins*, 319 N.C. 465, 356 S.E.2d 279, the jury found not only the prior violent felony aggravating circumstance, N.C.G.S. § 15A-2000(e)(3), but also that the murder for which the defendant was on trial had been committed while the defendant was engaged

in committing a robbery, N.C.G.S. § 15A-2000(e)(5). Although the jury found in mitigation that defendant had been under the influence of a mental or emotional disturbance at the time of the murders and that his capacity to appreciate the criminality of his acts had been impaired, this Court concluded that it was "clear from his convictions of premeditated and deliberate murder that human life meant little to Robbins." *Robbins*, 319 N.C. at 529, 356 S.E.2d at 316. This Court did not fail to note the gravity of the aggravating circumstance that *Robbins* shares with this case: "A heavy factor against Robbins is that he is a multiple killer." *Id.*

In *State v. McKoy*, 323 N.C. 1, 372 S.E.2d 12, the single aggravating circumstance found by the jury in addition to the prior violent felony circumstance was that the murder was committed against a deputy sheriff while engaged in the performance of his official duties. N.C.G.S. § 15A-2000(e)(8) (1988). The jury found two circumstances in mitigation. This Court noted with regard to the earlier murder supporting the prior violent felony circumstance that this "unlawful killing of another human being with malice . . . was . . . among the most serious of the many felonies 'involving the use or threat of violence to the person.' " *McKoy*, 323 N.C. at 48, 372 S.E.2d at 38 (citations omitted).

A third analogous case in which a prior conviction for murder was before the jury as an aggravating circumstance was *State v. Cummings*, 323 N.C. 181, 372 S.E.2d 541 (1988). This is the only case in the proportionality pool in which the second killing was designated as "another capital felony" under N.C.G.S. § 15A-2000(e)(2). *Cummings*, 323 N.C. at 197, 372 S.E.2d at 552. The Court remarked upon the unique status of the two aggravating circumstances (e)(2) and (e)(3) as being the only circumstances that "reflect upon a defendant's character as a recidivist," *id.*, and cited the following three cases in addition to those described above, in which the defendant had been convicted of a prior violent felony resulting in the victim's death: *State v. McLaughlin*, 323 N.C. 68, 372 S.E.2d 49 (previous conviction of involuntary manslaughter); *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) (previous conviction of murder in the first degree); *State v. McDowell*, 301 N.C. 279, 271 S.E.2d 286 (previous conviction of murder in the second degree). In three of the four cases cited in *Cummings* some mitigating circumstances had been found; in *Cummings* the jury found none.

The Court distinguished *Cummings* from *State v. Withers*, 311 N.C. 699, 319 S.E.2d 211 (1984), in which a multiple murder occurred yet the defendant received a sentence of life imprisonment. In *Withers* the defendant shot and killed his fiancee's twelve-year-old daughter after an argument concerning her accusations of sexual abuse, then shot his fiancee and himself. Sixteen years before, he had been convicted of murder in the first degree, and he had been paroled after serving thirteen years in prison for that crime. The jury found the same two aggravating circumstances in *Withers* as were found in the case before us—that defendant had previously been convicted of a violent felony and that the murder was part of a course of violent conduct. In *Withers*, however, the jury also found one or more of the ten mitigating circumstances submitted.[4] The Court in *Cummings* found *Withers* distinguishable from the other cases in which a multiple murder underlay the jury's finding of a prior violent felony or other capital felony because of this "substantial mitigation." *State v. Cummings*, 323 N.C. at 196, 372 S.E.2d at 553. A similar distinction applies to the case now before us: although a single mitigating circumstance was found by the jury—that defendant's family had a history of mental illness—this was not "substantial mitigation" underlying the appropriateness of a life sentence. Rather, compared to the number and significance of the circumstances the jury specifically rejected, its mitigating effect appears slight.

In *State v. McNeil*, 324 N.C. 33, 60, 375 S.E.2d 909, 925, this Court noted three other cases involving multiple murders in which the juries returned life sentences: *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*, 296 N.C. 607, 252 S.E.2d 745 (1979). The killings in each of these cases, however, appear less heinous than the deliberate, senseless, sequential murders that underlay this defendant's sentence of death, both of which resulted in convictions of murder in the first degree. In *King*, the defendant shot into the house where his former girlfriend was hiding, killing not the girlfriend, but her mother and sister. He was convicted of murder in the first degree on the basis of felony murder, not on the basis of premeditation and deliberation. In *Whisenant*, the

4. Because the jury there failed to specify which of the ten mitigating circumstances applied, we must assume for purposes of proportionality review that all ten circumstances were found. *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).

defendant was convicted of murder in the first degree of an elderly man, but only of murder in the second degree of the victim's housekeeper. In *Crews*, two victims died when the defendants lured them to their campsite, but each died at the hands of a different defendant.

It is readily apparent that the facts and circumstances surrounding defendant's murder of Brenda Smith reveal a very different kind of killing than those in the cases in which the jury returned a sentence of life. Defendant was a man who admitted to a cellmate that he had been dating too many women and suffering too much pressure, causing him to feel he had to "eliminate" somebody. With this end in mind he murdered Joan Brady by ligature strangulation, a torturous mode of death that, like manual strangulation, is a prolonged process "during which the victim's life is quite literally in the hands of the assailant [and] . . . the victim is rendered helpless, aware of impending death, but utterly incapable of preventing it." *State v. Artis*, 325 N.C. at 319, 384 S.E.2d at 493. Two days later defendant took the life of Brenda Smith in exactly the same way. That night he ignited the house of a third girlfriend, intending for her and her young son to burn to death in the fire. These grossly excessive attempts to disentangle himself from overabundant romantic commitments, followed shortly after by an evening of threatening and terrorizing his uncle, were so depraved as graphically to "demonstrate a callous disregard for the value of human life." *State v. Cummings*, 323 N.C. at 199, 372 S.E.2d at 553. Worse, the murders and attempted murder of girlfriends—women who had cared for and been intimate with defendant and who at the time of defendant's assault upon them had no apparent quarrel with him—were "especially cold-blooded because of the absence of any motive of the sort which is usually powerful enough to cause one human being to destroy another." *State v. Greene*, 321 N.C. 594, 614-15, 365 S.E.2d 587, 599, *cert. denied*, --- U.S. ---, 102 L. Ed. 2d 235 (1988).

We have scrupulously reviewed the record and measured defendant's contentions of error in both the guilt phase and the penalty phase of his trial against the law. We conclude that no prejudicial error tainted either phase. Our careful and comprehensive review of other capital cases arising since 1 June 1977 reveals that the facts and circumstances of defendant's crime and character are more like those in similar cases in which a sentence of death has been affirmed than like those in cases in which the perpetrator

received a sentence of life imprisonment. We thus cannot hold that the sentence of death recommended by the jury and imposed by the trial court in this case is disproportionate or excessive as a matter of law.

No error.

Judge FRYE concurring in the result.

One of the preservation issues raised by defendant relates to the applicability of the United States Supreme Court's decision in *Mills v. Maryland*, 486 U.S. ---, 100 L. Ed. 2d 384 (1988), to the unanimity requirement for mitigating circumstances in determining whether death is the appropriate punishment in a given case. This issue is now pending before the Supreme Court of the United States. *See State v. McKoy*, 323 N.C. 1, 372 S.E.2d 12 (1988), *cert. granted*, --- U.S. ---, 103 L. Ed. 2d 180 (1989). While I believe that *Mills* is applicable to North Carolina, *see State v. Lloyd*, 321 N.C. 301, 364 S.E.2d 316, *vacated and remanded on other grounds*, --- U.S. ---, 102 L. Ed. 2d 18, *reinstated*, 323 N.C. 622, 374 S.E.2d 277 (1988) (Exum, C.J., and Frye, J., dissenting), assuming error arguendo, I would find the error nonprejudicial under the peculiar circumstances of this case.

RIVER BIRCH ASSOCIATES v. CITY OF RALEIGH AND RIVER BIRCH HOMEOWNERS ASSOCIATION, INC.

No. 291PA89

(Filed 7 February 1990)

1. Municipal Corporations § 30.10 (NCI3d)— subdivision ordinance—conveyance of recreation area to homeowners' association

A city has the authority under N.C.G.S. § 160A-372 to provide by ordinance for the conveyance of an open space recreation area to a homeowners' association in accordance with a subdivision plat previously approved by the city.

Am Jur 2d, Dedication § 32; Zoning and Planning §§ 106, 123, 163.

2. Municipal Corporations § 30.10 (NCI3d)— subdivision ordinance—conveyance of common areas to homeowners' association

A city subdivision ordinance required the conveyance of common areas depicted on a preliminary plat to a homeowners' association where no amendment thereto had been approved and the project had been substantially developed in accordance with the preliminary plat.

Am Jur 2d, Dedication § 32; Zoning and Planning §§ 106, 123, 163.

3. Municipal Corporations § 30.10 (NCI3d)— subdivision project—common area on preliminary plat—refusal to permit development—proper exercise of police power

Where a city approved the application for a phased subdivision development on the condition that actual development would be in substantial conformance with the project as depicted on the preliminary plat, and the project was substantially developed in accordance with the preliminary plat, the city did not improperly exercise its police power by refusing to process an application to develop three acres originally depicted as a common recreation area on the preliminary plat even though the common area shown on the preliminary plat exceeds the minimum required by city ordinance.

Am Jur 2d, Dedication § 32; Zoning and Planning §§ 106, 123, 163.

4. Municipal Corporations § 30.10 (NCI3d)— subdivision ordinance—conveyance of open space to homeowners' association—no taking of property

A city subdivision ordinance providing for conveyance of open space to an association of homeowners living within the subdivision is reasonably related to the purpose of preserving urban open space, does not deprive the developer of the reasonable value and all practical use of the property, and thus does not constitute a taking of land. Art. I, § 19 of the N. C. Constitution; 14th Amendment to the U. S. Constitution.

Am Jur 2d, Dedication § 32; Zoning and Planning §§ 106, 123, 163.

5. Boundaries § 10.2 (NCI3d); Evidence § 32.7 (NCI3d)— subdivision covenants—meaning of "Common Areas"—latent ambiguity—parol evidence—preliminary and landscaping plats—statements by sales agents

A description in a declaration of subdivision covenants of land to be conveyed to a homeowners' association as "Common Area" was latently ambiguous, and evidence of the preliminary plat and landscaping plan filed by the developer was admissible to identify the common area referred to in the declaration of covenants. Furthermore, evidence that sales agents used the preliminary and landscaping plats to illustrate the location of the common area was competent to show that those plats were documents intended by the parties to identify the boundaries and condition of the common area referred to in the covenants.

Am Jur 2d, Boundaries §§ 8, 76, 95, 96.

6. Parties § 6 (NCI3d); Rules of Civil Procedure § 24 (NCI3d)—proper but not necessary parties—denial of motion to intervene

The trial court did not err in denying the motion of individual homeowners to intervene in an action to determine whether a subdivision developer was required to convey to a homeowners' association a three-acre parcel designated as a common area on the preliminary plat since the individual homeowners were proper but not necessary parties, and the homeowners' association adequately represented their interest in the action. N.C.G.S. § 1A-1, Rule 14.

Am Jur 2d, Boundaries §§ 8, 76, 95, 96.

7. Associations § 5 (NCI3d); Rules of Civil Procedure § 17 (NCI3d)— fraud and unfair trade practices—no standing by homeowners' association

The trial court properly ruled that a homeowners' association did not have standing to prosecute on behalf of its members claims against a subdivision developer for fraud and unfair trade practices based on its failure to convey a common area to the association where it cannot be concluded that the damages claims are common to the entire membership of the association; it is unlikely that each association member shares the injury in equal degree; and permitting the association to pursue a

claim for damages for fraud would deprive its members of the right to seek the alternative remedy of rescission of contract.

Am Jur 2d, Associations and Clubs §§ 54, 55.

8. **Appeal and Error § 2 (NCI3d) — theory not raised in trial court**

A theory of recovery not raised in the trial court will not be considered on appeal.

Am Jur 2d, Appeal and Error § 545.

ON appeal by plaintiff and cross-appeal by defendant Homeowners Association of a judgment entered on 8 August 1988 by *Brewer, J.*, sitting without a jury, on the initiative of this Court made *ex mero motu* pursuant to N.C.G.S. § 7A-31(a) and Rule 15(e)(2) of the Rules of Appellate Procedure to hear the case prior to a determination by the Court of Appeals. Heard in the Supreme Court 10 October 1989.

Michael B. Brough & Associates, by Michael B. Brough and Robert E. Hagemann, for plaintiff-appellant and cross-appellee.

City of Raleigh, by Thomas A. McCormick, Jr., City Attorney, for defendant-appellee City.

Hatch, Little & Bunn, by David H. Permar and Josephine L. Holland, for defendant-appellee and cross-appellant Homeowners Association.

MEYER, Justice.

At issue is a parcel of land of 3.0 acres, more or less, which plaintiff seeks to develop with town homes. Defendants claim this property has been set aside by the plaintiff as a recreation area for the benefit of the members of the River Birch Homeowners Association (hereinafter Homeowners Association). In its final judgment, the trial court found that the Raleigh City Code required the conveyance of the disputed property to the Homeowners Association and that such a requirement was not beyond the authority of the City. The court held further that there was no oral contract between the developer, River Birch Associates (hereinafter River Birch),[1] and the Homeowners Association to convey or landscape

1. The home owners refer to their association in various documents as "River Birch" or "Riverbirch" Homeowners Association, but to their subdivision as

the property in question. The court ordered the conveyance of the parcel to the Homeowners Association.

We confirm that the City has the authority to provide by ordinance for the conveyance of an open space recreation area to a home owners' association in accordance with the plat of a subdivision previously approved by the City. Additionally, we confirm that the City is not required to process the project plan for the development of the last remaining area of the subdivision until it is presented in compliance with the approved preliminary plat. We affirm the trial court's decision that River Birch must convey the three-acre parcel in dispute to the Homeowners Association as per the approved preliminary plat. However, we reverse the trial court's ruling that parol evidence was inadmissible to identify the boundaries and condition of the common area to be conveyed.

In August 1980 River Birch filed an application with the City of Raleigh for subdivision and site plan approval for a 144-unit town home project on 19.6 acres to be known as Riverbirch Township.[2] Among the documents submitted were a preliminary site plan and a landscaping plan. These documents depicted the three-acre parcel which is the subject of this dispute as common area appropriately landscaped. At no time did River Birch record these documents with the Wake County Register of Deeds. In October 1980 the Raleigh City Council approved the Riverbirch Township site plan.

Following approval of the Riverbirch Township site plan, River Birch developed and sold town homes within this project on a section-by-section basis. River Birch developed seven sections in this manner, with the three-acre parcel representing the eighth and final section. Before sales began in each section, River Birch obtained final plat approval of one or more plats from the City of Raleigh and recorded these plats with the Wake County Register of Deeds. None of the recorded final plats contain any portion of the three-acre parcel which to this date remains undeveloped.

"Riverbirch." Most documents filed with the City refer to the subdivision as "Riverbirch." The developer refers to itself as "River Birch." For the sake of clarity, we refer to the subdivision as "Riverbirch" and to the parties as "River Birch."

2. The land subdivision called Riverbirch Township is not to be confused with the county political unit known as a "township." *See* N.C.G.S. § 153A-19 (1987). River Birch Associates designated the name of the development and labeled the preliminary plat filed with the City as "Riverbirch Township."

Contemporaneously with the development of section one of Riverbirch Township, River Birch prepared, executed and recorded a "Declaration of Covenants, Conditions and Restrictions for the River Birch Subdivision." As River Birch developed subsequent sections of Riverbirch Township, it prepared and recorded amendments to the covenants. The covenants specifically state that common area is to be held by the Homeowners Association for the common use and enjoyment of the subdivision home owners. They do not refer specifically to the three-acre parcel.

Riverbirch Township is located on property which the Raleigh City Council has zoned R-10 (ten residential units per acre maximum). A city ordinance requires town home developments in an R-10 zone to include a minimum of ten percent open space. Each of the seven recorded sections of Riverbirch Township, alone and in combination with previously recorded sections of Riverbirch Township, met common open space and density requirements of the Raleigh city subdivision and site plan ordinances.[3] River Birch has conveyed the common area of each of the seven recorded sections to the Homeowners Association. The three-acre parcel in dispute is not necessary to meet city common area and density requirements for the 16.6 acres already developed.

Until December 1985, River Birch developed the project in a manner consistent with the preliminary site plan it had filed with the City. At that time River Birch filed a new site plan depicting twenty-nine town homes (later adjusted to twenty-four homes) on the three-acre parcel in dispute. In its application for site plan approval submitted to the City of Raleigh on 2 September 1986, River Birch proposed to name this new development "Marsh Creek Townes." The development depicted on the Marsh Creek Townes proposal did not conform to the open recreation area depicted in the original Riverbirch Township site plan. Viewed in isolation, this preliminary plat also met the minimum requirements of the Raleigh subdivision ordinance. However, because the three-acre parcel was set aside as common recreation area for the Riverbirch Township subdivision in the plan approved by the City, the City Council on 16 September 1986 refused to process the application

---

3. These are located in chapter 3, Subdivisions and Site Plans, of section 10, Planning and Development, of the Raleigh City Code. Unless otherwise noted, all ordinance references are to the 1989 edition of the Raleigh City Code. We will cite to the Code in the following manner: "Section XX-XXXX."

any further and instead requested River Birch to convey the three-acre parcel to the Homeowners Association.

River Birch filed suit against the City of Raleigh claiming: Section 10-3073 of the subdivision and site plan ordinance exceeds the statutory authority of the City, the refusal of the City to process the Marsh Creek Townes application denied River Birch all use of its property, and thus its action constituted a taking. River Birch sought declaratory and injunctive relief as well as monetary damages. The City of Raleigh responded with a motion to dismiss for failure to join a necessary party—the Homeowners Association. The Homeowners Association and several Riverbirch Township home owners acting in their individual capacities filed motions to intervene in order to defend the primary action and to enter a counterclaim. Presiding Superior Court Judge Barnette in a preliminary hearing allowed the intervention motion of the Homeowners Association (which River Birch did not oppose) but denied the motion of the individual home owners.

In its counterclaim, the Homeowners Association alleges: Section 10-3073 obligates River Birch to transfer the three-acre parcel to the Homeowners Association; River Birch has breached contractual obligations to the property owners; River Birch's acts constitute fraud; and the acts of River Birch were unfair and deceptive practices in violation of N.C.G.S. § 75-1.1. Upon motion by River Birch, Superior Court Judge Battle, in a subsequent preliminary hearing, dismissed the fraud and unfair and deceptive trade practices claims on the pleadings. He denied the motion to dismiss the contract claim, indicating orally that judgment on the pleadings was not appropriate because the statute of frauds is an affirmative defense.

On 1 August 1988 the case came on for trial without a jury before Superior Court Judge Brewer. At that time Judge Brewer, pursuant to a motion in limine by River Birch, ruled that he would exclude evidence that sales agents of River Birch referred to copies of the preliminary plat and landscaping plan, contained in brochures and hanging on the model unit walls, to indicate that the three-acre parcel at issue would be conveyed to the Homeowners Association or that the parcel would be developed as open space. Judge Brewer based his decision on the parol evidence rule, declaring that such evidence would contradict or add to the unambiguous term "Common Area" as defined in the written contracts of sale, and that

if offered to establish a contract separate and apart from the written sales contracts, such evidence would fail to satisfy the writing requirement of the statute of frauds. Following the presentation of evidence, Judge Brewer held that section 10-3073 is a valid exercise of statutory authority which worked no taking against plaintiff River Birch and which in fact required the plaintiff to convey to the Homeowners Association the three-acre parcel as shown on the approved preliminary plat.

Subsequent to oral argument in this Court, the Homeowners Association moved for an order restraining River Birch from disposing of certain remaining town house units. We denied this motion on 28 December 1989.

I.

[1] Plaintiff asserts that the Raleigh city subdivision and site plan ordinance section 10-3073(b)(2) exceeds the statutory authority of cities to regulate subdivisions. In particular, plaintiff objects to the ordinance's provision that developers of subdivisions convey fee simple title of common areas to the subdivision home owners' association. We hold that the ordinance requiring a conveyance in accordance with the approved plat does not exceed the statutory authority of the City.

Section 10-3073(b)(2) states in part that "[a]ll areas which are shown on the site plan other than public streets and residential sites, shall be shown and designated as common areas, the fee-simple title to which shall be conveyed by the developer to the homeowners' association."[4] The statutes granting cities authority to regulate subdivision development are N.C.G.S. §§ 160A-371 to -376. More particularly, N.C.G.S. § 160A-372 provides, "A subdivision control ordinance may provide . . . for the dedication or reservation of recreation areas serving residents of the immediate neighborhood within the subdivision." The plain words of the statute make it abundantly clear that the legislative intent is to somehow secure to the residents of the "immediate neighborhood within the subdivision" the benefit of particular recreation areas.

The legislature has specifically provided that the powers granted to municipalities in chapter 160A "shall be broadly construed and

4. The current ordinance is virtually identical to the ordinance as it read in October 1980 (an amendment added the words "which are shown").

grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect." N.C.G.S. § 160A-4 (1987). *See Grace Baptist Church v. City of Oxford*, 320 N.C. 439, 443, 358 S.E.2d 372, 374 (1987); *Smith v. Keator*, 285 N.C. 530, 534, 206 S.E.2d 203, 205-06, *appeal dismissed*, 419 U.S. 1043, 42 L. Ed. 2d 636 (1974); *Town of West Jefferson v. Edwards*, 74 N.C. App. 377, 385, 329 S.E.2d 407, 412-13 (1985); *City of Durham v. Herndon*, 61 N.C. App. 275, 278, 300 S.E.2d 460, 462 (1983). Thus, the subject of inquiry is the scope of the enabling legislation on which Raleigh relies in enacting its ordinance.

Plaintiff argues that the conveyance to the subdivision Homeowners Association provided for by the city ordinance in question is neither a "dedication" nor a "reservation." It is true that the city ordinance in question does not provide for a "dedication" of common recreation areas within the technical sense of the word. A conveyance creates a "dedication" only when the conveyance benefits the public at large and not merely a portion of it, such as the property owners within a particular subdivision. *Realty Co. v. Hobbs*, 261 N.C. 414, 421, 135 S.E.2d 30, 36 (1964). "[T]here is no such thing as a dedication between owner and individuals. The public must be a party to every dedication. In fact the essence of a dedication to public uses is that it shall be for the use of the public at large." *Jackson v. Gastonia*, 246 N.C. 404, 409, 98 S.E.2d 444, 447 (1957) (quoting authorities). The ordinance in this case states unequivocally that the conveyance of common areas shall be in fee simple to the home owners' association, which is composed of the property owners of the subdivision. Neither does the ordinance contemplate a "reservation" in the technical sense.

"[A] reservation is a clause in a deed whereby the grantor reserves something arising out of the thing granted not then in esse, or some new thing created or reserved, issuing or coming out of the thing granted and not a part of the thing itself . . . ." *Trust Co. v. Wyatt*, 189 N.C. 107, 109, 126 S.E. 93, 94 (1925). The creation of a reservation, then, technically contemplates some instrument by which there is a withholding of an interest for the benefit of the grantor.

Drafters often use terms such as "dedication" and "reservation" without regard to their technical meaning. *Reynolds v. Sand Co.*, 263 N.C. 609, 613, 139 S.E.2d 888, 891 (1965) (citing numerous

instances). When the clear purpose of a statute would be subverted by a mechanical application of a technical term, the courts will interpret that term to ensure that the legislative purpose achieves its full effect. *Duggins v. Board of Examiners*, 294 N.C. 120, 126, 240 S.E.2d 406, 411 (1978) (the proper course in interpreting an ambiguous statute is to adopt that sense of the words which promotes the object of the statute in the fullest manner); *Ikerd v. R.R.*, 209 N.C. 270, 272, 183 S.E. 402, 403 (1936) (where terms are ambiguous, court may control the language to give effect to the real intention of lawmakers); *Fortune v. Commissioners*, 140 N.C. 322, 327, 52 S.E. 950, 951 (1905) (where language used admits of more than one meaning, it is to be taken in such a sense as will conform to the scope of the act and effectuate its object).

Inherent in a "dedication" is the fact that a conveyance occurs. By the same token, a conveyance is a necessary feature of any "reservation." Thus, a common denominator throughout the enabling statute is that cities are authorized to require conveyances. The purpose of the statute is to provide for recreation areas for the benefit of residents within the immediate neighborhood of the subdivision. Giving maximum effect to the terms and the purpose of the statute with the least amount of judicial interpretation, we find that N.C.G.S. § 160A-372 contemplates that a city ordinance may provide for the conveyancing of property so long as the conveyance promotes the establishment of recreation areas for the benefit of residents within the immediate neighborhood of the subdivision. We find further support for this interpretation of the legislative grant of power from the legislative mandate that we are to construe in a broad fashion the provisions and grants of power contained in chapter 160A. N.C.G.S. § 160A-4 (1987).[5] We conclude that the requirement of a conveyance of the common recreation areas to the home owners' association of a subdivision is an "additional and supplementary" power "reasonably necessary or expedient" to carry into effect the legislative intent to secure to the residents of the subdivision the benefits of the recreation areas.

---

5. Provisions in chapter 160A (including those in N.C.G.S. § 160A-372) "*shall* be broadly construed and grants of power *shall* be construed to include any additional and supplementary powers that are reasonably necessary." N.C.G.S. § 160A-4 (1987) (emphasis added). The legislature adopted this provision in 1971 in the same session law that established N.C.G.S. § 160A-372. 1971 N.C. Sess. Laws ch. 698. Thus, there can be no doubt that the broad interpretation mandated by N.C.G.S. § 160A-4 is to apply to N.C.G.S. § 160A-372.

River Birch concedes that an application of the technical meaning of the term is not appropriate. River Birch urges us to adopt a narrow generic meaning that would require the developer to "withhold" an area from development without requiring conveyance of that area. Although the interpretation proposed by River Birch may be appropriate in the reservation of school sites as provided for in the statute under review, N.C.G.S. § 160A-372 (1987), a question we need not decide, such an interpretation would create severe problems regarding the continued maintenance of subdivision open space in future years.

The ordinance provision that a developer convey open space to a home owners' association represents a municipal effort to control the very real problem of "nuisance lots" that may otherwise result. The fundamental problem is one of providing for the continued maintenance of urban open space. It is true that the City could have opted to require a dedication of the recreation areas subject to a provision that the City would assume no responsibility for maintenance until the City deemed it was in the public interest. *See Emanuelson v. Gibbs*, 49 N.C. App. 417, 271 S.E.2d 557 (1980). But this approach does not address the municipality's core problem of providing for the future maintenance of the urban open space. While the City may always require maintenance by ordinance using nuisance abatement authority under N.C.G.S. § 160A-193, for example, such authority is empty where the developer has sold all developed property and gone out of business or otherwise has no assets. Real estate development corporations are often project-specific; upon the completion of the project, the developer will frequently liquidate the corporation. In the event that the home owners' association should dissolve, the City will receive the space through dedication. Section 10-3071(b)(8)(b)(5).

Additionally, by providing for a conveyance to the home owners' association, the City takes advantage of the fact that those with an immediate interest in a common area have the duty to provide for its maintenance. Thus, section 10-3073(b)(2) is a limited, practical attempt to provide for open recreation space without creating burdens on the municipal purse or inadvertently creating an abundance of nuisance areas.

We note the line of cases holding that because the zoning and subdivision regulations are in derogation of private property, such provisions should be liberally construed in favor of the owner.

See, e.g., Heaton v. City of Charlotte, 277 N.C. 506, 522, 178 S.E.2d 352, 362 (1971). However, these cases have a limited applicability where the question, as here, is not whether the owner's land may be restricted, but what tools are available to a municipality to ensure and protect that restriction.

The foregoing analysis of N.C.G.S. § 160A-372 indicates that the legislature contemplated that city ordinances provide for the conveyancing of subdivision recreation areas. We hold that N.C.G.S. § 160A-372 permits city ordinances to provide for the conveyance of recreation areas in accordance with approved plats to home owners' associations, in order to set aside to the residents of a subdivision certain areas for recreation purposes. The trial court was correct when it held that Raleigh city ordinance section 10-3073(b)(2) does not exceed the statutory authority of the City.

II.

[2] Under the peculiar facts of this case, we hold that Raleigh city ordinance section 10-3073(b)(2) provides for the conveyance of common areas to home owners' associations where conveyance of the common areas as depicted on approved preliminary plats is all that remains to complete the approved project.

River Birch contends that the unrecorded, preliminary site and landscaping plans which depict the three-acre common area should not bind it as to the common areas to be conveyed. The procedural context in which the ordinance rests is relevant to our inquiry into proper interpretation of the ordinance. Like many subdivision ordinances, the Raleigh city subdivision ordinance contemplates a two-step administrative process—preliminary and final plat approval. For a general discussion, see 5 Ziegler, *Rathkopf's The Law of Zoning and Planning* § 66.02 (1989). The appellation "preliminary" is a beguiling one, for the preliminary plat is hardly a rough introductory document. Unlike a sketch plan, which is used as a vehicle for informal discussion between developers and city planners, the preliminary plan is a formal document that constitutes the most critical step in the subdivision approval process. A developer submits a preliminary plat with the application for subdivision approval. This gives the applicant and the city the opportunity to ascertain whether the proposed project complies with the applicable subdivision standards. Under the Raleigh ordinance, the departments of planning, public utilities, public works, and engineering, as well as the city manager, review the plan

for compliance with standards and effect on delivery of services. Section 10-3012(b). The City may note where changes are necessary, and the developer may take the necessary changes into account without significant expense. Following departmental review and comment, the plat must receive unanimous planning commission approval or, if that is not given, approval from the City Council. Section 10-3012(c). Approval by the City constitutes approval of the *proposed* project and gives the applicant the authority to construct all improvements indicated. Once the applicant makes substantial expenditures in good-faith reliance on the approval, he has a vested right to carry out the project as approved. *See Town of Hillsborough v. Smith*, 276 N.C. 48, 170 S.E.2d 904 (1969). Such approval also indicates that if the project is completed substantially as proposed, the completed project will receive final approval.

By the time the developer seeks final plat approval, he has constructed the improvements depicted on the final plat. Once the developer has constructed all streets and utilities in "substantial conformity" with the preliminary plat, section 10-3012(d), and these have been inspected by the city, and after all deeds of dedication and easement are completed, the approval of the final plat is automatic. Section 10-3012(f).

> Final approval under the two-step procedure amounts to endorsement of the final form of the plat to be filed in the county recording office after board investigation and determination that the terms and conditions of tentative approval have been met and that required improvements . . . have been installed or provided for.

Levin v. Township of Livingston, 35 N.J. 500, 512, 173 A.2d 391, 398 (1961). Final plat approval is, essentially, a ministerial check and statement, *Southern Co-op Dev. Fund v. Driggers*, 696 F.2d 1347, 1352 (11th Cir.), *cert. denied*, 463 U.S. 1208, 77 L. Ed. 2d 1389 (1983); *Bienz v. City of Dayton*, 29 Or. App. 761, 767, 566 P.2d 904, 913 (1977), made by the city affirming that what the developer has done is in conformity with city standards. Where development of a subdivision is in multiple stages, the developer need seek approval for only that phase of the development that is complete.

Final approval is a prerequisite to the recording of the plat, and recording is a prerequisite to the sale of lots in reference to a subdivision plat. N.C.G.S. § 160A-375 (1987). Recording of the

plat still is not sufficient to create an interest in the common areas for the benefit of subdivision home owners. There must be purchasers of lots subject to deeds that reference the final recorded plat. *Realty Co. v. Hobbs*, 261 N.C. at 421, 135 S.E.2d at 35-36; *Janicki v. Lorek*, 255 N.C. 53, 59-61, 120 S.E.2d 413, 418-19 (1961).

This two-step process recognizes the fact that "[u]ntil a plat of a proposed subdivision is properly recorded, there is no assurance that the subdivision will ever be established. The act of recording brings the subdivision into being and makes of it a reality." *Metropolitan Plan Commission of Marion County v. Indiana*, 243 Ind. 46, 50, 182 N.E.2d 786, 788 (1962). Prior to recording, the use and purpose of the subdivision or the plat could have been abandoned altogether. Thus, it is conceivable that property owners may never acquire rights in some common areas shown on the preliminary site plan and may acquire rights in other areas that were not shown as common areas on the preliminary site plan but that are shown as common areas on the final plat.

In the context of a phased development (as was the development of Riverbirch Township), the policy of the City of Raleigh has been to require each phase of such a development to stand on its own. Section 10-3073(b)(4)(b) (by unwritten policy prior to 1985). Under this policy, each subdivision phase alone must meet all ordinance requirements, thereby ensuring the public's health, safety and welfare should the developer fail to complete the entire development as depicted on the preliminary plat.

In the case before us, River Birch had substantially completed all construction depicted on the approved preliminary plat. There was no need for River Birch to seek any further final plat approval, for all residential units contemplated in the preliminary plan had been constructed and had been made the subject of approved and recorded final plats. There was no need to file a final plat for the last remaining section, the common area, as that area was not subject to further development other than landscaping. Thus, it was entirely appropriate for the trial court to require the conveyance of the remaining three-acre parcel as depicted on the preliminary plat.

The defendant City urges us to hold that the preliminary site plan is a document of public record that, although not recorded, does create implied rights and obligations as to the developer, the City, and individual home owners. While implied rights and

obligations may arise in certain fact-specific circumstances, we cannot go as far as the City urges and hold that section 10-3073(b)(2) requires the conveyancing of common areas as depicted on preliminary site plans at the time they are filed. To do so would produce peculiar results.

One of the purposes of the preliminary plat approval process is to give a developer an indication that the proposal is legally feasible. Frequently, prior to applying for preliminary plat approval, developers will purchase an option on the subject land parcel rather than obtaining fee simple title in the property. The purpose of the option is to reduce the developers' risk should the city with jurisdiction deny approval. *See Finch v. City of Durham*, 325 N.C. 352, 367, 384 S.E.2d 8, 17, *reh'g denied*, 325 N.C. 714, 388 S.E.2d 452 (1989) (one purpose of an option contract is to minimize investment exposure by postponing the decision to accept or reject an offer). This was precisely the procedure followed in this instance by River Birch, which did not acquire fee simple title to the properties subsequently developed until some fifteen months after the City of Raleigh approved the preliminary plat.[6] If River Birch had instead chosen not to exercise its option, it would follow from a holding that the city ordinance requires the conveyance of property as per preliminary plats that the City would have the power to force River Birch to purchase and convey the common areas depicted even if River Birch elected not to exercise its option.

The interpretation urged by the City would also affect developers of multi-phase projects that abandon the project prior to substantial completion but subsequent to finishing one or more phases of the project. Under the City's interpretation of the ordinance, such a developer would be required to convey to the home owners' association the property depicted as common area in the undeveloped phases of the project.

Here, however, the proposed development had been substantially developed in compliance with the preliminary plan. There was nothing left to develop except the open space. We hold that the trial court was correct when it stated that section 10-3073(b)(2) of the Raleigh city subdivision and zoning ordinance required the

---

6. That River Birch had standing to submit the preliminary plat prior to obtaining fee simple title is not in dispute. *See, e.g., Lakeshore Dev. Corp. v. Plan Comm. of Village of Oconomowoc Lake*, 12 Wis. 2d 560, 569-70, 107 N.W.2d 590, 595 (1961).

conveyance of common areas as depicted on a preliminary plat so long as no amendments thereto had been approved and the project had been substantially developed in accordance with the preliminary plat.

III.

[3] Nor must the City process River Birch's application to develop the three acres originally depicted as common area in the preliminary plat. River Birch insists that the refusal by the City of Raleigh to process River Birch's application for development of the Marsh Creek Townes project constitutes an improper exercise of the City's police power for private purposes. More specifically, River Birch asserts the City's refusal is a violation of due process under article I, section 19 of the North Carolina Constitution (the law of the land clause) and of the fourteenth amendment of the United States Constitution. We reject these contentions. Rather, we hold that where a developer submits a project plan for approval and undertakes the development of the property according to the approved preliminary plan, a city may refuse to consider a subsequent stage of the overall project that fails to take into account the prior development as proposed and undertaken in the prior stages of development.

We note as a preliminary matter that the rights at issue here are those of the City. These rights are separate and distinct from those asserted by the Homeowners Association.

That the police power of a City must be exercised for public rather than private purposes is a well-established principle of this State, *State v. Ballance*, 229 N.C. 764, 769-70, 51 S.E.2d 731, 734-35 (1949); *State v. Ray*, 131 N.C. 814, 42 S.E. 960 (1902), and of the federal Constitution, *Keystone Bituminous Coal v. Benedictus*, 480 U.S. 470, 485, 94 L. Ed. 2d 472, 488 (1987); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 67 L. Ed. 322 (1922). River Birch argues that the City is exercising its police power to further the narrow private interests of the Homeowners Association members. According to River Birch, the refusal by the City to process the Marsh Creek Townes application is in fact a political response to the claim of the Homeowners Association that the three-acre parcel should be conveyed to the Homeowners Association as open recreation space. River Birch argues that because the Marsh Creek Townes project meets the density and open space requirements of the City, the City must give its preliminary approval to the scheme. *See,*

e.g., *Woodhouse v. Board of Commissioners*, 299 N.C. 211, 218, 261 S.E.2d 882, 887 (1980) ("The board is 'without power to deny a permit on grounds not expressly stated in the ordinance' "); *Application of Rea Construction Company*, 272 N.C. 715, 718, 158 S.E.2d 887, 889-90 (1968) ("Where the applicant meets all the requirements of the ordinance he is entitled to the issuance of a permit as a matter of right and it may not lawfully be withheld"). Nevertheless, in this case we find no abuse of police power for the benefit of a narrow private class.

Cities may regulate open space as part of their power to provide for the physical, social, aesthetic and economic welfare of the community. *Agins v. Tiburon*, 447 U.S. 255, 261, 65 L. Ed. 2d 106, 112 (1980). *See also* N.C.G.S. §§ 160A-351, -402 (1987). Once a developer shows the project meets the minimum standards for development, " 'the burden of establishing that such use would violate the health, safety and welfare of the community falls upon those who oppose the issuance' " of the development permit. *Woodhouse v. Board of Commissioners*, 299 N.C. at 219, 261 S.E.2d at 888 (quoting *West Whiteland Township v. Exton Materials Inc.*, 11 Pa. Cmwlth. 474, 479, 314 A.2d 43, 46 (1974)). In *Woodhouse*, the developers sought approval for a preliminary plan to construct a planned unit development in Nags Head. We held that the Nags Head Board of Commissioners improperly denied the application where the developer had met the local minimum requirements for a planned unit development and where there was no contrary showing that the project would otherwise impermissibly compromise the health, safety or welfare of the community. In that case there had been no construction undertaken subject to a prior approved preliminary plan. In the case before us, although it is true that the Marsh Creek Townes project standing alone would meet the minimum ordinance requirements, the project fails the approval process because it differs significantly from the prior preliminary plan as approved and undertaken by the developer.

River Birch admits that the City must use its authority to ensure compliance with its established standards. One such standard is that a final approved plat shall comply substantially with the prior approved plat. The version of this ordinance in effect on 7 October 1980, the date River Birch received approval for its preliminary plat application, stated that "[t]he engineering plat(s) will be checked against the requirements and conditions of preliminary approval before . . . signing of the plat to be recorded

by the city clerk." Section 10-3012(d) (1979).[7] Raleigh city planners consistently have adopted the view that the final plat should reflect generally the same configuration and acreage as was shown in the preliminary site plan. In an unrelated action taken subsequent to the approval of the Riverbirch Township preliminary plat, the City amended section 10-3012(d) on 14 November 1980 to state in part: "Developments approved under [the subdivision standards] of this chapter shall show sections or phases on the approved preliminary plat and *all subsequent plats shall be in substantial conformity therewith.*" (Emphasis added.) This amendment, continuing in force today, is an explicit statement of prior unwritten policy. "[T]he construction adopted by those who execute and administer the law in question is relevant and may be considered." *MacPherson v. City of Asheville*, 283 N.C. 299, 307, 196 S.E.2d 200, 206 (1973). By referencing the construction given section 10-3012(d) by city planners and the subsequent history of legislation of the ordinance, we interpret section 10-3012(d) as in effect in 1979 to have required that subsequent plats, namely the engineering and final plats, be in substantial conformity with the approved preliminary plat. A project application contemplating construction on a parcel of land depicted as open space in a prior plan subsequently undertaken cannot result in a final plat "in substantial conformity" with the initial approved preliminary plan. Thus, the City's refusal to process the Marsh Creek Townes proposal is not an abuse of police power; rather, this refusal is the result of enforcement of established standards.

Even if section 10-3012(d) as in effect in 1979 did not require substantial conformity between the preliminary plat and subsequent plats, River Birch would be bound by the preliminary plat which it submitted and undertook. Section 10-3013(b)(5) requires preliminary plats to show, among other information, the "[b]oundary line of the proposed development, the lot lines, parcels of land to be dedicated to public use, setback lines, easements, street right-of-way lines, and other property lines, drawn to scale and with tentative dimensions." Subpart (b)(6)(i) of the same ordinance requires the preliminary plat to show the "[t]otal acres" of the

7. The engineering plat is a detailed survey plat showing the exact proposed location of all monuments, utilities, streets, etc. Section 10-3014(b). It is temporally intermediate to the preliminary and final plats in the filing process. The final plat is the same as the engineering plat "only corrected in cases where minor variations were necessary upon actual installation of facilities." Section 10-3015.

proposed project. One purpose of these requirements is to aid the City in area planning based upon the information included in the preliminary plan. The preliminary plan River Birch submitted included the required information. River Birch depicted on the preliminary plan the disputed three-acre parcel within the boundary of the development. The landscaping plan submitted by River Birch as part of its application depicted the three-acre parcel within the development boundary. No lot lines indicated the parcel was to be subdivided in either document. Instead, the parcel was an undifferentiated part of a larger area clearly labeled "common area" on both the site plan and the landscaping plan. River Birch indicated that the total acreage of the Riverbirch Township project was "19.6 acres," not the 16.6 acres that would result if the City were to approve the Marsh Creek Townes project. The request River Birch submitted to the Raleigh Planning Commission was for construction of "144 Townhouse units on 19.6 acres." The Planning Commission recommended "that this request be approved *according to a map entitled, 'Riverbirch Township,'* " which was the preliminary map River Birch submitted. (Emphasis added.) The City Council approved the request to "construct 144 Townhouse units on 19.6 acres" "*according to a map entitled, 'Riverbirch Township'* " and subject to a further condition not relevant here. (Emphasis added.) Thus, a condition of approval was that development of the subdivision was to be in accordance with the site plan that River Birch submitted.

"It is well settled that conditions may be imposed by a municipal planning commission in connection with the approval of a proposed subdivision map or plan." 3 Yokley, *Zoning Law and Practice* § 17-8 at 71 (4th ed. 1979) (citing cases). However, any such condition imposed must be authorized by statute. *Id.* § 17-9 at 79. That Raleigh authorities could condition approval on development in substantial conformity with a preliminary plat as approved is without doubt.

This situation is analogous to that of *Convent v. Winston-Salem*, 243 N.C. 316, 90 S.E.2d 879 (1956). In that case the Sisters of St. Joseph secured a special use permit to convert a home to a school in a residential zoning district. The permit included a condition requiring city approval for any subsequent structural changes made to the exterior of existing buildings. When the Sisters subsequently sought to make such changes, the city denied the Sisters a building permit, even though the proposed changes other-

wise fully complied with zoning ordinance provisions on yard, area and height restrictions. We held that acceptance of benefits under the special use ordinance prevented an attack upon it.[8]

Here, as in *Convent v. Winston-Salem*, River Birch took advantage of benefits that accrued as a result of voluntarily depicting common area in its preliminary plat. Upon approval of its plan, River Birch received and exercised the right to cluster the development and effectively increase the housing density to greater than otherwise allowed under the zoning ordinance. Raleigh explicitly ties this right to subdivision approval. Section 10-3071(b). That River Birch depicted more than the minimum common area necessary is of no great import. *Cf. Doughtie v. Dennison*, 240 Ga. 299, 240 S.E.2d 89 (1977) (although twenty-five-foot strips sufficient for recreation easement, developer could not unilaterally alter terms of restrictive covenant setting aside larger area for same purpose). River Birch cannot now attack a condition of its own making which the City has accepted.

We do not suggest that River Birch was required to develop the Riverbirch Township project once it submitted its project proposal. But having substantially undertaken the development according to the approved preliminary plan, River Birch indicated its assent to the condition that development be according to the approved preliminary plan. Failure to meet a condition of approval is grounds for revocation of preliminary plat approval. *Parker v. Bd. of County Comm'rs of Dona Ana County*, 93 N.M. 641, 603 P.2d 1098 (1979). "When a subdivision plan has been approved upon conditions, the failure to comply with the conditions will result in the rescission of the approval." *Foley v. Hamilton*, 603 S.W.2d 151, 153 (Tenn. App. 1980) (citing *Patelle v. Planning Bd. of Woburn*, 6 Mass. App. 951, 383 N.E.2d 94 (1978)). We see no reason why failure to meet a condition also should not be grounds for denial of approval of a preliminary plat of a subsequent stage of development where the project submitted would make compliance with

---

8. While acceptance of a special use permit may preclude a challenge to its validity, there is no preclusion of a challenge to interpretation of that permit. *Davidson County v. City of High Point*, 321 N.C. 252, 259, 362 S.E.2d 553, 558 (1987). River Birch does not challenge the City's interpretation of its condition. Instead, River Birch denies the existence of the condition altogether. However, were River Birch to make such a challenge, the evidence supports the conclusion that the three-acre remaining area is an undifferentiated part of the larger common area depicted on the preliminary plat and landscaping plans.

a prior condition impossible. To say that Riverbirch Township meets the minimum requirements of the city open space ordinance without the three-acre area is not enough where a condition of preliminary approval is that development will proceed substantially according to the plan submitted.

Nor does our holding prohibit a city from granting a variance to its prior condition upon proper submission of an otherwise compliant application. *See Bienz v. City of Dayton*, 29 Or. App. 761, 769, 566 P.2d 904, 914. However, where a condition of city approval is one proposed and accepted by the developer, the city is not obligated to grant a variance to the developer's self-created and subsequently undertaken condition, even if hardship results. *See Cryderman v. City of Birmingham*, 171 Mich. App. 15, 21-22, 429 N.W.2d 625, 627 (1988).

River Birch has received all the rights which it sought in the subdivision development it proposed. There is no basis to its claim that the City's refusal to approve the plat for Marsh Creek Townes was a denial of due process. Rather, it was exactly because there was due process that the Homeowners Association was able to bring this matter to the attention of the Raleigh City Council. Thus, we hold that the City of Raleigh properly exercised its police power when it refused to process the Marsh Creek Townes project which River Birch submitted.

IV.

[4] In its final assignment of error, River Birch urges us to hold that the ordinance's provision that the developer convey the disputed common area to the Homeowners Association constitutes a taking of land. We decline to do so.

The fifth amendment of the United States Constitution, through the fourteenth amendment, and the law of the land clause of our state Constitution, article I, section 19, require just compensation for all takings of private property for public use. *Keystone Bituminous Coal Assoc. v. DeBenedictus*, 480 U.S. 470, 481 n.10, 94 L. Ed. 2d 472, 486 n.10; *Long v. City of Charlotte*, 306 N.C. 187, 196, 293 S.E.2d 101, 107-08 (1982). The two-part test to determine whether a taking has occurred under the federal Constitution is similar to that used to determine whether a taking has occurred under the state Constitution. We first determine whether the action at issue is a valid exercise of police power by which the ends

sought are related to the means used. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 836-37, 97 L. Ed. 2d 677, 689 (1987) (there must be a "nexus" between imposed condition and otherwise legitimate end advanced as justification); *Responsible Citizens v. City of Asheville*, 308 N.C. 255, 261, 302 S.E.2d 204, 208 (1983) (means chosen must be reasonable and ends sought must be within scope of police power). If there is a rational relation between the ends sought and the means taken, we then determine whether the property has "a practical use and a reasonable value." *Finch v. City of Durham*, 325 N.C. at 364, 384 S.E.2d at 15.

The objective of preserving open space is within the scope of a municipality's police power. *Agins v. Tiburon*, 447 U.S. at 260, 65 L. Ed. 2d at 112. Like the ordinance in *Agins*, the ordinance here is part of a comprehensive plan of development that applies uniformly to all property owners and from which all property owners, including developers, will benefit. As we have noted in the previous section, the General Assembly has recognized the importance of preserving open space and has given broad authority to municipalities to take action to conserve open space. *See, e.g.*, N.C.G.S. §§ 160A-402, -372 (1987). One aspect of preserving open space involves providing for its future maintenance. Raleigh ordinance § 10-3073(b)(2) is a reasonable means to provide for the preservation of open space. We thus conclude that "a nexus exists between those goals and the . . . ordinance itself," *Finch v. City of Durham*, 325 N.C. at 367, 384 S.E.2d at 17, and hold that a city ordinance providing for conveyance of open space to an association of home owners living within the subdivision is reasonably related to the purpose of preserving urban open space.

River Birch nonetheless argues that the city ordinance denies the developer the right to develop its three-acre parcel. Thus, River Birch asserts, the City has denied it the reasonable value and all practical use of the area.

Such an argument ignores the fact that in return for River Birch's promise to set aside common area, the City permitted River Birch to develop the subdivision tract in a more intensive manner than otherwise permitted. The City permitted this intensive development in precisely the manner that River Birch requested. River Birch has made significant profits from the developed subdivision. Looking at the three-acre area as a portion of the larger subdivision, we cannot hold that River Birch has been denied all use and prac-

tical value of the property. By setting aside common area, the City permitted River Birch to develop the 19.6 acres more densely than the Raleigh zoning ordinances would have otherwise permitted. By setting aside common area, River Birch was able to attract purchasers to the subdivision. River Birch has received all the use of the property which it sought and to which it was entitled according to the terms of the original preliminary plat submitted by it.

A requirement of dedication of park space for subdivision approval does not necessarily constitute a taking. *Aunt Hack Ridge Estates, Inc. v. Plan. Comm. of Danbury*, 27 Conn. Supp. 74, 230 A.2d 45 (1967). Where the subdivider creates the specific need for the parks, it is not unreasonable to charge the subdivider with the burden of providing them. *Billings Properties, Inc. v. Yellowstone County*, 144 Mont. 25, 33-36, 394 P.2d 182, 187-88 (1964). Here, the increased density of development renders necessary the setting aside of open space.

Denial of a project application for preliminary plat approval does not amount to an unconstitutional taking of land where the denial was based on a failure to meet valid requirements. *Szeles-Natale, Inc. v. Bd. of Comm'rs of Swatara Township, Dauphin County*, 28 Pa. Cmwlth. 563, 568, 368 A.2d 1336, 1338 (1977). Nor is there a violation when suspension or revocation of plat approval is due to a developer's failure to meet legitimate conditions of approval. *Parker v. Bd. of County Comm'rs of Dona Ana County*, 93 N.M. at 643-44, 603 P.2d at 1101. We conclude that denial of a project application which would violate the valid condition of a previously approved and substantially undertaken proposal works no taking of the three-acre area.

V.

We turn now to the assignments of error raised by the defendant-appellant Homeowners Association. These include one assignment of a substantive nature and several of a procedural cast. We will first address the substantive issue.

[5] Prior to trial, the trial judge granted River Birch's motion in limine to exclude parol evidence that the subdivision common area included the three-acre parcel which is the subject of this dispute. This evidence included numerous affidavits of Riverbirch Township home owners to the effect that River Birch's sales agents

indicated that River Birch intended to convey the three-acre parcel, and the sales agents used the preliminary plat and landscaping plan River Birch submitted to the City to illustrate this intent. The Homeowners Association urges on appeal that the unrecorded preliminary plat and landscaping plan are documents necessary to resolving a latent ambiguity in the "Declaration of Covenants, Conditions and Restrictions for the River Birch Subdivision." We agree.

A contract to convey an interest in land must satisfy the requirements of the statute of frauds. The contract must be in writing and signed by the party to be charged. N.C.G.S. § 22-2 (1986). Although the writing must contain all essential elements of a contract to convey land, *Satterfield v. Pappas*, 67 N.C. App. 28, 36, 312 S.E.2d 511, 516, *disc. rev. denied*, 311 N.C. 403, 319 S.E.2d 274 (1984), memoranda of land sales may be informal, *Hurdle v. White*, 34 N.C. App. 644, 239 S.E.2d 589 (1977), *cert. denied*, 294 N.C. 441, 241 S.E.2d 843 (1978), and all provisions of the contract need not be in a single instrument, *Satterfield v. Pappas*, 67 N.C. App. at 35, 312 S.E.2d at 516. The essential elements of a contract for conveyance of land are the names of the grantor and grantee, the price or consideration, and a description of the property to be sold. *Hurdle v. White*, 34 N.C. App. at 648, 239 S.E.2d at 592.

> When a description leaves the land "in a state of absolute uncertainty, and refers to nothing extrinsic by which it might be identified with certainty," it is patently ambiguous and parol evidence is not admissible to aid the description. The deed or contract is void. *Lane v. Coe, supra* [262 N.C. 8,] at 13, 136 S.E. 2d [269,] at 273 [(1964)]. Whether a description is patently ambiguous is a question of law. *Carlton v. Anderson*, 276 N.C. 564, 173 S.E. 2d 783 (1970). "A description is . . . latently ambiguous if it is insufficient in itself to identify the property but refers to something extrinsic by which identification might possibly be made." *Lane v. Coe, supra* [262 N.C.] at 13, 136 S.E. 2d at 273.

Kidd v. Early, 289 N.C. 343, 353, 222 S.E.2d 392, 400 (1976). Thus, a description missing or uncertain in one document may be rendered certain by another and together the documents may satisfy the statute of frauds. *Simpson v. Beaufort County Lumber Co.*, 193 N.C. 454, 137 S.E. 311 (1927).

River Birch recorded a Declaration of Covenants, Conditions and Restrictions prior to the conveyance of the first subdivision unit. Article II, section 3 of the covenants recites:

> *Title to the Common Area.* The Declarant [River Birch] hereby covenants for itself, its heirs and assigns, that it will convey fee simple title to the Common Area to the [Homeowners] Association, free and clear of all encumbrances and liens, prior to the conveyance of the first lot, except utility and drainage easements.

This covenant to convey the "common area" creates an ambiguity regarding the identity and description of that area. As such, the ambiguity is latent. "A patent ambiguity raises a question of construction; a latent ambiguity raises a question of identity." *Lane v. Coe*, 262 N.C. at 13, 136 S.E.2d at 273.

Article I, section 4 of the recorded covenants provides some help in resolving the identity of the common area:

> "Common Area" shall mean all real property owned by the [Homeowners] Association for the common use and enjoyment of the owners. The Common Area to be owned by the [Homeowners] Association at the time of the conveyance of the first lot is described as follows: See Exhibit B Hereto.

Exhibit B reads:

> All of the property of River Birch Associates according to a plat of survey dated December 2, 1980 prepared by Al Prince and Associates, P.A. and being also all of Section 1 according to a map recorded in Book of Maps 1980, page 1066 of the Wake County Registry with the exception of the designated lots 1 through 15 inclusive as shown on said plat.

Article I, section 4 of the covenants makes evident that the land described in Exhibit B was not intended to be all the common area that River Birch covenanted to convey. Rather, Exhibit B describes only the common area to be owned by the Homeowners Association "*at the time of the conveyance of the first lot.*" This clause implies that there was more common area property which River Birch intended to convey in the future. Such in fact was the case, as River Birch by addendum to the covenants conveyed common area additional to that described in Exhibit B on the completion of each phase of the subdivision. Exhibit B and the subse-

quent addenda describe common area, but not necessarily *all* of the common area, that River Birch intended to convey.

The intentions of the parties are relevant to an evaluation of a description of land to be conveyed.

> [I]t is not necessary that the description should be given with such particularity as to make a resort to extrinsic evidence unnecessary. The doctrine '*Id certum est quod certum riddi potest*'[9] applies, and if the designation is so definite that the purchaser knows exactly what he is buying and the seller knows what he is getting, and the land is so described that the court can, with the aid of extrinsic evidence, apply the description to the exact property intended to be sold, it is enough.

Lewis v. Murray, 177 N.C. 17, 20, 97 S.E. 750, 751 (1919).

In *Lewis*, the Court upheld a contract of sale which described the property to be conveyed simply as "the Home Place." The party seeking to enforce the contract was permitted to present evidence that identified the land; that it was known as "the Home Place"; and that while the nonperforming party owned several tracts, he had lived only on this particular acreage.

> The presumption is strong that a description which actually corresponds with an estate owned by the contracting party is intended to apply to that particular estate . . . . When all the circumstances of possession, ownership and situation of the parties, and of their relation to each other and the property, as they were when the negotiation took place and the writing was made, are disclosed, if the meaning and application of the writing, read in the light of those circumstances, are certain and plain, the parties will be bound by it as a sufficient written contract or memorandum of their agreement.

Id. at 20-21, 97 S.E. at 752, *cited in Hurdle v. White*, 34 N.C. App. at 649-50, 239 S.E.2d at 593. *See also Norton v. Smith*, 179 N.C. 553, 103 S.E. 14 (1920).

In *Lane*, this Court held that a contract to sell the "house and lots on 601 highway where his residence is" was a sufficient

---

9. "That is certain which can be made certain." Black's Law Dictionary 670 (5th ed. 1979).

description to satisfy the statute of frauds. This description admitted the possibility of specific identification through a showing of extrinsic evidence, either by reference to a map, a deed or a fixed monument. *Lane v. Coe*, 262 N.C. at 14, 136 S.E.2d at 273-74.

Like the descriptions in *Lewis* and *Lane*, the term "common area" as used in the covenants is so definite that the grantee knows exactly what he is receiving and the grantor knows what he is conveying. With the aid of extrinsic evidence, the court can apply the description to the exact property to be conveyed.

River Birch alleged that it was always its intention to develop the three-acre parcel in dispute in some fashion and that failure to label the parcel "[r]eserved for future development" was inadvertent error. River Birch based its allegation on the fact that the term "common area" appears on the western half of the southern portion of the plat and that the largest segment of this southern portion, the three-acre parcel in dispute, begins approximately in the middle of the southern portion and extends to the eastern boundary of the property. Nonetheless, by its own admission, the term "common area" appears on the plat, and there is no additional designation indicating an alternate use of the three-acre area. "Material evidence may be supplied by admissions in the pleadings." *Id.* at 15, 136 S.E.2d at 274. By reference to the preliminary plat that River Birch included in its complaint, we are able to determine that the "Common Area" referred to in the covenants includes the three-acre parcel in dispute. By the terms of its covenants, River Birch is obligated to convey that parcel to the Homeowners Association. The trial court incorrectly excluded evidence of the preliminary plat for the purpose of resolving a latent ambiguity in the identity of common area referred to in the covenants.

Moreover, the covenants indicate that they are for the benefit of the "River Birch Subdivision." The development of a subdivision is necessarily the subject of strict ordinancing, which in this case includes a requirement of plat filing and designation of common areas. The documents included in the application are a source to determine the extent of the common area which River Birch covenanted to convey. As required by the Raleigh city ordinance, River Birch indicated the location of common area on both the preliminary site plan and on the landscaping plan. These documents were competent to resolve the ambiguity in the description of

the common area, and it was error for the trial court to exclude them for this purpose.

The trial court should not have excluded affidavits of individual home owners describing the use of the preliminary and landscaping plats by sales agents to illustrate the location of the common area. This evidence was competent to show that the landscaping plan and preliminary plat were documents intended by the parties to identify the boundaries of the common area referred to in the covenants. This evidence, tending to show that the three-acre parcel is part of one contiguous area, is like that which the trial court improperly excluded in *Lane*. *Id.* at 15, 136 S.E.2d at 274.

Parol assurances made by a developer to prospective buyers regarding the general scheme or plans of development that the developer intends to pursue are admissible to establish the existence of such a scheme. *Warren v. Detlefsen*, 281 Ark. 196, 199, 663 S.W.2d 710, 711-12 (1984). Such parol evidence may be in the form of a field map, sales brochures, maps, advertising or oral statements on which purchasers relied. *Id.* In this case, the evidence establishes a general scheme of setting aside open space that included the three-acre parcel.

We do not suggest the affidavits are competent to identify the boundaries of the common area, for then the declarations would be used to alter the terms of the written agreement. However, where the declarations confirm that the parties intended certain documents to identify the boundaries of land referred to in other documents, then those declarations will be admitted for that limited purpose.

Moreover, the oral assurance that the common area would be conveyed in a landscaped state, given by the real estate agents to prospective home owners, was competent evidence. Where a contract to convey land that otherwise satisfies the statute of frauds is part oral and part written, parol evidence is admissible so long as it does not conflict with the writing. *Boone v. Boone*, 217 N.C. 722, 729, 9 S.E.2d 383, 387 (1940). Parol evidence of these assurances would merely affirm that the open area depicted on the landscaping plan was to be appropriately landscaped.

Thus, on this issue we hold that the trial court improperly excluded evidence of statements made to buyers. Additionally, the trial court should have admitted the preliminary plat and the land-

scaping plan as maps tending to identify the common area referred to in the declaration of covenants. This evidence was competent to support the Homeowners Association's claims for damages and should have been considered.

VI.

[6] The trial court denied the motion of several home owners to intervene in this suit in their individual capacities. Assuming arguendo that the Homeowners Association has standing to pursue this issue on appeal, we hold that the individuals, though proper parties, were not necessary, and therefore there was no error in this ruling.

The individuals sought to intervene under Rule 24 of our Rules of Civil Procedure. N.C.G.S. § 1A-1, Rule 24 (1983). Parties may intervene as of right when a statute confers an unconditional right to intervene, N.C.G.S. § 1A-1, Rule 24(a)(1), or

> [w]hen the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, *unless the applicant's interest is adequately represented by existing parties.*

N.C.G.S. § 1A-1, Rule 24(a)(2) (1983) (emphasis added). There is no claim that a statute confers upon the individuals the right to intervene.

In a decision construing N.C.G.S. § 1-73,[10] the precursor to Rule 24, this Court held that the interest of a third party seeking to intervene as of right " 'must be of such direct and immediate character that he will either gain or lose by the direct operation and effect of the judgment . . . . One whose interest in the matter in litigation is not a direct or substantial interest, but is an indirect, inconsequential, or a contingent one cannot claim the right to defend.' " *Strickland v. Hughes*, 273 N.C. 481, 485, 160 S.E.2d 313, 316 (1968) (quoting *Mullen v. Town of Louisburg*, 225 N.C. 53, 56, 33 S.E.2d 484, 486 (1945)), *cited in Long v. City of Charlotte*, 306 N.C. at 212, 293 S.E.2d at 117. The interest of the individuals

10. The rules of intervention as set out in N.C.G.S. § 1A-1 make no substantive change in the rules as previously set out in N.C.G.S. § 1-73. *Long v. City of Charlotte*, 306 N.C. at 212 n.13, 293 S.E.2d at 117 n.13.

in the common area is indirect. Any interest the home owners have in common area derives through their membership in the Homeowners Association. The Homeowners Association is the party that has the direct interest in a determination as to whether the boundaries of the common area include the three-acre parcel. Thus, the individuals were not necessary parties to the action.

Moreover, the Homeowners Association adequately represented such interest that the individual home owners did have. The Homeowners Association asserted every claim that the individuals sought to assert, and, as members of the Homeowners Association, many of the individual home owners testified at trial. *Hillcrest Building Co. v. Peacock*, 7 N.C. App. 77, 171 S.E.2d 193 (1969), is not apposite, since the restrictive covenants in that case ran directly to the purchasers of subdivision lots and not to a home owners' association as in this case.

The individual home owners were in fact proper parties. A proper party is one whose interest may be affected by a judgment but whose presence is not essential for adjudication of the action. *Strickland v. Hughes*, 273 N.C. at 485, 160 S.E.2d at 316. Loss of the use of the three-acre parcel as common area would be likely to affect property values of the individuals' lots. Whether a proper but not necessary party may be permitted to intervene is within the sound discretion of the trial court. *Long v. City of Charlotte*, 306 N.C. at 212, 293 S.E.2d at 117. The trial court did not abuse its discretion when it denied the individual home owners' motion to intervene.

VII.

[7] On motion of River Birch, the trial court ruled that the Homeowners Association did not have standing to prosecute claims for fraud and unfair trade practices. This ruling was correct.

To have standing the complaining association or one of its members must suffer some immediate or threatened injury. *Hunt v. Washington State Apple Advertising Comm.*, 432 U.S. 333, 342, 53 L. Ed. 2d 383, 393 (1977). Legal entities other than natural persons may have standing. "An association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy." *Warth v. Seldin*, 422 U.S. 490, 511, 45 L. Ed. 2d 343, 362 (1975).

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v. Washington State Apple Advertising Comm., 432 U.S. at 343, 53 L. Ed. 2d at 394. The Homeowners Association's claims for fraud and unfair trade practices fail to meet the third prong of this test.

When an organization seeks declaratory or injunctive relief on behalf of its members, "it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured." *Warth v. Seldin*, 422 U.S. at 515, 45 L. Ed. 2d at 364. *See Piney Mt. Neighborhood Assoc. v. Chapel Hill*, 63 N.C. App. 244, 247, 304 S.E.2d 251, 253 (1983) (association had standing to seek review of issuance of special use permit affecting its members). However, where an association seeks to recover damages on behalf of its members, the extent of injury to the individual members and the burden of supervising the distribution of any recovery mitigates against finding standing in the association. *See* Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 3531.9 at 620-21 (1984). In *Warth*, the United States Supreme Court denied the organization standing because "damages claims [were] not common to the entire membership, nor shared by all in equal degrees." *Warth v. Seldin*, 422 U.S. at 515, 45 L. Ed. 2d at 364.

There was no allegation by the Homeowners Association that representations regarding the three-acre parcel were made to each of its members. Nor is there any suggestion that River Birch made such representations to Homeowners Association members who purchased town homes on the secondary market. Thus, we cannot conclude that the damage claims are common to the entire membership of the Homeowners Association.

Nor is it likely that each Homeowners Association member shares the injury in equal degree. The measure of damages for fraud in the inducement of a contract is the difference between the value of what was received and the value of what was promised, *Horne v. Cloninger*, 256 N.C. 102, 123 S.E.2d 112 (1961), and is potentially trebled by N.C.G.S. § 75-16. In this instance, damages

suffered by the individual members of the Homeowners Association would vary based upon the locational relationship between the member's town home and the three-acre parcel, among other things.

Moreover, permitting the Homeowners Association to pursue the fraud claim would deprive its members of an alternative remedy. By electing the damages remedy that is available in claims of fraud, the Homeowners Association would have deprived its members of the right to seek rescission of the contract, which is an alternative remedy to damages. *Horne v. Cloninger*, 256 N.C. 102, 123 S.E.2d 112. We thus conclude that the Homeowners Association did not have standing to assert any claims for fraud or unfair trade practices that members of the association might have had.

VIII.

[8] The Homeowners Association asks us to rule that it is a third-party beneficiary of contracts made between its individual members and River Birch. In the "List of Issues for Trial" to which the Homeowners Association stipulated, there is no indication that the Homeowners Association proceeded on a third-party beneficiary theory. Rather, the theory of recovery stated in the complaint was based upon direct contract with the individual members of the Homeowners Association. Plaintiff asserts further that the Homeowners Association represented to the trial judge in chambers that it was not seeking recovery under a third-party beneficiary theory. Failure to argue a theory of recovery below prohibits its assertion on appeal. *Plemmer v. Matthewson*, 281 N.C. 722, 725, 190 S.E.2d 204, 206 (1972). We do not reach this issue since the Homeowners Association waived the matter.

In summary, we hold that under the General Statutes of North Carolina, a city may by ordinance provide for conveyance of common area by a subdivision developer to the home owners' association of that subdivision. Such a conveyance must be in accord with the plat as submitted and approved.

Where there was a valid preexisting condition governing development of a subdivision to which the developer agreed, a city does not improperly exercise its police power by denying an application which would violate that condition. In this case, the City of Raleigh approved the application for Riverbirch Township on the condition that actual development of the property would be in substantial conformance with the project as depicted on the

preliminary plat. The approved project was unchanged by subsequent amendment affecting the common area. The fact that the common area depicted on the preliminary plat exceeds the minimum required by city ordinance does not alter the basic condition of approval, nor does enforcement of the condition work a taking of land.

We hold furthermore that the term "Common Area" as set out in the declaration of covenants is a latently ambiguous description of the property to be conveyed to the Homeowners Association. Reference to the preliminary plat and the landscaping plat is proper to identify the boundaries of the common area. Evidence of assurances by plaintiff's sales agents tending to establish that the preliminary plat and the landscaping plan were intended to identify the boundaries and condition of the common area was also admissible. The trial court erred in excluding parol evidence identifying the boundaries and condition of the land to be conveyed as common recreation area.

The trial court did not err when it denied the motion to intervene of certain individual home owners. These were proper but not necessary parties. The trial court was also correct when it ruled that the Homeowners Association did not have standing to prosecute claims for fraud and unfair trade practices.

Accordingly, we affirm in part and reverse in part the decision of the trial court and remand for further proceedings not inconsistent with this opinion.

Affirmed in part, reversed in part and remanded.

C. D. SPANGLER CONSTRUCTION COMPANY v. INDUSTRIAL CRANKSHAFT AND ENGINEERING CO., INC., D/B/A DYNATECH INDUSTRIES; DURHAM LIFE INSURANCE COMPANY; INTERNATIONAL INSURANCE COMPANY; AETNA FIRE UNDERWRITERS INSURANCE COMPANY; WESTCHESTER FIRE INSURANCE COMPANY; GREAT AMERICAN INSURANCE COMPANY; FEDERAL INSURANCE COMPANY; ST. PAUL FIRE AND MARINE INSURANCE COMPANY; UNITED STATES FIRE INSURANCE COMPANY; AMERICAN STATES INSURANCE COMPANY; AND TRAVELERS INDEMNITY COMPANY

No. 128PA88

(Filed 7 February 1990)

1. **Insurance § 6.2 (NCI3d)— policy provisions extending coverage—construction favoring coverage**

So long as it is reasonable to do so, insurance policy provisions which extend coverage are construed liberally in favor of coverage.

Am Jur 2d, Insurance §§ 283, 284.

2. **Insurance § 149 (NCI3d)— general liability insurance—contamination of natural resources—property damage**

The State's interest in protecting its natural resources is a form of property right, and the contamination of the State's resources such as groundwater and soil is "property damage" within the meaning of the coverage clauses of a standard comprehensive general liability policy.

Am Jur 2d, Insurance § 711.

3. **Insurance § 149 (NCI3d)— general liability insurance—environmental cleanup costs as damages**

Expenditures incurred by an insured in complying with lawful orders of a State agency to remove hazardous waste from its premises are "damages" which the insured was legally obligated to pay because of property damage within the meaning of coverage clauses of a comprehensive general liability insurance policy. The term "damages" is not being used in its legal and technical sense in the policy and is susceptible to more than one definition. Therefore, the appellate court must employ the interpretation which favors the insured, and a reasonable person in the position of the insured may have

understood that the term "damages" included state-ordered environmental cleanup costs.

Am Jur 2d, Insurance § 711.

4. Insurance § 149 (NCI3d)— general liability insurance—hazardous waste—removal order by State agency—insurer's duty to defend

Compliance orders issued by a State agency requiring an insured to remove hazardous waste from its premises are "suits" giving rise to the insurer's duty to defend under a comprehensive general liability policy.

Am Jur 2d, Insurance § 711.

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

APPEAL by C.D. Spangler Construction Company (Spangler) and Durham Life Insurance Company (Durham Life) pursuant to N.C.G.S. § 7A-27(b) from an Order and Judgment entered by *Snepp, J.*, at the 4 January 1988 Session of Superior Court, MECKLENBURG County, granting St. Paul Fire and Marine Insurance Company's (St. Paul) Motion for Partial Summary Judgment and The Travelers Indemnity Company's (Travelers) Motion for Summary Judgment. St. Paul's and Travelers' motions to bypass the Court of Appeals were allowed pursuant to N.C.G.S. § 7A-31(b). Heard in the Supreme Court on 13 October 1988.

Perry, Patrick, Farmer & Michaux, P.A., by Roy H. Michaux, for plaintiff appellant.

Young, Moore, Henderson & Alvis, P.A., by Walter E. Brock, Jr., for defendant appellant Durham Life Insurance Company.

Golding, Crews & Meekins, by Harvey L. Cosper, Jr.; Steptoe & Johnson, by Roger E. Warin, for defendant appellee St. Paul Fire and Marine Insurance Company.

Womble, Carlyle, Sandridge & Rice, by Richard T. Rice and Reid C. Adams, Jr., for defendant appellee The Travelers Indemnity Company.

Manning, Fulton & Skinner, by Howard E. Manning, Sr., and Covington & Burling, by Eric S. Koenig, for amici curiae American Petroleum Institute, ICI Americas, Inc., International Business Machines Corporation and Olin Corporation.

Bode, Call & Green, by S. Todd Hemphill, for amicus curiae Insurance Environmental Litigation Association.

EXUM, Chief Justice.

This is an action for declaratory judgment brought by the insured seeking judicial construction of comprehensive general liability insurance policies. The question presented is whether the policies' coverage clauses protect the insured against losses incurred in complying with lawful orders of a state agency to remove a certain hazardous waste from its premises. The trial court concluded the coverage clauses did not protect against such losses and entered summary judgment for St. Paul and Travelers. We conclude to the contrary and reverse.

I.

The record before the trial court shows the material undisputed facts to be as follows:

Spangler is a North Carolina construction company organized with its principal place of business in Mecklenburg County. On 14 April 1967 Spangler leased for twenty years a site on Hawkins Street in Charlotte from a predecessor to Durham Life, which currently owns the property. In May 1973 Spangler sublet a portion of the premises to Industrial Crankshaft and Engineering Company, Inc., d/b/a Dynatech Industries (Dynatech), which conducted a chromium plating operation at the site.

On 29 July 1974 a fire on the subleased premises destroyed much of Dynatech's equipment including its chrome tanks. The tanks' contents, 625 gallons of liquid solution containing 1,150 pounds of chromic acid, were washed by city firefighters into the yard and into a large open pit located inside the building.[1]

In December 1984 the Mecklenburg County Environmental Health Department informed a representative of the North Carolina Department of Human Resources, Solid and Hazardous Waste Management Branch (the State) of the presence at the Hawkins Street site of hazardous waste containing chromium in amounts exceeding legal limits. *See* 40 C.F.R. § 261 (adopted by reference at N.C. Admin. Code tit. 10, r. 10F.0029). The State also concluded that discharge of such waste is a prohibited disposal under 40 C.F.R. § 270.1(b) (adopted by reference at N.C. Admin. Code tit. 10, r. 10F.0034(a)(1)). The State informed Dynatech of its obligation

1. Spangler was first advised as to the occurrence and details of the fire in April or May of 1985.

under the North Carolina Solid Waste Management Act (the Act), N.C.G.S. § 130A-290, et seq., to develop and execute a remedial plan to clean up the waste material pursuant to 40 C.F.R. § 265.15(c) (adopted by reference at N.C. Admin. Code tit. 10, r. 10F.0033(b)).[2] Dynatech conducted tests to determine the extent of the contamination and began removing contaminated soil from the site in June 1985. It then vacated the site some time before 30 June 1985.

On 5 July 1985 pursuant to the Act, the State issued a Compliance Order addressed to Spangler, Durham Life, and Dynatech. The order required Dynatech and Spangler to perform a number of cleanup actions to bring the site into compliance with state regulations. By letter dated 11 September 1985, Spangler notified its insurer St. Paul of the order and demanded protection from losses or costs which might be incurred by Spangler in the cleanup.[3]

By October 1985 Spangler had employed Chas. T. Main, Inc., an engineering firm, to study the problem and to recommend reasonable remedial action. One of the firm's environmental engineers conducted tests and determined that the groundwater at the site had been contaminated. There were complaints that the contaminated water was getting into storm drains and appearing off the site.

On 27 March 1986 the State issued a second Compliance Order which superseded its July 1985 order. The new order required action by Durham Life in addition to Spangler and Dynatech. In this order, the State concluded: chromium levels at the Hawkins Street site exceeded state limits; spills or other leaching had occurred at the site; "discharge" from the site had continued to the present; and there was a potential for groundwater contamination. The State found that Spangler, Durham Life, and Dynatech, having failed to control or treat spills of hazardous wastes, were operating an unpermitted hazardous waste disposal facility in violation of state and federal regulations. The State directed Spangler, Dynatech, and Durham Life to perform a sequence of enumerated actions to bring the site in compliance with these regulations. They were

---

2. On this appeal, we are not asked to resolve any questions about the accuracy of the State's environmental analysis or the appropriateness of its orders. Consequently, we assume the State's interpretation and application of the administrative regulations were proper.

3. St. Paul responded in a letter dated 3 January 1986 which notified Spangler that it was investigating the circumstances underlying Spangler's claims.

ordered to: control run-on and run-off from the active portion of the site; dispose of or decontaminate all equipment and structures on the site; submit a closure plan and complete closure of the site within 180 days of its approval; and collect and analyze soil and groundwater samples for waste content. The order informed the parties of their right to request a formal hearing under the Administrative Procedure Act, 1973 N.C. Sess. Laws ch. 1331 (recodified at N.C.G.S. § 150B (1987)). Though Spangler subsequently petitioned for a hearing, nothing in the record indicates that one was held.

After Spangler had evaluated the investigative report from its engineers, the State advised it to remove the contaminated portion of the building and the soil and haul it to a hazardous waste landfill in Pinewood, South Carolina, to avoid damage to the surrounding properties. By letter dated 30 July 1986 Spangler again notified its insurer, St. Paul, of the State's demands. The letter set out in detail the extent of hazardous waste contamination at the site, the remedial requirements imposed by the State's two compliance orders, and the costs of cleanup to date.[4] In October 1986 St. Paul responded, denying it had any obligation to Spangler. Spangler proceeded with the cleanup of the site.

In July of 1987, the State directed Spangler to dig permanent wells designed to collect underground water at different levels in the same spot next to the adjoining property owned by Durham Life. The affidavit of Gary Ribblett, an environmental engineer employed by Chas. T. Main, Inc., indicated that chromium contaminated groundwater had migrated off the site area:

> From our analysis of the water samples removed from these wells, we have discovered chromium at highly concentrated levels which, in our opinion, will require some treatment system designed to recover the groundwater to prevent further migration off the site. The State has requested a meeting to discuss a specific course of action with regard to the water treatment.

---

4. This letter contained the following comments regarding the status of groundwater contamination at the Hawkins Street site:

> As a result of the findings by [Spangler's engineer] Charles T. Main, it has been determined that there are chromium deposits on the site and in the groundwater which exceed maximum limits. . . . If . . . steps are not taken, there is clear and eminent danger that surface water from the site may seep into the acquifer [sic] and cause contamination of other properties.

By 10 October 1987 Spangler had expended $507,143.72 in testing and analysis, attorney's fees, and other cleanup related expenses. By 9 February 1987 Durham Life reported incurring costs and expenses for engineering and attorney's fees totaling in excess of $10,000.

St. Paul provided comprehensive general liability insurance coverage to Durham Life from 1 April 1970 through 1 April 1985 and to Spangler from 1 November 1982 through 1 November 1985. Travelers provided similar coverage to Durham Life from 1 April 1985 to 1 July 1986. The pertinent insuring provisions of these policies contained language identical, or comparable, to the following:

> The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as *damages* because of . . . *property damage* to which this insurance applies, caused by an occurrence . . . and the Company shall have the right and duty to defend any *suit* against the insured seeking *damages* on account of such . . . *property damage*, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or *suit* as it deems expedient . . . .

(Emphasis added.)[5] The policies define the term "property damage" as:

---

5. This language was quoted from Durham Life's policies issued by St. Paul for annual policy periods from 1 April 1970 through 1 April 1980. Spangler's policy issued by St. Paul and Durham Life's policies issued by St. Paul for the annual policy periods 1 April 1980 through 1 April 1985 contain the following comparable language:

> Your general liability protection covers you and other persons protected under this agreement against claims for . . . damage to tangible property resulting from an accidental event. . . . We'll defend any suit brought against you for damages covered under this agreement, even if the suit is groundless or fraudulent. We have the right to investigate, negotiate and settle any suit or claim if that seems proper and wise.

Durham Life's policy issued by Travelers contains the following comparable language:

> The Company will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of . . . property damage to which this insurance applies, caused by an occurrence, and the Company shall have the right and duty to defend any suit against the Insured seeking damages on account of such . . . property damage, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient . . . .

None of the parties argue that the differing language in the policies affects the issues before the Court.

> (1) *physical injury* to or destruction of *tangible property* which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period.

(Emphasis added.)[6] None of the policies define the term "damages" or "suit."

On the basis of these insurance policies, Spangler filed on 1 December 1986 an action in Superior Court, Mecklenburg County, seeking a declaratory judgment that St. Paul was obligated to defend Spangler against and indemnify it for losses it incurred in cleaning up the premises pursuant to the State's compliance orders. Durham Life answered the complaint and sought successfully to join Travelers as an additional defendant. Durham Life also asserted cross-claims against St. Paul and Travelers for a declaratory judgment that these insurers were obligated to defend it against and indemnify it for such cleanup costs as it might incur pursuant to the State's compliance orders. St. Paul answered Spangler's and Durham Life's claims, denying that it owed any defense or indemnification. Travelers answered Durham Life's cross-claim, similarly denying that it had a duty to defend or indemnify Durham Life.

Both St. Paul and Travelers moved for summary judgment on the claims asserted against them by Spangler and Durham Life. On 4 January 1988 the trial court concluded that the coverage clauses provided no protection for losses incurred by Spangler and Durham Life, and it allowed both insurers' motions for summary judgment.[7] The trial court identified three grounds for its decision:

---

6. This language is quoted from Durham Life's policies issued by St. Paul for the annual policy periods 1 April 1977 through 1 April 1980. Identical language was used in Durham Life's policy issued by Travelers. Spangler's policy issued by St. Paul and Durham Life's policies issued by St. Paul for the annual policy periods of 1 April 1980 through 1 April 1985 contain no definition of "property damage." Durham Life's policies issued by St. Paul for the annual policy periods of 1 April 1970 through 1 April 1976 defined "property damage" as "injury to or destruction of tangible property."

7. Because the trial court's decision was based solely on the coverage clauses, we do not consider whether any of the numerous exclusion clauses would preclude the claims.

1. The State's Compliance Orders issued to Spangler and Durham Life do not constitute "suits" within the terms of the liability coverage provisions of the insurance policies and that the moving insurers have no duty of defense under the insurance policies in connection with the Compliance Orders . . . ;

2. Any sums which Spangler or Durham Life may expend in conforming with the State's Compliance Orders do not constitute "damages" within the terms of the liability coverage provisions of the insurance policies . . . ; and

3. The State's Compliance Orders do not constitute suits seeking recovery of damages from Spangler or Durham Life for "property damage" within the terms of the liability coverage provisions of the policies . . . .

Spangler and Durham Life appealed to the Court of Appeals. On 6 May 1988 this Court allowed St. Paul's and Travelers' petitions for discretionary review prior to a determination by the Court of Appeals. Subsequently this Court allowed the motions of the Insurance Environmental Litigation Association (IELA) and a group consisting of the American Petroleum Institute, ICI Americas, Inc., International Business Machines Corporation, and Olin Corporation—(The American Petroleum Group)—for leave to appear as amici.

II.

Appellants Spangler and Durham Life ask us to reverse the trial court's entry of summary judgment. More specifically, they contend that as the pertinent terms are used in the policies' coverage provisions, (1) the injury done to the environment by the release of toxins was "property damage"; (2) the costs incurred in the cleanup are "damages" which the insured was legally obligated to pay because of "property damage"; and (3) administrative actions requiring cleanup of hazardous wastes are "suits" giving rise to the insurers' duty to defend. Appellees St. Paul and Travelers contend the conclusions of the trial court are correct and urge us to affirm. Because we agree with appellants' position, we reverse.[8]

---

8. At this point, we turn to St. Paul's motion to strike portions of the brief and exhibits of The American Petroleum Group, filed 1 July 1988. We reserved ruling on this motion until after the case was argued. St. Paul contends that the brief and attached exhibits address matters outside the record in violation of N.C.R. App. P. 9 and principles established in case law. The American Petroleum

A.

There is no real dispute among the parties regarding the facts or the language of the insurance policies. Their disagreement relates to the meaning and scope of the policies' basic coverage provisions. As we noted under similar circumstances in *Waste Management of Carolinas, Inc. v. Peerless Insurance Co.*, 315 N.C. 688, 691, 340 S.E.2d 374, 377 (1986), "[r]esolution of [an insurance policy's scope] involves construing the language of the coverage . . . and determining whether events as alleged in the pleadings and papers before the court are covered by the policies. As such, it is an appropriate subject for summary judgment." *See also Kessing v. Mortgage Corp.*, 278 N.C. 523, 535, 180 S.E.2d 823, 830 (1971).

We first addressed the question of an insurer's contractual duties regarding environmental contamination cleanup in *Waste Management of Carolinas, Inc.* There, the policies being construed contained essentially the same provisions as the ones now before us. *Waste Management of Carolinas, Inc.*, 315 N.C. at 693-94, 315 S.E.2d at 378-79. The trial court granted summary judgment for the insurers, ruling that they had no duty to defend. *Id.* We affirmed on appeal, holding that the insurers were under no obligation to defend the plaintiff, because under the facts alleged in the pleadings the policies' pollution exclusion clauses precluded coverage. *Id.* at 700, 315 S.E.2d at 383.

Because of the instant case's procedural posture and the manner in which it is presented on appeal, we are not called on to

---

Group responds that this nonrecord material, mainly involving the historical context and background of the term "damages" in the comprehensive general liability policy, directly addresses assertions of underwriting intent made by the insurers. We permitted St. Paul to address this issue at oral argument.

This Court has stated "[o]nly those pleadings and other materials that have been considered by the trial court for purposes of summary judgment and that appear in the record on appeal are subject to appellate review." *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 690, 340 S.E.2d 374, 377 (1986). *Accord Vassey v. Burch*, 301 N.C. 68, 74, 269 S.E.2d 137, 141 (1980). Both parties here concede that Exhibits 1, 12, 13, 14, 15, 16, and 17 of amici curiae American Petroleum's brief and references thereto at pages 4, 11, 11 n.6, 15, 33-38, 42-49, 52 n.35, 53, and 58 are nonrecord materials which were not before the trial court. We therefore grant St. Paul's motion to strike these portions of The American Petroleum Group's brief. We find it unnecessary to order The American Petroleum Group to submit redacted versions of its brief which eliminate all references to the nonrecord material and to allow St. Paul additional time to respond to the redacted version. We consequently deny St. Paul's motions requesting this relief.

construe any of the policies' exclusion clauses. Summary judgment was entered solely upon the trial court's construction of the policies' basic *coverage* provisions. The only question raised by the parties on appeal is the correctness of this construction. Consequently, we do not consider or comment on any potential application of the policies' exclusion clauses.

[1] We turn first to several well-settled principles governing the construction of insurance policies. An insurance policy is a contract and its provisions govern the rights and duties of the parties thereto. *Fidelity Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 380, 348 S.E.2d 794, 796 (1986); *see, e.g., Powers v. Insurance Co.*, 186 N.C. 336, 337, 119 S.E. 481, 482 (1923). "As with all contracts, the goal of construction is to arrive at the intent of the parties when the policy was issued." *Woods v. Insurance Co.*, 295 N.C. 500, 505, 246 S.E.2d 773, 777 (1978); *see, e.g., Trust Co. v. Insurance Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 552 (1970). So long as it is reasonable to do so, policy provisions which extend coverage are construed liberally in favor of coverage. *State Capital Ins. Co. v. Nationwide Mutual Ins. Co.*, 318 N.C. 534, 538, 350 S.E.2d 66, 68 (1986); *see, e.g., Waste Management of Carolinas, Inc.*, 315 N.C. at 693, 340 S.E.2d at 378. In *Woods v. Insurance Co.*, we summarized the general principles of construction applicable to disputed terms in an insurance policy:

> Where a policy defines a term, that definition is to be used. If no definition is given, non-technical words are to be given their meaning in ordinary speech, unless the context clearly indicates another meaning was intended. 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. Whereas, if the meaning of the policy is clear and only one reasonable interpretation exists, the courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein.

Woods, 295 N.C. at 505-06, 246 S.E.2d at 777.

B.

[2] Bearing these principles in mind, we now apply them to the insurance policies being construed. In pertinent part the policies state that "[t]he [insurance] company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . property damage." As a threshold matter, we must decide whether "property damage" has occurred within the meaning of the policies, thereby potentially invoking their coverage provisions.

The appellant insureds contend that the trial court erred in ruling as a matter of law that the State's compliance orders do not constitute suits seeking recovery for "property damage" within the coverage of the insurance policies. They argue that the trial court's ruling is contradicted by the plain language of the policies and by a long line of decisions holding that remedial claims under federal and state environmental protection statutes are claims for "property damage" under standard comprehensive general liability policies.

Appellee insurers argue that the trial court properly determined they had no duty to defend or indemnify the insureds because any monies, including costs of cleanup or closure, that Durham Life and Spangler paid in complying with the State's orders are not sums which they had become legally obligated to pay because of "property damage." The insurers argue that the State's claim against the insureds may impose an economic cost, but that it does not constitute "property damage" within the meaning of the policies.

We hold that injury to the State's natural resources is "property damage."

We rely on the principles of insurance policy construction discussed in Part II-A. "Property damage" is defined in several of the policies. The following definition is included in the policy issued by Travelers and two of the policies issued by St. Paul:

> (1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period.

We use this definition to construe the meaning of "property damage" as that term is used in the pertinent policies.

In determining whether "property damage" has occurred under the policies, it is important to examine the circumstances surrounding the cleanup. The soil and groundwater at the site were contaminated. The insureds incurred the cost of cleaning up this contamination because of the compliance orders which the State entered pursuant to legislation enacted under its police power for the protection of natural resources such as water the purity of which is necessary for the health and safety of our citizens. In issuing the cleanup order, the State was acting in *parens patriae* to protect "quasi-sovereign interests such as health, comfort, and welfare of the people." Black's Law Dictionary 1003 (5th ed. 1979). *See also* 31 Words and Phrases 99 et seq. (1957) and supplement thereto.

The United States Supreme Court has held that discharge of pollutants into a state's soil, water and air injures a state's quasi-sovereign interests. In *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 51 L. Ed. 1038 (1907), the state of Georgia brought a suit to enjoin a company located in Tennessee from discharging pollutants into Georgia's environment. In discussing the nature of Georgia's interests, Mr. Justice Holmes said for the Court:

> This is a suit by a State for an injury to it in its capacity of *quasi*-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.

(Emphasis in the original.) *Id.* at 237, 51 L. Ed. at 1044. *Cf. Missouri v. Illinois*, 180 U.S. 208, 45 L. Ed. 497 (1901). We agree with the *Tennessee Copper* analysis of the state's interests.

An Eighth Circuit panel has also relied on *Tennessee Copper* to determine that discharge of pollutants into the atmosphere caused "property damage" to governmental property interests. In *Continental Insurance Co. v. Northeastern Pharmaceutical and Chemical Co.*, 811 F.2d 1180 (8th Cir. 1987), *rev'd en banc on other grounds*, 842 F.2d 977 (8th Cir. 1988), the court stated:

> The [*Tennessee Copper* Court's] discussion of a governmental interest in "title" to all the soil, water, and air within its

> jurisdiction suggests that the government has a property interest in natural resources. A similar implication arises from *Missouri v. Illinois*, 180 U.S. 208, 21 S.Ct. 331, 45 L.Ed. 497 (1901), where the Court held that Missouri was permitted to sue as *parens patriae* to enjoin the discharge of sewage from Chicago, Illinois, into the Illinois and Mississippi rivers: "impairment of the health and prosperity of the town and cities of the state situated on the Mississippi river * * * would injuriously affect the entire state." 180 U.S. at 241, 21 S.Ct. at 844, 45 L.Ed. at 512. The Court suggested that although a dispute between states over interstate waters may not involve "direct property rights" of a state, the injury to the state's "quasi-sovereign" rights is akin to an injury to state property rights. *Id.* Furthermore, the Court stressed that in environmental damage suits, a state has the power to seek redress in court for the property damage caused to the general public. *Id.; see also Maryland v. Louisiana*, 451 U.S. 725, 766, 101 S.Ct. 2114, 2139, 68 L.Ed.2d 576, 608 (1981) (Rehnquist, J., dissenting on other grounds) (pointing out that when a state sues to advance its quasi-sovereign interests, it is not suing simply to protect the economic interests of its citizens).

811 F.2d at 1185.

Numerous other jurisdictions have held that federal and state ordered cleanups of environmental contamination are claims against the contaminator for "property damage" under the coverage provisions of comprehensive general liability policies.[9]

---

9. *See Continental Ins. v. Northeastern Pharmaceutical*, 842 F.2d at 983 ("we agree that environmental contamination caused by improper disposal of hazardous wastes can constitute 'property damage' "); *Port of Portland v. Water Quality Ins. Syndicate*, 796 F.2d 1188, 1194 (9th Cir. 1986) ("discharge of pollution into water causes damage to tangible property and hence cleanup costs are recoverable under a property damage liability clause"); *Chesapeake Utils. Corp. v. American Home Assurance Co.*, 704 F. Supp. 551, 566 (D. Del. 1989) ("[t]o trigger coverage under the policies . . . [i]t is sufficient . . . that the insured was forced to pay damages because of property damage"); *New Castle County v. Hartford Acc. & Indem. Co.*, 673 F. Supp. 1359, 1366 (D. Del. 1987) ("[t]he complaint . . . clearly states claims for remedial action to remedy property damage, in this case harm to surface and groundwater"); *Pepper's Steel & Alloys, Inc. v. United States Fidelity & Guaranty Co.*, 668 F. Supp. 1541, 1550 (S.D. Fla. 1987) ("[t]his exclusion is not applicable insofar as the underlying complaints allege damage to the property of adjoining landowners and the public"); *United States v. Conservation Chemical Co.*, 653 F. Supp. 152, 194 (W.D. Mo. 1986) ("environmental harm associated with the . . . site constitutes 'property damage' as such term is used and defined in the CGL

We agree with the foregoing authorities that the State's interest in protecting its natural resources is a form of property right. Thus, it follows that injury to these resources constitutes "property damage" within the meaning of the policies. We conclude that the contamination of the State's resources such as groundwater and soil on appellants' land is a "physical injury to . . . tangible property . . . during the policy period," and is therefore "property damage" within the meaning of the policies.

C.

[3] Having concluded that "property damage" has occurred within the meaning of the policies, we now turn to the question of whether expenses incurred in cleaning up the contamination are "damages because of . . . property damage." The policies do not define the word "damages."

Spangler and Durham Life contend that under the policies, the word "damages" includes expenditures incurred in cleaning up toxic waste pursuant to government mandate. St. Paul and

---

[comprehensive general liability] insurance policies"); *Chemical Applications Co. v. Home Indem. Co.*, 425 F. Supp. 777, 778 (D. Mass. 1977) (parties stipulated that cleanup costs constituted "property damage" within the terms of the policy); *United States Fidelity and Guar. Co. v. Specialty Coatings Co.*, 2 Mealey's Litigation Rep. (Mealey Publications, Inc.) at C-3 (Ill. Cir. Ct. 22 June 1988) ("one who is alleged to pollute the ground and water of another obviously commits property damage"); *United States Aviex Co. v. Travelers Ins. Co.*, 125 Mich. App. 579, 589, 336 N.W.2d 838, 843 (1983) ("contamination of subterranean and percolating water as a result of the fire is 'physical injury to tangible property' within the terms of the insurance policy"); *Upjohn Co. v. New Hampshire Ins. Co.*, 2 Mealey's Litigation Rep. (Mealey Publications, Inc.) at 3,752 (Mich. Cir. Ct. Jan. 5, 1987) ("damage caused by spilled distillate was of a type covered by the policies"); *CPS Chemical Co. v. Continental Insurance Co.*, 222 N.J. Super. 175, 188, 536 A.2d 311, 317 (1988) ("the insurers' obligation is to pay the costs of abating the polluting effects of prior discharges"); *Lansco, Inc. v. Dep't of Envtl. Protection*, 138 N.J. Super. 275, 282, 350 A.2d 520, 524 (1975), *aff'd*, 145 N.J. Super. 433, 368 A.2d 363 (1976), *cert. denied*, 73 N.J. 57, 372 A.2d 322 (1977) (court finding "property damage" under comprehensive general liability policy when insured incurs liability as a result of oil spill which damages environment); *Kutsher's Country Club Corp. v. Lincoln Ins. Co.*, 465 N.Y.S. 2d 136, 139 ("the oil spill does constitute 'property damage' as defined in the insurance policy"); *Sharon Steel Corp. v. Aetna Casualty and Sur. Co.*, 2 Mealey's Litigation Rep. (Mealey Publications, Inc.) at B-10 (Utah Dist. Ct. Jan. 15, 1988) ("[t]he policies' use of the phrase 'because of . . . property damages' countenances recovery for response costs even if property damage is merely a factual predicate therefor"). *Contra Aetna Casualty & Sur. Co. v. Gulf Resources & Chem. Corp.*, 709 F. Supp. 958, 961 (D. Idaho 1989) ("Because response cost liability is not based upon the existence of damage to persons or property, there is no coverage under the policies in question for such liability").

Travelers contend that the term "damages" does not cover this type of expenditure. Rather, they argue that "damages" only means compensation recovered by a third party in an action at law for injuries sustained by the third party at the hands of the insured.

We hold that the insureds' expenses incurred in complying with the State's compliance orders are "damages" as that term is used in the coverage provisions of the insurers' policies. We again apply the rules of construction discussed in Part II-A to decide the term's meaning in this context.

Travelers argues that "[t]he term 'damages' has been so consistently defined to include the type of compensation which the law awards for actual injury that this has become the plain, ordinary and accepted meaning as it has been used over the years in insurance policies." Several courts have reached the conclusion that Travelers urges. In *Continental Insurance Co. v. Northeastern Pharmaceutical*, 842 F.2d 977 (8th Cir. 1988) (*en banc*), the court held that under Missouri law the plain meaning of the term "damages" in the insurance context refers to legal damages and does not include cleanup costs or equitable monetary relief. In *Maryland Casualty Co. v. Armco*, 822 F.2d 1348 (4th Cir. 1987) (hereinafter "*Armco*"), the Fourth Circuit held under Maryland law that " '[d]amages' as distinguished from claims for injunctive or restitutionary relief, includes 'only payments to third persons when those persons have a legal claim for damages.' . . . Thus 'damages' is to be construed in consonance with its 'accepted technical meaning in law.' " *Armco*, 822 F.2d at 1352 (quoting *Aetna v. Hanna*, 224 F.2d 499, 503 (5th Cir. 1955)).[10] The majority of cases which the insurers have submitted for our consideration rely on *Armco* and *Northeastern Pharmaceutical*.[11]

---

10. *Armco* was criticized by the Federal District Court for the District of Delaware in *Chesapeake Utilities*, 704 F. Supp. at 558-561. The Delaware federal court cited several decisions by the Maryland Court of Appeals which tended to show that under Maryland law, words in insurance contracts are given their customary and normal meaning rather than their technical meaning.

11. The *Armco* and *Northeastern Pharmaceutical* courts reached the consistent *result* that liability policies do not cover monies paid for cleaning up environmental contamination. However, the courts arrived at their conclusions for different *reasons*. The Eighth Circuit sitting *en banc* in *Northeastern Pharmaceutical* held that the ordinary meaning of the term "damages" does not include environmental cleanup costs incurred pursuant to government order. But in *Armco*, the Fourth Circuit did not use the "ordinary" meaning of the word damages to deny recovery. It held that the word has a technical meaning which only contemplates payments

Though the foregoing authorities hold that there is no coverage, the better reasoned decisions find that the term "damages" as used in the coverage provisions of liability policies includes the type of expenditures under consideration. Courts have found coverage under at least four different theories.

One theory is that the technical meaning of the word "damages" in this context includes the relief sought by plaintiff because there is legal coercion involved. In *Broadwell Realty v. Fidelity and Casualty Co.*, 218 N.J. Super. 516, 528 A.2d 76 (N.J. Super. A.D. 1987), the New Jersey appellate court stated:

> We . . . acknowledge that the word "damages" generally refers to a pecuniary compensation or indemnity . . . and that the cost of complying with an injunctive decree does not ordinarily fall within this definition. . . . This much conceded, we are entirely satisfied that the [State's] directive which threatened to assess [the insured] an amount equal to triple the costs of the prospective cleanup operation constituted a claim for damages within the meaning of the policy language. The insured's expenditures were made to discharge its legal obligation to the [State] or, at the very least, to prevent what would have been an avoidable legal obligation to pay damages to a third party. The expenses were incurred by virtue of the *in terrorem* and coercive effect of the [State's] directive. The harm to the State, by reason of discharge of pollutants into its streams, and to others was continuing and ongoing. Further peril was both imminent and immediate. Under these circumstances, the abatement and response expenses constituted "damages" which [the insured] was legally obliged to pay.

---

to injured parties in a *legal* action, but does not cover costs incurred in an equitable or administrative proceeding. Regardless of the analytical differences in these two cases, most subsequent decisions favoring insurers rely on *Armco* and *Northeastern Pharmaceutical. See Cincinnati Ins. Co. v. Milliken and Co.*, 857 F.2d 979, 981 (4th Cir. 1988) ("in the insurance context the word 'damages' is not ambiguous. It means legal damages"); *Argonaut Ins. Co. v. Atlantic Wood Indus., Inc.*, No. 87-0323-R, slip op. at 1 (E.D. Va. June 20, 1988) (final judgment order) ("the environmental cleanup costs or 'response costs' for which the defendant claims coverage, do not constitute 'damages' within the meaning of the comprehensive general liability policies issued by the plaintiff"); *Verlan, Ltd. v. John L. Armitage & Co.*, 695 F. Supp. 950, 954 (N.D. Ill. 1988) ("cost recovery claims . . . do not seek damage relief, but are restitutional in nature"); *Hayes v. Maryland Casualty Co.*, 688 F. Supp. 1513, 1515 (N.D. Fla. 1988) ("the expenses that [the State] seeks to recover are not damages within the meaning of the policy here involved").

Id. at 527-28, 528 A.2d at 82.

A second theory is that the word "damages" has a plain, ordinary meaning which includes the type of expenses under consideration because a reasonable business person purchasing a comprehensive general liability insurance policy would expect cleanup of toxic wastes pursuant to government order to be covered unless the policy explicitly limited the term's meaning. In *National Indemnity Co. v. United States Pollution Control*, 717 F. Supp. 765 (W.D. Okla. 1989), a federal district court applying Oklahoma law concluded that the term "damages" in a liability policy covered response and environmental cleanup costs. Because the policy did not "affirmatively limit the definition of damages to the legal definition only," *id.* at 766, the court determined that the plain, ordinary meaning of the word applied. The court relied on the definition of damages found in Webster's Third New International Dictionary: "the estimated reparation in money for detriment or injury sustained: compensation or satisfaction imposed by law for a wrong or injury caused by violation of a legal right." *National Indemnity Co.*, 717 F. Supp. at 767. Because the plain meaning did not distinguish between legal and equitable actions, the court concluded that government-mandated cleanup was covered under the policy.

In *Aerojet-General v. Superior Court (Cheshire and Companies, real party in interest)*, 257 Cal. Rptr. 621, *reh'g denied*, 258 Cal. Rptr. 684 (1989), the California Court of Appeals noted that there is a technical meaning for "damages" similar to that employed in *Armco*. 257 Cal. Rptr. at 626. However, the court recognized that there are other definitions for the term, including that "damages" means "compensation in money imposed by law for loss or injury" (citing Webster's New Collegiate Dictionary, p. 286):

> It is not unreasonable to argue that while a technical meaning of "damages" may refer to an award in an action at law, the ordinary plain meaning of damages is broader and covers environmental response costs incurred at the behest of government entities and under express or implied sanction of law.

257 Cal. Rptr. at 626. The California court determined that a reasonable person in the position of the insured would expect that environmental cleanup costs incurred pursuant to governmental mandate are "damages" within the meaning of his liability policy. *Id.* at 626-27. Other courts have drawn the same conclusion for

similar reasons. *See, e.g., Avondale Industries, Inc. v. Travelers Indemnity Co.*, 887 F.2d 1200, 1207 (2d Cir. 1989) ("an ordinary businessman reading [the] policy would have believed himself covered for the demands and potential damage claims now being asserted in the . . . administrative proceeding"); *United States Fidelity and Guaranty Co. v. Thomas Solvent*, 683 F. Supp. 1139, 1168 (W.D. Mich. 1988) ("from the standpoint of the insured damages are being sought for injury to property. It is that contractual understanding rather than some artificial and highly technical meaning of damages which ought to control"); *Boeing Co. v. Aetna Cas. & Sur. Co.*, 784 P.2d 507, 512 (1990) ("Courts consistently agree that the 'common-sense' understanding of damages within the meaning of the policy 'includes a claim which results in causing [the policyholder] to pay sums of money because his acts or omissions affected adversely the rights of third parties.' ") (quoting *Thomas Solvent*, 683 F. Supp. at 1168).

A third theory concentrates on the substance of governmental cleanup mandates rather than their form to find coverage. In *United States Aviex v. Travelers*, 125 Mich. App. 579, 336 N.W.2d 838 (1983), the Michigan Court of Appeals stated:

> It is merely fortuitous from the standpoint of either plaintiff or defendant [insurer] that the state has chosen to have plaintiff remedy the contamination problem, rather than choosing to incur the costs of cleanup itself and then suing plaintiff to recover those costs. The damage to the natural resources is simply measured in the cost to restore the water to its original state. . . . Defendant must defend and indemnify plaintiff against such claims and costs under the insurance policy.

Id. at 590, 336 N.W.2d at 843 (citations omitted). The Federal District Court for the Eastern District of Michigan followed *United States Aviex* in *Firemen's Fund v. Ex-Cell-O Corp.*, 662 F. Supp. 71 (E.D. Mich. 1987). *United States Aviex* and *Ex-Cell-O* concentrate on the nature of the expenditures, the presence of legal coercion, and injury to the public to hold the insurers liable under their policies for toxic waste cleanup.

The fourth theory is that when "property damage" to a third party occurs within the meaning of the policy, costs associated with remedying that injury are "damages." In *Boeing Co. v. Aetna*

Cas. & Sur. Co., 748 P.2d at 510, the Washington Supreme Court considered a liability policy which provided that the insurer "pay on behalf of the insured all sums which the insured shall become obligated to pay *as damages* * * * because of property damage." In concluding that response costs incurred pursuant to a United States Environmental Protection Agency order were covered under the policy, the court stated that "[t]he occurrence of the hazardous wastes leaking into the ground contaminating the groundwater, aquifer and adjoining property constituted 'property damage' and thus triggered the 'damages' provision of the policies carried by the policyholders." *Id.* at 516.

In *Port of Portland v. Water Quality Insurance Syndicate*, 796 F.2d 1188, 1194 (9th Cir. 1986), the Ninth Circuit court stated: "We agree with the district court that the 'reasonable, enlightened view' that the Oregon Supreme Court would adopt would be that discharge of pollution into water causes damage to tangible property and hence cleanup costs are recoverable under a property damage liability clause." In other words, once "property damage" occurs injuring a third party, costs associated with remedying it are "damages" within the meaning of the liability policy. The existence of "property damage" under the policy bootstraps the coverage provisions into use.

We find all four of these theories have some merit. We rest our decision, however, on the basis that the term "damages" is not being used in its legal and technical sense in these policies. As these cases show, it is a term easily susceptible to more than one definition. Clearly, there is a specific, technical definition for the word: "payments to third persons when those persons have a legal claim for damages." *Hanna*, 224 F.2d at 503. If the insurer intended that "damages" have only this meaning, it should have so indicated in the policy. The insured would then have understood that cleanup costs incurred pursuant to government mandate were not covered, and would have been able to enter into other insuring arrangements. Because such a limiting definition was not included in the policy, we must conclude that the parties did not intend "damages" to have a specific technical meaning in the insurance policy. Rather, they intended to use its ordinary meaning. Use of the plain, ordinary meaning of a term is the preferred construction. *Woods*, 295 N.C. at 505-06, 246 S.E.2d at 777. *Cf. Waste Management of Carolinas, Inc.*, 315 N.C. at 694, 340 S.E.2d at 379.

In construing the ordinary and plain meaning of disputed terms, this Court has used "standard, nonlegal dictionaries" as a guide. *Insurance Co. v. Insurance Co.*, 266 N.C. 430, 438, 146 S.E.2d 410, 416 (1966); *see Waters v. Lumber Co.*, 115 N.C. 649, 654, 20 S.E. 718, 720 (1894). The American Heritage Dictionary Of The English Language 333 (1969) defines the term "damages" as "[m]oney paid or ordered to be paid as compensation for injury or loss." The Random House Dictionary of The English Language 504 (2d ed. 1987) and Webster's Third New World International Dictionary 571 (1976), however, define damages more broadly as the estimated money equivalent "for detriment or injury sustained."

Because the policy term "damages" is uncertain and capable of several reasonable interpretations, this Court must employ the interpretation which favors the policyholder. *Woods v. Insurance Co.*, 295 N.C. at 505-06, 246 S.E.2d at 777. Reading the policy provisions as a whole and assuming none of the exclusions apply, we conclude that a "reasonable person in the position of the insured" may have understood that the term "damages" included state-ordered environmental cleanup costs. *See Grant v. Insurance Co.*, 295 N.C. 39, 43, 243 S.E.2d 894, 897 (1978); *Financial Services v. Capital Funds*, 288 N.C. 122, 143, 217 S.E.2d 551, 565 (1975).[12]

Finally, our words in *Insurance Co. v. Insurance Co.*, 266 N.C. at 437-38, 146 S.E.2d at 416, are equally applicable here:

> When an insurance company, in drafting its policy of insurance, uses a "slippery" word to mark out and designate those who are insured by the policy, it is not the function of the court to sprinkle sand upon the ice by strict construction of the

12. In addition to the court decisions cited above, several commentators have concluded that comprehensive general liability policies should be given a broad reading. *See* Chesler, Rodburg & Smith, *Patterns of Judicial Interpretation of Insurance Coverage for Hazardous Waste Site Liability*, 18 Rutgers L.J. 9, 14 (1986) ("CGL [comprehensive general liability] insurance purchased by commercial enterprises provides indemnity for, and defense against, the broadest spectrum of property damage . . . brought by third parties arising out of day to day business operations"); *Developments in the Law—Toxic Waste Litigation*, 99 Harv. L. Rev. 1458, 1576 (1986) (comprehensive general liability policy "provides coverage for all 'occurrences' causing damage"); Note, *The Applicability of General Liability Insurance to Hazardous Waste Disposal*, 57 S. Cal. L. Rev. 745, 757 (1984) ("The very title 'Comprehensive General Liability Insurance' suggests the expectation of maximum coverage. . . . If a risk neither party contemplated develops, the comprehensive policy must necessarily cover that risk. Indeed, protection against unknown risks is the very reason the insured purchases comprehensive liability insurance").

> term. All who may, by any reasonable construction of the word, be included within the coverage afforded by the policy should be given its protection. If, in the application of this principle of construction, the limits of coverage slide across the slippery area and the company falls into a coverage somewhat more extensive than it contemplated, the fault lies in its own selection of the words by which it chose to be bound.

We conclude that cleanup costs incurred pursuant to the State's compliance orders are "damages" within the policies' meaning.

D.

[4] The policy provision governing the insurers' duty to defend states:

> [T]he Company shall have the right and duty to defend any *suit* against the insured seeking *damages* on account of . . . *property damage*, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or *suit* as it deems expedient . . . .

The term "suit" is not defined in the policy.

Appellees Travelers and St. Paul urge us to affirm the trial court's ruling that compliance orders are not "suits" triggering the insurers' duty to defend under the policies. Appellants Spangler and Durham Life argue that such a strict interpretation of the term is contrary to principles governing judicial construction of insurance policies which have led courts consistently to hold that the duty to defend is much broader than the obligation to indemnify. They claim they are entitled to a defense to determine the extent of their duties under the statutes and regulations which may apply.

We hold that the issuance of compliance orders constitutes "suits" within the meaning of these policies. We again rely on the principles set out under Part II-A.

In *Waste Management of Carolinas, Inc.*, 315 N.C. at 691, 340 S.E.2d at 377, we stated:

> Generally speaking, the insurer's duty to defend the insured is broader than its obligation to pay damages incurred by events covered by a particular policy. An insurer's duty to defend is ordinarily measured by the facts as alleged in the

> pleadings; its duty to pay is measured by the facts ultimately determined at trial. When the pleadings state facts demonstrating that the alleged injury is covered by the policy, then the insurer has a duty to defend, whether or not the insured is ultimately liable. Conversely, when the pleadings allege facts indicating that the event in question is not covered, and the insurer has no knowledge that the facts are otherwise, then it is not bound to defend.

(Citations and footnote omitted.) We must analyze the policy provisions and compare them with the events as alleged. *Id.* at 693, 340 S.E.2d at 378. Under this so-called "comparison test" the pleadings are read side-by-side with the policy to determine whether the events as alleged are covered or excluded. *Id.* None of the parties argue that "suit" is a technical term which should be given anything other than its ordinary speech interpretation. Thus, we conclude it is a nontechnical word and should be given that meaning it has acquired in ordinary speech. *See Woods v. Insurance Co.*, 295 N.C. at 505-06, 246 S.E.2d at 777.

Standard dictionary definitions of the term "suit" include court proceedings to enforce or recover on a right or claim. The Random House Dictionary of The English Language 1902 (2d ed. 1987) ("[t]he act, the process, or an instance of suing in a court of law"); Webster's Third New International Dictionary 2286 (1976) ("an action or process in a court for the recovery of a right or claim"); The American Heritage Dictionary Of The English Language 1287 (1969) ("Any proceeding in a court to recover a right or claim"). However, not all definitions of "suit" require a court or other adjudicatory proceeding. A second entry in Webster's Third New World International Dictionary 2286 (1976) defines "suit" as "the attempt to gain an end by legal process."

We believe the compliance orders under consideration fall within this broader definition. In each of these orders the State, pursuant to statute, directed appellants to take certain remedial actions required by state law. These compliance orders were an attempt by the State to "gain an end by legal process." Reading the policies as a whole and assuming none of the exclusions apply, we find that a "reasonable person in the position of the insured" may not have understood the term "suit" as limiting appellees' duty to defend until a court proceeding had been instigated. *See Grant v. Insurance Co.*, 295 N.C. at 43, 243 S.E.2d at 897; *Financial Services v. Capital Funds*, 288 N.C. at 143, 217 S.E.2d at 565. Because this Court must give effect to reasonable interpretations which favor the policyholder, we conclude that the term "suit" as used

in the policies covers the compliance orders. *See Woods v. Insurance Co.*, 295 N.C. at 506, 246 S.E.2d at 777.

We also note that many cases from other jurisdictions addressing this issue have also addressed the "property damage" and "damages" questions we discussed above. Our research has uncovered no decisions where environmental cleanup expenses were deemed "damages because of property damage," but where the administrative orders requiring cleanup were not deemed "suits." In this context, invocation of the narrower duty to indemnify *a fortiori* invokes the broader duty to defend.

We hold that the trial court erred in granting summary judgment to appellees on the grounds that "[t]he State's Compliance Orders issued to [appellants] do not constitute 'suits' within the terms of the liability coverage provisions of the insurance policies and that the moving insurers have no duty of defense under the insurance policies in connection with the Compliance Orders."

III.

In summary, we hold that within the meaning of these policies, (1) injury to the State's natural resources is "property damage"; (2) costs incurred pursuant to State order to remedy this environmental injury are "damages" which the insured was legally obligated to pay because of such property damage; and (3) the State's orders requiring cleanup of toxic wastes are "suits" giving rise to the insurers' duty to defend. Because the trial court erred in this proceeding, its order is, therefore,

Reversed.

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

STATE OF NORTH CAROLINA v. JAMES IRA LEVAN

No. 234A88

(Filed 7 February 1990)

1. Criminal Law § 73.2 (NCI3d)— hearsay—statements against interest—admissible

The trial court did not err in the prosecution of a cocaine dealer for murder by admitting various hearsay statements

where the statements constituted statements against the penal interest of the declarants; the facts of the case and non-hearsay testimony substantiate the trustworthiness of the statements; and, additionally, repetition of those hearsay statements in open court was against the penal interest of the witnesses testifying. N.C.G.S. § 8C-1, Rule 804(b)(3).

Am Jur 2d, Evidence § 610.

2. **Criminal Law § 46.1 (NCI3d)— murder—flight—evidence sufficient to support instruction**

The evidence in a murder prosecution supported the trial court's instruction on defendant's flight where defendant attempted to conceal the victim's body; ordered an accomplice to wipe fingerprints off the murder weapon and then to throw it into a nearby river from which it was never recovered; defendant and the accomplice later tried to throw the victim's clothes and personal effects into a dumpster and, thwarted by the arrival of a passing police officer, eventually threw the items over the guardrail along a major highway; and defendant approached a fellow inmate and offered him money if the inmate would smuggle a gun to him so that he could escape. The question is not where or how defendant chose to live in the year between the victim's death and his arrest; rather the relevant inquiry concerns whether there is evidence that defendant left the scene of the murder and took steps to avoid apprehension, and evidence of defendant's attempt to escape provides additional support for the instruction.

Am Jur 2d, Evidence §§ 280, 623.

3. **Criminal Law § 89.3 (NCI3d)— murder—prior consistent statements—slight variation—admissible**

The trial court did not err in a murder prosecution by admitting testimony of an SBI agent concerning remarks made to him by a witness who was then a suspect where there were variations in the details present in the trial testimony and the prior statements. The statements were sufficiently consistent with and supportive of the trial testimony to be admissible as corroborative; slight variations in statements that do not go to the heart of the testimony will not preclude the admission of prior statements as corroborative.

Am Jur 2d, Evidence § 500.

4. Homicide § 15 (NCI3d) — murder — possession of large number of firearms — relevant

The trial court did not err in a murder prosecution by admitting testimony that defendant owned a double-barreled sawed-off shotgun and that more than twenty handguns, long guns, and shotguns, including a double-barreled sawed-off shotgun, were found at defendant's residence where the testimony regarding defendant's ownership of a double-barreled sawed-off shotgun was relevant to show defendant's violent lifestyle as well as his relationship with the witness and the victim; a large number of weapons and large quantities of ammunition found at defendant's residence were relevant inasmuch as those facts pointed out that defendant owned .380 caliber ammunition and that a .380 caliber weapon was not found at his residence, supporting the theory that defendant shot the victim with a .380 caliber gun and then threw the gun in a nearby river; and defendant raised the issue of his interest in guns under direct examination and thus waived his right to complain of the admission of related evidence by the State.

Am Jur 2d, Evidence §§ 288, 446.

5. Criminal Law § 70 (NCI3d) — murder — tape recording — admissible

The trial court did not err in the murder prosecution of a drug dealer by admitting into evidence testimony about a conversation another suspect had with defendant which led to defendant's arrest as well as a tape recording of the conversation and a transcript of the tape recording. The pre-arrest warrantless recording of defendant's incriminating statements did not violate defendant's right to be free of unreasonable search and seizure under article 1, section 20 of the North Carolina Constitution inasmuch as defendant had no legitimate expectation of privacy regarding a conversation he voluntarily maintained with a confederate; defendant's article 1, section 23 right to be free from compulsory self-incrimination was not violated because his participation in the conversation was wholly voluntary; defendant's right to counsel under article 1, section 23 was not violated because the conversation in question occurred during the initial investigation of the suspect prior to his arrest; and there was no merit to the contention

that the recordings were improperly obtained or that their transcription or admission into evidence was in violation of 18 U.S.C. §§ 2510-2518.

Am Jur 2d, Evidence § 436; Telecommunications § 216.

APPEAL of right by defendant pursuant to N.C.G.S. § 7A-27(a) from judgment imposing sentence of life imprisonment entered by *Owens, J.*, at the 22 February 1988 Criminal Session of Superior Court, BURKE County, upon a jury verdict of guilty of murder in the first degree. Heard in the Supreme Court 11 December 1989.

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

Malcolm Ray Hunter, Jr., Appellate Defender, by Daniel R. Pollitt, Assistant Appellate Defender, for defendant-appellant.

MARTIN, Justice.

Defendant was convicted of murder in the first degree of Charles Jennings Feimster and sentenced to life in prison. Our examination of the five issues raised by defendant on his appeal reveals no prejudicial error.

Briefly, the facts show that in the spring of 1986, defendant James Ira Levan was in the business of selling cocaine in and around Statesville, North Carolina, where he also resided. At approximately 11:30 p.m. on Friday evening, 25 April 1986, defendant arrived at the home of Terry Kurley for the purpose of selling Kurley a gram of cocaine. Kurley went into his house to test the cocaine while defendant waited outside in his car. Kurley returned to the car and announced that he was dissatisfied with the quality of the cocaine. Defendant and Kurley argued and defendant angrily left Kurley's residence. After the defendant had left the premises, Kurley told his wife, Patricia Kurley Poore, that defendant had accused Kurley of "cutting" the cocaine while out of defendant's sight and that defendant had stated that Kurley was going to "pay for it."

During April of 1986, the victim, Charles Jennings Feimster, worked as a bouncer at a local gambling club in the Statesville area and was also known in the community as an enforcer who collected drug debts for defendant. Sometime between 11:30 p.m. and midnight on the evening of 25 April 1986, the victim called

his wife, Susan Feimster Dugan, at work and told her he was going to help a friend before coming home and not to wait up for him. On the following day, his wife checked their answering machine and found a message from defendant stating, "Chuck, this is Jim, I have been burnt in a coke deal and I need your help." Testimony at trial indicated that defendant had contacted Feimster, the victim, and told him that he could keep any money he could collect from Kurley as a result of a failed drug deal.

Shortly after defendant had angrily left Terry Kurley's house, the victim Feimster appeared in Kurley's driveway. Taking a knife and a Doberman puppy with him, Kurley went outside to speak with Feimster, but came back to the front door to tell his wife to call the police. As Kurley's wife was calling the police, she heard a shot and ran to the door. From there, she saw her husband lying face down on the ground beside the porch and saw Charles Feimster running for his car. Terry Kurley died from a gunshot wound to the head.

Sometime between 12:45 a.m. and 1:00 a.m., Feimster returned to his home and told his wife that defendant had sent him to talk to an individual. He told her the individual had been armed with a sword and had a Doberman and that Feimster had reflexively shot the man because he thought the man had made a movement to go for a gun. Feimster told his wife he was going to call a friend, witness Willie John Campbell, to help him make arrangements to leave town. Before leaving, Feimster telephoned defendant and asked him to remove the license plates from his car and then to have it burned.

Witness Campbell later testified that Feimster called him sometime between 1:00 a.m. and 1:30 a.m. on 26 April 1986. Campbell testified that he then went to Feimster's house, drove Feimster to Charlotte and registered Feimster at a local motel there. When requested by Feimster to provide an alibi for him for the entire evening, Campbell refused.

While at the motel in Charlotte, Feimster arranged for another friend, witness Robert Smith, to pick up some personal items from Feimster's wife and deliver them to him in Charlotte. Before leaving Statesville, Smith stopped at defendant's house and received approximately $400.00 from the defendant to deliver to Feimster. Defendant also instructed Smith to take the victim, Feimster, as far south as he could. Ultimately, Smith and Feimster went to

Greenville, South Carolina, where Feimster checked into another motel. Smith then returned to Statesville. While at the motel in South Carolina, Feimster contacted his brother, witness Calvin Feimster, and told him initially that he had not killed Kurley. Later, Feimster told his brother that he had shot Kurley while collecting money for a drug debt but that the shooting was in self-defense.

In April of 1986, Steve Wooten was employed by defendant in a number of capacities, including enforcer, arsonist, bodyguard, driver, and drug dealer. At trial, Wooten testified that early in the morning of 26 April 1986 he was contacted by the defendant and asked to burn Feimster's car. On Sunday, 27 April 1986, defendant came to Wooten's home and told him that the two of them would need to go to South Carolina to pick up Feimster. Armed with a .380 automatic pistol and a .22 caliber revolver, the two men drove in Wooten's van to Greenville, South Carolina, where they met the victim in his motel room. Defendant told the victim that it would not be long before the police caught up with him in Greenville for the murder of Kurley and suggested that Feimster come with defendant and Wooten to defendant's cabin in the North Carolina mountains. After Feimster elected to go back to North Carolina with defendant, defendant told him not to call anyone.

Defendant, Wooten, and the victim left South Carolina and went back north on I-85, later switching to back roads to avoid detection. Outside of Morganton, North Carolina, on Highway 18, Wooten noticed the van was running out of gas. Fearing detection, Feimster did not want to go into town to get gas because the police were looking for him and he was afraid he would be identified. Consequently, defendant and the victim got out of the van to wait by the roadside until Wooten returned with the gas.

When Wooten returned, he blew his horn and defendant emerged from the woods alone. Coming around to the driver's side, defendant stated, "that is a heavy S.O.B. to move. Go down and move him further into the woods." Wooten went down to the bottom of the hill where Feimster's body was lying on the ground. Failing to find a pulse, Wooten ran back to the van and, with defendant driving, the two men began to drive back to Statesville. On the return trip, defendant gave Wooten his .380 automatic and told him to wipe defendant's prints off the gun and then throw the gun in a river which was adjacent to Highway 18. The two men

stopped once to try to throw Feimster's clothes and personal belongings into a dumpster, but were unsuccessful because a police officer drove by. Once back on I-40 heading for Statesville, however, Wooten pulled over and defendant threw the victim's clothing and personal belongings over a guardrail.

On the trip home, defendant told Wooten that he had killed Feimster because he was afraid Feimster would turn state's evidence against defendant regarding his cocaine dealings in exchange for a lighter sentence if the police arrested Feimster for the murder of Terry Kurley. Wooten testified at trial that defendant told him a few days later that he had walked up behind Feimster, put the .380 automatic to the back of his head, and pulled the trigger. At trial, however, defendant testified that he and Feimster had gotten into an argument while Wooten was getting gas for the van and that defendant had shot Feimster in self-defense.

Feimster's body was discovered at the bottom of a hill by the side of Highway 18 by a construction worker on 28 April 1986. An autopsy revealed that Feimster, an unusually large and powerful man, had been shot once in the back of the head with a bullet of a size consistent with a 9 mm., .38 caliber or .380 caliber gun.

On the morning of Tuesday, 29 April 1986, defendant voluntarily went to the County Sheriff's Department to see if there was a warrant issued for his arrest. Within forty-eight hours of the shooting, he had spoken with a total of five law enforcement officers to determine if a warrant had been issued in his name. At the Sheriff's Department, defendant explained to the deputy on duty that he would like to be called if a warrant appeared because his father had heart trouble and he would prefer to come to the sheriff's office voluntarily than to have a warrant delivered at his home.

On 14 April 1987, nearly a year after the shooting of Charles Feimster, an SBI agent provided Steve Wooten with a small tape recorder. Using the recorder, Wooten initiated a conversation with defendant in which defendant was implicated for Feimster's murder. An arrest warrant was issued on 27 April 1987 for defendant, and he was indicted for murder in the first degree of Charles Jennings Feimster on 11 May 1987. At trial and over defendant's repeated objections, the trial court admitted Wooten's testimony about his 14 April 1987 conversation with defendant, admitted the tape recording itself, and a transcript of the tape recording. On

3 March 1988, the jury returned a verdict of guilty and on 4 March 1988 recommended that defendant be sentenced to life imprisonment.

[1] On appeal, defendant raises five assignments of error. Defendant first contends that it was error for the trial court to admit a number of hearsay statements made by the victim, Charles Feimster, by Terry Kurley, and by the defendant to five witnesses who testified at trial. The five witnesses who entered hearsay statements were: (1) Robert Smith, the friend who drove the victim to Greenville, S.C. prior to his murder; (2) Calvin Feimster, the victim's brother; (3) John Campbell, the friend who drove the victim to Charlotte prior to his murder; (4) Patricia Kurley Poore, Terry Kurley's wife, and (5) Susan Feimster Dugan, the victim's wife.

The record shows that witness Robert Smith was permitted to testify over objection that Feimster repeatedly told him on the day following Kurley's murder that he, Feimster, had not shot Kurley and did not know why he was accused of murder. Smith was then permitted to testify that Feimster later told him he had gone to Kurley's house to collect a debt for defendant and that he had shot Kurley there. Smith also testified about instructions Feimster had given to Smith to help orchestrate Feimster's flight from Statesville. The victim's brother, Calvin Feimster, was similarly permitted to testify over objection regarding statements his brother had made to him to the effect that he had not shot Kurley. Calvin Feimster was also permitted to repeat later statements made to him by the victim confessing that he had gone to Kurley's house to collect a drug debt for defendant and that he had shot Kurley in self-defense. Additionally, the victim's brother repeated statements made to him by Feimster regarding his flight to Charlotte and his refusal to return to Statesville. Like Robert Smith and Calvin Feimster, witness John Campbell testified over objection that the victim had told him he had shot Kurley. Campbell also testified about the victim's efforts to get Campbell to provide an alibi for him during the time of Kurley's murder.

Patricia Kurley Poore, Terry Kurley's wife, repeated a number of hearsay statements made to her by her husband prior to his death. Specifically, she was allowed to repeat their conversation regarding Kurley's cocaine deal with defendant to the effect that defendant had accused Kurley of "cutting" the cocaine and that defendant had warned Kurley that he was "going to pay" for tampering with the drug. Finally, the victim's wife, Susan Feimster Dugan,

testified about a number of statements Feimster had made to her prior to his death. Among the hearsay statements admitted during Dugan's testimony was the victim's assertion that the defendant "sent him over to this individual's home in order to talk with him concerning a coke deal . . . and on reflex he drew his gun . . . and shot the individual" in self-defense. Dugan further testified that Feimster had told her "from time to time that he would run errands for [defendant] concerning cocaine deals."

Prior to trial, the state had filed several notices of intention to introduce hearsay statements at trial pursuant to North Carolina Evidence Rule 804(b)(5). In the notices, the state showed its intention to introduce various hearsay statements through the testimony of the five witnesses set forth above. Defendant filed a motion to suppress this evidence, arguing that it was inadmissible as untrustworthy hearsay and did not fall under any other hearsay exceptions. After conducting separate *voir dire* hearings of the witnesses in question, the trial court found all the challenged statements to be admissible under Rule 804(b)(5) and permitted the five witnesses to testify about the hearsay statements.

On appeal, defendant argues that the trial court made almost an identical error in every instance in permitting these statements to come into evidence. It is defendant's contention that the trial court failed to follow the guidelines set out by this Court in *State v. Triplett*, 316 N.C. 1, 340 S.E.2d 736 (1986), for admission of hearsay evidence under Rule 804(b)(5) and that such failure constituted reversible error. Upon examining the record, we find that the hearsay statements in question constituted statements against the penal interest of the declarants, Charles Feimster, Terry Kurley, and defendant. As such, these statements are admissible hearsay under Rule 804(b)(3) of the North Carolina Rules of Evidence. N.C.G.S. § 8C-1, Rule 804(b)(3) (1986). Hence, we find it unnecessary to examine defendant's contentions regarding the trial court's application of the more stringent standards set forth in *State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985), and incorporated in *Triplett* for the admission of hearsay evidence under the catchall provision of Rule 804(b)(5). *See State v. McElrath*, 322 N.C. 1, 366 S.E.2d 442 (1988).

"The circumstantial guaranty of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for

good reasons that they are true." *State v. Wilson*, 322 N.C. 117, 132, 367 S.E.2d 589, 598 (1988) (citing N.C.G.S. § 8C-1, Rule 804(b)(5) (1986), comment). In an effort to avoid fabrication of statements against penal interest which might exculpate a defendant, Rule 804(b)(3) includes an additional requirement that "a statement tending to expose the declarant to criminal liability is not admissible in a criminal case unless corroborating circumstances clearly indicate the trustworthiness of the statement." In the case before us, the facts surrounding Terry Kurley's death, Charles Feimster's efforts to flee Statesville, and non-hearsay testimony regarding defendant's involvement with drugs all substantiate the trustworthiness of the admitted statements. In reaching this conclusion, we note that in addition to having been against the penal interest of each of the declarants, repetition of these hearsay statements in open court is against the penal interest of the witnesses testifying. The implication of the witnesses' penal interest, while unnecessary for a hearsay analysis, adds an additional circumstantial guarantee of the trustworthiness of the testimony in this case. Finally, we are mindful that a number of the admitted hearsay statements are arguably neutral on their face and note that non-incriminating collateral statements are also admissible under Rule 804(b)(3) when they are integral to the larger statement more clearly admissible as being directly against declarant's penal interest. *State v. Wilson*, 322 N.C. 117, 367 S.E.2d 589. Based on our conclusion that these statements are admissible under Rule 804(b)(3), we find no merit in defendant's contention that admission of these hearsay statements constituted reversible error.

[2] Defendant next contends that a new trial is in order because there was insufficient evidence supporting the trial court's jury instruction about defendant's flight. Following an unrecorded charge conference, the trial court instructed the jury as follows:

> The State contends that the defendant fled. Evidence of flight may be considered by you together with all other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show a consciousness of guilt. However, proof of this circumstance is not sufficient in itself to establish guilt.

Defendant correctly notes that our courts have long held that a trial court may not instruct a jury on defendant's flight unless "there is some evidence in the record reasonably supporting the

theory that defendant fled after commission of the crime charged." *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977). *See also State v. Moxley*, 78 N.C. App. 551, 557, 338 S.E.2d 122, 125 (1985), *disc. rev. denied*, 316 N.C. 384, 342 S.E.2d 904 (1985). However, defendant erroneously concludes that his open and conspicuous return to his home in Statesville following the shooting as well as his conspicuous approach to five law enforcement officers within forty-eight hours of Feimster's murder necessarily preclude a finding that defendant fled in this case.

The question in this case is not where or how defendant chose to live in the year between the victim's death and defendant's arrest. Rather, the relevant inquiry concerns whether there is evidence that defendant left the scene of the murder and took steps to avoid apprehension. In this case, defendant did not merely drive home following the shooting as he contends. Rather, he attempted to conceal the victim's body by ordering Wooten to drag it further into the woods by the roadside where the shooting had occurred. Further, he ordered Wooten to wipe the fingerprints off the gun and then to throw the murder weapon into a nearby river from which it was never recovered. Still later, defendant and Wooten tried to throw the victim's clothes and personal effects into a dumpster and, thwarted by the arrival of a passing police officer, eventually threw the items over the guardrail along a major highway. These actions are clearly sufficient to support the trial court's instruction on flight.

Additionally, following his arrest defendant approached a fellow inmate and offered him money if the inmate would smuggle a gun to him so that he could escape. It is well settled in this state that an escape from custody constitutes evidence of flight. *State v. Sheffield*, 251 N.C. 309, 111 S.E.2d 195 (1959); *State v. Miller*, 26 N.C. App. 190, 215 S.E.2d 181 (1975). Evidence of defendant's attempt to escape provides additional support for the trial court's instruction on flight. Concerning the instruction, we find no error.

[3] The defendant's third assignment of error involves testimony of SBI Special Agent Call concerning remarks made to him by witness Steve Wooten during a number of interviews conducted by the SBI while Wooten was himself a suspect in Feimster's murder. Defendant raises objections to seven specific instances in which Agent Call recounted statements made by Wooten which the defendant believes contradict or add new facts to Wooten's trial

testimony. As such, defendant asserts that these statements are non-corroborative and hence constitute inadmissible hearsay. Our examination of the trial testimony and the relevant case law reveals that in each instance Agent Call's testimony was properly allowed for the purpose of corroborating Wooten's prior testimony and is not inadmissible hearsay.

Defendant complains that it was error for Agent Call to have been permitted to testify that Wooten told him in April of 1987: (1) that defendant was afraid that Feimster would be identified if Feimster went back to get gas with Wooten and that defendant told Feimster that the two of them would wait by the roadside while Wooten got gas when at trial Wooten had testified that it was Feimster himself who initiated these remarks; (2) that defendant threw the murder weapon out of the van into the river after the shooting when at trial Wooten had testified that defendant had ordered Wooten to throw the pistol out of the van; (3) that Wooten accompanied one of defendant's friends to Florida to pick up two ounces of pure cocaine on two occasions and that Wooten's job was to drive and watch money when at trial Wooten had not mentioned the trips to Florida; (4) that defendant kept cocaine stashed in large coolers that he had buried underground in two different locations near his property when at trial Wooten had not mentioned these coolers; (5) that defendant told Wooten in April 1986 that he had cut Kurley off from getting more cocaine because Kurley was not paying his drug debts and that defendant and Wooten discussed collecting Kurley's drug debt when Wooten had not mentioned these facts in his testimony; (6) that Feimster sold long guns and pistols for defendant when Wooten had not made this statement during his testimony; and (7) that defendant told Wooten that he was planning to set Wooten up in a cocaine selling business when Wooten had not testified to that effect.

Corroboration has been defined as "the process of persuading the trier of the facts that a witness is credible—the opposite of impeachment." 1 Brandis on North Carolina Evidence § 49 (1982). Under North Carolina law, a trial court has wide latitude in deciding when a prior consistent statement can be admitted for corroborative, non-hearsay purposes. *See generally id.* at §§ 50-52 and cases cited therein. This Court has defined corroboration as meaning, "to strengthen; to add weight or credibility to a thing by additional and confirming facts or evidence." *State v. Higgenbottom*, 312 N.C. 760, 769, 324 S.E.2d 834, 840 (1985). *See also State v. Riddle*, 316

N.C. 152, 340 S.E. 2d 75 (1986). Under the case law of this state, the latitude for admission of prior consistent statements is so wide that we do not require that a witness be impeached before a prior consistent statement is admissible as corroborative. *State v. Burton*, 322 N.C. 447, 368 S.E.2d 630 (1988); *State v. Howard*, 320 N.C. 718, 360 S.E.2d 790 (1987); *State v. Riddle*, 316 N.C. 152, 340 S.E.2d 75 (1986); *State v. Martin*, 309 N.C. 465, 308 S.E.2d 277 (1983).

The theory behind admitting prior consistent statements for the non-hearsay purpose of buttressing the credibility of a witness "rests upon the obvious principle that, as conflicting statements impair, so uniform and consistent statements sustain and strengthen [the witness'] credit before the jury." *Jones v. Jones*, 80 N.C. 246 (1879). A prior consistent statement may be admissible as non-hearsay even when it contains new or additional information when such information tends to strengthen or add credibility to the testimony which it corroborates. *State v. Burton*, 322 N.C. 450, 368 S.E.2d 630; *State v. Kennedy*, 320 N.C. 20, 357 S.E.2d 359 (1987); *State v. Howard*, 320 N.C. 718, 360 S.E.2d 790; *State v. Ramey*, 318 N.C. 457, 349 S.E.2d 566 (1986) (disapproving prior cases *contra*); *State v. Higgenbottom*, 312 N.C. 760, 324 S.E.2d 834; *State v. Burns*, 307 N.C. 224, 297 S.E.2d 384 (1982).

Applying these standards to the specific statements objected to by defendant here, we find that in each and every instance the statements were sufficiently consistent with and supportive of the witness' trial testimony to be admissible as corroborative. While there are admittedly slight variations in the details present in the trial testimony and the prior statements, the spirit of the statements made prior to trial and of the in-trial testimony was the same. Slight variations in statements that do not go to the heart of the testimony will not preclude the admission of prior statements as corroborative. *State v. Locklear*, 320 N.C. 754, 360 S.E.2d 682 (1987). Because these statements were admitted for the purpose of substantiating the witness' credibility, they were not offered for their substantive truth and consequently were not hearsay. We find no error in the admission of these statements.

[4] Defendant next contends that he was prejudiced by witness Wooten's testimony that the defendant owned a double-barreled sawed-off shotgun and by Agent Call's testimony that more than twenty handguns, long guns, and shotguns, including a double-

barreled sawed-off shotgun, were found at defendant's residence. We find no merit to defendant's contention.

Under Rule 402 of the North Carolina Rules of Evidence, all relevant evidence is generally admissible. Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." During presentation of the state's case, testimony was admitted showing that when Robert Smith went to defendant's house to pick up money to help Feimster's escape from North Carolina, Steve Wooten was on defendant's front porch holding a sawed-off shotgun which had been given to him by defendant so that Wooten could protect him. Further testimony indicated that the victim was killed with a .380 caliber weapon and that the SBI found ammunition in .380 caliber at defendant's residence but no .380 caliber gun was among the other guns found there.

We find Wooten's testimony regarding defendant's ownership of a double-barreled sawed-off shotgun and defendant's decision to give the shotgun to Wooten for the purpose of protecting defendant to be relevant evidence tending to show the violent nature of defendant's lifestyle as well as his relationship with both witness Wooten and the victim, Feimster. Furthermore, the large number of weapons and large quantities of ammunition found at defendant's residence were relevant inasmuch as these facts pointed out that defendant owned .380 caliber ammunition but a .380 caliber weapon was not found at his residence. This evidence supported the state's theory of the case, which was that defendant shot the victim with a .380 caliber automatic gun and then threw the gun in a nearby river following the shooting. Finally, we note that the defendant presented testimony on direct examination that he was a hunter and a gun collector, and that he sold and traded guns. Having raised the issue of his interest in guns on direct examination, defendant has waived his right to complain of the admission of related evidence presented by the state. *State v. Artis*, 325 N.C. 278, 384 S.E.2d 470 (1989); *State v. Wright*, 282 N.C. 364, 192 S.E.2d 818 (1972). We find that defendant's concern regarding admission of this evidence is unfounded.

[5] Defendant's remaining assignment of error raises state constitutional questions concerning the admissibility of testimony about a conversation which Steve Wooten had with the defendant which

led to the defendant's arrest, as well as state constitutional questions concerning the admissibility of a recording of the conversation and a transcript of the tape recording. In April of 1987, witness Steve Wooten was a suspect himself in the murder of Charles Feimster. He was interviewed by agents of the SBI and assured them that the defendant, in fact, committed the murder. Wooten offered to prove his contention to the law enforcement officers by obtaining a recorded statement from the defendant confirming defendant's killing of the victim. On 14 April 1987, SBI Agent Call placed a small tape recorder on Wooten. On that same day, Wooten approached defendant and initiated a conversation with him in which defendant ultimately implicated himself in the murder. At trial, Wooten testified about that conversation and others he had had with defendant concerning the shooting. The tape recording itself was played for the jury, while each jury member was given a transcript of the tape recording to help them understand its content.

Defendant asserts that he is entitled to a new trial because the tape recording was obtained in violation of his constitutional right to be free from unreasonable search and seizure under article 1, section 20 of the North Carolina Constitution and in violation of his right not to be compelled to give self-incriminating evidence as guaranteed by article 1, section 23 of the North Carolina Constitution. It is defendant's contention that since Steve Wooten was a close friend of defendant's, defendant had a reasonable expectation of privacy in their conversations together and that Wooten adopted the pose of a co-conspirator to trick and disarm defendant. Defendant believes that to permit Wooten to record a conversation with defendant for the purpose of obtaining evidence against him would be tantamount to permitting the state to do through Wooten what it could not constitutionally do itself—obtain a statement from a suspect by trickery without giving any constitutionally required Miranda warnings. Thus, without specifically stating so, it appears that defendant further alleges violations of his constitutional right to counsel. Finally, defendant submits a *pro se* argument that the tape recordings were illegally obtained in violation of 18 U.S.C. §§ 2510-2518 (1988) and that inaccuracies in the transcript of the recordings should have prohibited admission of the transcript into evidence.

Even though the pertinent provisions of the state and federal constitutions are textually dissimilar, we find it helpful to examine

the United States Supreme Court decisions concerning similar challenges under the parallel provisions of the United States Constitution. In *Hoffa v. United States*, 385 U.S. 293, 17 L. Ed. 2d 374 (1966), the United States Supreme Court found that the police are not required to presume there is honor among thieves and that when an individual knowingly carries on an incriminating conversation with another individual, no legitimate fourth amendment right to be free from unreasonable search and seizure has been implicated. In *Hoffa*, the Court reasoned that where a government informant elected to testify to an incriminating conversation voluntarily carried on in his presence or directed to him, the informant was not a "surreptitious eavesdropper" and no privacy interest of the defendant had been violated. *See also Lopez v. United States*, 373 U.S. 427, 10 L. Ed. 2d 462 (1963) (holding that testimony of an agent about a recorded incriminating conversation and the recording itself were both clearly admissible). The Court in *Hoffa* further held that defendant's fifth amendment right to be free from compulsory self-incrimination had not been violated by the informant's testimony. In view of the fact that the defendant's conversations with the confederate in *Hoffa* were wholly voluntary, the Court reasoned that the necessary element of compulsion was absent. Without some kind of compulsion, defendant's fifth amendment privilege against self-incrimination did not come into play. *Hoffa v. United States*, 385 U.S. at 304, 17 L. Ed. 2d at 383. Finally, the defendant in *Hoffa* presented a sixth amendment argument, similar to defendant's in this case, which was summarily dismissed by the Supreme Court. As stated by that Court, the defendant's argument was that:

> Not later than October 25, 1962, the Government had sufficient ground for taking the petitioner into custody and charging him. . . . Had the Government done so, it could not have continued to question the petitioner without observance of his Sixth Amendment right to counsel. (Citations omitted). Therefore, the argument concludes, evidence of statements made by the petitioner subsequent to October 25 was inadmissible, because the Government acquired that evidence only by flouting the petitioner's Sixth Amendment right to counsel.

Id. at 309-10, 17 L. Ed. 2d at 386. In response, the Supreme Court concluded:

> Nothing in . . . any case . . . that has come to our attention, even remotely suggests this novel and paradoxical constitu-

> tional doctrine, and we decline to adopt it now. There is no constitutional right to be arrested. The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long. Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction.

Id. at 310, 17 L. Ed. 2d at 386.

Having established the principles underlying the limits on constitutional protections to be afforded incriminating conversations, the Supreme Court next had an opportunity to determine the extent to which electronic surveillance or recordings of such conversations could be admitted into evidence. In *United States v. White*, 401 U.S. 745, 28 L. Ed. 2d 453 (1971), an informant was provided with a radio transmitter which allowed his conversations with defendant to be simultaneously monitored by law enforcement officers. The Court held that admission of the testimony of law enforcement agents who had monitored the conversations without a warrant was not a constitutional violation of defendant's rights. In *White*, the Court noted that:

> No warrant to "search and seize" is required [when a defendant misplaces trust in an apparent colleague], nor is it when the Government sends to defendant's home a secret agent who conceals his identity and makes a purchase of narcotics from the accused, *Lewis v. United States*, 385 U.S. 206 (1966), or when the same agent, unbeknown to the defendant, carries electronic equipment to record the defendant's words and the evidence so gathered is later offered in evidence. *Lopez v. United States*, 373 U.S. 427 (1963).

Id. at 749, 28 L. Ed. 2d at 457. In concluding that defendant's constitutional rights were not violated, the Court further reasoned:

> If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by

> the agent or by others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks.

Id. at 751, 28 L. Ed. 2d at 458.

Under the rulings of the United States Supreme Court, then, the evidence challenged by defendant here would not be inadmissible under federal constitutional grounds. Defendant in this case, however, bases his constitutional claims not on the fourth, fifth, or sixth amendments of the United States Constitution, but rather rests his arguments solely on state constitutional grounds. As this Court stated in *State v. Carter*, 322 N.C. 709, 370 S.E.2d 553 (1988), even though our state constitutional provisions are virtually identical to their federal counterparts, "we have the authority to construe our own constitution differently from the construction by the United States Supreme Court of the Federal Constitution . . . . *Michigan v. Long*, 463 U.S. 1032, 77 L. Ed. 2d 1201; *State v. Arrington*, 311 N.C. 633, 642, 319 S.E.2d 254, 260 (1984)." 322 N.C. at 713, 370 S.E.2d at 555. However, in this case we decline to do so.

Adopting the reasoning of the United States Supreme Court set forth above, we hold that the pre-arrest warrantless recording of defendant's incriminating statements through the witness Wooten did not violate defendant's right to be free of unreasonable search and seizure under article 1, section 20 of the North Carolina Constitution inasmuch as defendant had no legitimate expectation of privacy regarding a conversation he voluntarily maintained with a confederate. Further, defendant's article 1, section 23 right to be free from compulsory self-incrimination was not violated because his participation in the conversation was wholly voluntary, albeit ill-advised. *See State v. Farrell*, 223 N.C. 804, 807, 28 S.E.2d 560, 563 (1944) ("The constitutional inhibition against compulsory self-incrimination, Art. I, sec. 11, is directed against compulsion, and not against voluntary admissions, confessions, or testimony freely given on the trial."). *See also State v. Sheffield*, 251 N.C. 309, 111 S.E.2d 180 (1959). Finally, we find that defendant's article 1, section 23 right to counsel alluded to by defendant was not violated because the conversation in question occurred during the initial investigation of the suspect prior to his arrest. While article 1, section 23 contains a guarantee of right to counsel, that right does not attach to all events leading to trial, but rather only to "critical

stages" of the proceedings. *State v. Odom*, 303 N.C. 163, 277 S.E.2d 352, *cert. denied*, 454 U.S. 1052, 70 L. Ed. 2d 587 (1981), *reh'g denied*, 454 U.S. 1165, 71 L. Ed. 2d 322 (1982). *See also State v. Hall*, 39 N.C. App. 728, 252 S.E.2d 100 (1979). In examining the sixth amendment right to counsel, this Court determined that the pre-arrest investigative stage of a criminal proceeding is not a "critical stage" to which the right to counsel attaches under the Federal Constitution. *State v. Detter*, 298 N.C. 604, 260 S.E.2d 567 (1979). Similarly, we now conclude that defendant's right to counsel under the state constitution was not violated by the SBI's pre-arrest investigation which resulted in the tape recording and testimony in question here.

The final issue for review concerns defendant's *pro se* argument that the state's investigative procedure violated federal wiretapping statutes. We find no merit to defendant's contention that the recordings in question were improperly obtained nor that their transcription or admission into evidence was in violation of 18 U.S.C. §§ 2510-2518 (1988).

Having carefully examined each of defendant's contentions, we hold that the defendant received a fair trial free of prejudicial error.

No error.

STATE OF NORTH CAROLINA v. WILLIE B. MELVIN

No. 482A86

(Filed 7 February 1990)

1. Constitutional Law § 68 (NCI3d)— right to present witnesses

A defendant's sixth amendment right to present his own witnesses to establish a defense is a fundamental element of due process of law, and is therefore applicable to the states through the due process clause of the fourteenth amendment.

Am Jur 2d, Criminal Law § 848; Trial §§ 43, 88, 113, 115.

2. Constitutional Law § 68 (NCI3d)— judicial or prosecutorial admonitions about perjury—due process—facts of each case

Neither a judicial warning to a witness about contempt sanctions or perjury prosecutions nor a prosecutorial threat of perjury proceedings constitutes a per se due process violation. Rather, whether judicial or prosecutorial admonitions to defense or prosecution witnesses violate a defendant's right to due process rests ultimately on the facts in each case.

Am Jur 2d, Criminal Law § 848; Trial §§ 43, 88, 113, 115.

3. Constitutional Law § 68 (NCI3d)— admonitions to witness about perjury—due process—appellate review

In determining whether judicial or prosecutorial admonitions to a witness violate a defendant's right to due process, the reviewing court should examine the circumstances under which a perjury or other similar admonition was made to a witness, the tenor of the warning given, and its likely effect on the witness's intended testimony. If the admonition likely precluded a witness from making a free and voluntary choice whether or not to testify or changed the witness's testimony to coincide with the judge's or prosecutor's view of the facts, defendant's right to due process may have been violated. However, a warning to a witness made judiciously under circumstances that reasonably indicate a need for it and which has the effect of merely preventing testimony that otherwise would likely have been perjured does not violate a defendant's right to due process.

Am Jur 2d, Criminal Law § 848; Trial §§ 43, 88, 113, 115.

4. Constitutional Law § 68 (NCI3d)— judicial admonition to respond to State's subpoenas—no violation of right to present witnesses

Defendant's right to due process was not violated by the trial judge's in-court admonition to two witnesses the day before defendant's trial began that they should comply with subpoenas issued to them by the State or be subject to the court's contempt powers where the admonition was fully justified in light of the witnesses' apparent belief that they did not have to comply with the subpoenas on any day after the day on which the subpoenas were returnable.

Am Jur 2d, Criminal Law § 848; Trial §§ 43, 88, 113, 115.

5. Constitutional Law § 68 (NCI3d)— judicial admonition to family members of witness—no violation of right to present witnesses

Defendant's right to due process was not violated by the trial judge's admonition to members of the family of a State's witness following his testimony that they would be subject to criminal prosecution if they harassed, intimidated or threatened the witness because of his testimony when the trial judge had been advised of a pattern of familial calls to the witness and his brothers urging them not to testify against defendant solely because of the family relationship between them and defendant.

Am Jur 2d, Criminal Law § 848; Trial §§ 43, 88, 113, 115.

6. Constitutional Law § 68 (NCI3d)— prosecutor's conduct toward witnesses—no violation of right to present witnesses

Defendant's right to due process was not violated by the prosecutor's out-of-court conduct toward the State's three principal witnesses, which included threats to charge them with perjury if they changed their story and the use of profanity and some physical force, where the prosecutor's conduct was not directed at persons who originally intended to testify on defendant's behalf in that two of the witnesses initially agreed to testify for the prosecution and the third maintained from his earliest contact with the prosecutor that defendant was guilty of the crimes charged; the three witnesses were defendant's cousins, and it was not until defendant and others appealed to their family loyalty that they made statements tending to exculpate defendant and considered testifying for him; and even after these exculpatory statements were made, defendant's counsel never intended to call defendant's cousins as defense witnesses but intended merely to use these statements to cross-examine them when they testified for the State.

Am Jur 2d, Criminal Law § 848; Trial §§ 43, 88, 113, 115.

APPEAL by defendant from judgment imposing a sentence of life imprisonment entered at the 7 April 1986 Criminal Session of Superior Court, CUMBERLAND County, *Johnson, J.*, presiding. Heard initially in the Supreme Court on 12 May 1987. Further proceedings in trial court ordered on 28 July 1987. Proceedings certified to Supreme Court on 11 October 1988.

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

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

EXUM, Chief Justice.

Defendant argues on appeal that three of the principal witnesses against him were so intimidated by actions of the prosecutor and the trial judge that they refused to give testimony favorable to him and, instead, testified against him, thereby depriving him of due process. We find no merit in this argument and no error in the trial.

Upon a two-count bill of indictment defendant was convicted by a jury of armed robbery and conspiracy to commit armed robbery. After returning these verdicts, the same jury considered an indictment charging defendant with being an habitual felon at the time he committed the conspiracy and armed robbery offenses. The jury determined that he was an habitual felon as charged. After a sentencing hearing, at which evidence was introduced that defendant had been previously convicted of a felonious assault, several larcenies, and common law robbery, none of which were used to prove defendant was an habitual felon, Judge Johnson found these prior convictions as an aggravating circumstance and found no mitigating circumstance. Using the sentence enhancing provisions of N.C.G.S. § 14-7.6, and consolidating the armed robbery and conspiracy cases for judgment, Judge Johnson imposed a sentence of life imprisonment pursuant to N.C.G.S. § 14-1.1(a)(3).

Defendant appealed to this Court under former N.C.G.S. § 7A-27(a) before it was amended by Chapter 679, 1987 Session Laws.

The appeal was heard initially in this Court on 12 May 1987. Under the Court's supervisory powers over the trial divisions we remanded the matter to the trial court for further proceedings by order dated 28 July 1987. The further proceedings were certified to the Court on 11 October 1988.

I.

On Tuesday, 8 April 1986, the day before defendant's trial began, Gregory and Anthony Rhone, two of the witnesses who testified against defendant, appeared before the trial judge, who

directed them to comply with the subpoenas issued them by the State and to be present in court at 9:30 the next morning "subject to the contempt powers of the court." The trial judge explained these powers by saying, "That means you go to jail." This admonition was apparently prompted by Gregory and Anthony Rhone's having indicated their intention not to appear pursuant to the subpoenas because, in their opinion, the subpoenas were not effective after Tuesday, 8 April 1986, the date upon which they were returnable.

At trial the State's evidence tended to show that on 1 July 1985 defendant conspired with others to rob Joseph Panzullo. Assisted by others, defendant entered Panzullo's house on that day and with the use of a pistol and a knife rendered Panzullo helpless and robbed him of various items of personal property.

Defendant presented no evidence.

The principal witnesses against defendant were the victim, Joseph Panzullo; James and Anthony Rhone, who were brothers, cousins of defendant, and defendant's accomplices; Owen Harris, who was present with Panzullo at the time of the robbery; and Gregory Rhone, brother to James and Anthony.

Harris testified that he had overheard James Rhone and others conspiring to rob Panzullo. He did not then recognize the others, but according to other testimony, they included Anthony Rhone. Harris went to Panzullo's house to warn him. Both Harris's and Panzullo's testimony tended to establish that James Rhone first entered Panzullo's house, followed by defendant. Defendant threatened Panzullo with a pistol and forced Panzullo and Harris to lie on the floor. Anthony Rhone then entered. Defendant handed James Rhone the pistol, took a knife and threatened to cut Panzullo's head off if Panzullo did not give him money. When Panzullo's assailants were not able to find money they began to remove from the house various items of Panzullo's personal property including a television set, a stereo receiver and cassette player, two other radios and a knife.

The testimony of James, Anthony and Gregory Rhone, all witnesses for the State, tended in most material respects to corroborate that of Panzullo and Harris. James and Anthony admitted they had earlier pleaded guilty to common law robbery of Panzullo, received ten-year suspended sentences and were placed on inten-

sive probation. Their pleas, however, were not entered with any understanding that they would testify against defendant. Gregory Rhone, having left the company of his brothers and defendant some time before Panzullo's robbery occurred, had not been charged with any offense arising out of these events. According to some of the Rhone brothers' testimony, James, Anthony and defendant planned to take drugs from Panzullo. When Panzullo told them he had no drugs, they decided to take his personal property instead.

On cross-examination each of the Rhone brothers admitted that on 4 April 1986, the Friday before defendant's trial was to begin on Monday, he told defense counsel's investigator that defendant had nothing to do with the robbery of Panzullo. Each also admitted that he had signed a statement, which was read to the jury, to the same effect. These witnesses also testified regarding certain pretrial conversations and encounters with Mr. Ammons, the assistant district attorney who was prosecuting defendant; the defendant; and defendant's representatives.

During James Rhone's direct testimony he said that in the last couple of days defendant telephoned him and "told me to be strong and that blood is thicker than water." James said he had also talked to defendant's girlfriend and to other members of defendant's family but that no one had put any pressure on him not to testify.

On cross-examination James Rhone said Mr. Ammons had told him that he might be prosecuted for perjury if he testified untruthfully and that he knew his probation might be revoked if he were convicted of perjury.

On redirect examination James testified that when Mr. Ammons asked him before trial what his testimony was going to be, he told Mr. Ammons it would be essentially as he had testified in court. At the time he entered his guilty plea he told Mr. Ammons that defendant had been involved in the robbery and that he would be willing to so testify. He signed the contrary pretrial statement for defendant's attorney because he did not want to testify against his cousin.

At the conclusion of James's testimony Judge Johnson, out of the jury's presence, asked the members of the Rhone family who were in the courtroom to stand and identify themselves and their relationship to the parties in the case. This colloquy estab-

lished that defendant and the Rhone brothers were second cousins, their grandfathers being brothers. The following colloquy then occurred, also outside the jury's presence:

> COURT: All right. Now, this court understands the relationship between the parties and the desire to see certain effects come about on behalf of Willie Bernard Melvin.
>
> MR. WILLIE RHONE [father of Anthony, James and Gregory Rhone]: Yes.
>
> COURT: And I understand the family relationship. However, the reason I brought all of you forward and have asked for your names and addresses and ages to be placed in the record, because I am putting each of you on notice now that should you harass James Rhone in any manner, shape or form as a result of his testimony given in court today on behalf of the State, that I'll cause an investigation to be made by the district attorney's staff to determine whether any one or all of you together have violated any of the criminal statutes dealing with harassment of, communication with or intimidating or interfering with witnesses in the trial of these matters. Now, do each of you understand that?
>
> MR. WILLIE RHONE: Yes.
>
> COURT: Then I take it that each of you can abide by this court's instructions that you're not to intimidate, harass or any way communicate threats to James Rhone as a result of his testimony here today, is that correct?

Each family member present answered affirmatively.

Anthony Rhone testified that his signed pretrial statement favorable to defendant was not true. He signed it to try to help his cousin because their families were close. "Over the last couple days" he told Mr. Ammons and his investigator, Mr. Livingston, that because he did not want to be responsible for sending defendant to prison, he would testify that defendant was not involved in the Panzullo robbery. Anthony expressed particular concern for defendant's seven- or eight-year-old daughter and defendant's girlfriend. Mr. Ammons and Mr. Livingston explained to him the crime of perjury and its penalty.

On cross-examination Anthony Rhone said he had told the defendant's investigator, Mr. Byrd, that in accordance with the

written statement he had signed for Mr. Byrd, he would testify that defendant had nothing to do with the crime. He also said this written statement was not the truth.

Anthony said he had considered taking out a warrant against Mr. Ammons because they had "exchanged a few words" about the case. Mr. Ammons had shouted at him, using profanity, and had pushed him in the hallway of the courthouse. Mr. Ammons' actions upset him and made him angry but did not frighten him. His testimony was not affected by the altercation with Mr. Ammons.

After Anthony Rhone's testimony defendant moved for a mistrial on the ground of prosecutorial misconduct which tended to intimidate the witness. The motion was denied.

Gregory Rhone testified that he overheard his brothers and defendant make plans to rob Panzullo. He wanted no part of the plans and they let him out of the car before the robbery occurred. Gregory said that he had been served with a subpoena by Mr. Livingston and Mr. Ammons. He told them he did not want to testify and that if he was forced to testify he was going to say that defendant had nothing to do with the robbery. At that point Mr. Ammons explained to him the oath, the crime of perjury, and the penalty for perjury. He admitted having been "generally uncooperative" with the prosecutor and engaging in "some shouting matches" with the prosecutor in the prosecutor's office. He admitted having signed a document in which he asserted that defendant had nothing to do with the case.

On cross-examination Gregory admitted that the document he had signed exonerating defendant was not the truth and that he did not want to testify against defendant because "I didn't want to see my cousin get in no trouble." He said Mr. Ammons had told him that if he committed perjury he would be in violation of his probation (apparently imposed after an unrelated conviction) and would go to jail. The following colloquy then occurred:

> Q. Well, did he tell you after he went over the statement with you that if you testified to something different that he'd prosecute you for perjury?
>
> A. Yes, sir.
>
> Q. Told you he'd get you ten years for perjury?
>
> A. Yes, sir. True.

On redirect examination by Mr. Ammons, the following colloquy occurred:

> Q. Mr. Rhone, when I explained what perjury was, I said I'd do—if you perjured yourself, I'd do everything in my power to see that you were charged with it?
>
> A. True.
>
> Q. And I also told you if you were charged with it and convicted, you could get up to ten years?
>
> A. Right.

At the conclusion of the testimony of Anthony Rhone, defendant moved for a mistrial on the ground that, according to Anthony's testimony, "there was inappropriate out-of-court conduct on the part of the prosecutor, at least in an attempt to intimidate the witness." Defendant also requested the court to instruct the jury to disregard the testimony of Anthony "because of the credibility problems and the severe questions of prosecutorial misconduct." The trial court denied the motion for mistrial upon the grounds stated but said, "At the close of all the evidence, Mr. Carter, I'll be glad to receive any instructions in respect to that question if you desire to make them at that time." At the close of all the evidence defendant moved to dismiss all charges on the ground that "the conduct of the prosecutor, as testified to by the witness Anthony Rhone . . . constitutes an interference with the defendant's right to due process under the Fourteenth Amendment of the Constitution of the United States." The trial court denied the motion.

On defendant's appeal he assigned error to the denial of his motion for mistrial and his motion to dismiss. Because the confrontations between the prosecutor and the Rhone brothers were not a part of the trial and no facts regarding them had been found by the trial court and made a part of the record on appeal, the Court, in the exercise of its supervisory powers over the trial divisions, remanded the matter to the Superior Court, Cumberland County, with instructions to "conduct a hearing in the nature of hearing on a Motion for Appropriate Relief [and] . . . to make findings of fact and conclusions of law regarding the prosecutor's conduct and . . . [to] have the Clerk of Superior Court certify

these findings and conclusions to this Court with reasonable dispatch."[1]

On remand, the trial court, Judge Ellis presiding, heard evidence from Mr. Ammons, James Rhone, Anthony Rhone and others. Judge Ellis found facts as follows:

The Rhone brothers had made out-of-court statements implicating defendant in the robbery. After entry of his guilty plea and without regard to it being part of a plea agreement, James Rhone initially agreed to testify on behalf of the State against defendant Willie Melvin. Likewise, Gregory Rhone initially agreed to testify against defendant. These findings are supported by the evidence. The court also found that Anthony Rhone initially agreed to testify against defendant. The evidence regarding this fact is unclear. However, there is evidence that from the first time Mr. Ammons discussed with Anthony the possibility that he would testify against defendant, Anthony stated that defendant was guilty of the crime charged.

Other findings, all of which are supported by the evidence, are:

The State issued subpoenas for all three Rhone brothers. Defendant did not issue subpoenas for them, and did not intend to call them as witnesses. During the pretrial period, defendant telephoned the Rhone brothers several times and urged James to be strong, telling him, "blood is thicker than water." Family pressures made Anthony reluctant to testify against his cousin. All three began to dodge subpoenas and stated that they would testify differently than they first intended because they did not want to be responsible for defendant's conviction.

Mr. Ammons thought these subpoenas had already been issued when he confronted Anthony and Gregory about their reluctance to testify on Friday, 4 April 1986. He asked why the brothers had changed their minds and warned them about the penalties for perjury. The brothers and Mr. Ammons became engaged in a heated dispute about whether they would testify, and the brothers used profanity with Mr. Ammons. Later, Anthony Rhone more calmly told Mr. Ammons that he did not want to testify against defendant because Melvin was the father of Anthony's niece and

---

1. The Court cited in support of its order *State v. Richardson*, 313 N.C. 505, 329 S.E.2d 404 (1985), and *State v. Sanders*, 319 N.C. 399, 354 S.E.2d 724 (1987).

it would not be fair for defendant to go to jail for the rest of his life, nor was it fair for Anthony to be responsible for such consequences. Anthony also told Mr. Ammons of the family pressure.

All three Rhone brothers then met by the courthouse with Billy Byrd, defense counsel's investigator. Byrd asked if they would sign statements for him about the case. James was not in favor of signing and he told Byrd that defendant was guilty and should not get off scot free. Byrd then told the brothers to step aside and get their stories straight.

Under his brothers' influence, James decided that he did not need to testify against a family member. Each brother then signed separate statements that exculpated defendant, and gave them to Byrd. Defense counsel obtained the statements but did not intend to call the Rhone brothers as witnesses for defendant. Instead he intended to use the statements to impeach the brothers if they testified for the State.

On the night of 4 April, the brothers discussed the matter with their parents who told them to be truthful at trial. James decided to testify for the State, and he told Gregory and Anthony that he did not want them to perjure themselves and get additional punishment.

On Monday, 7 April 1986, Anthony and Gregory came to the courthouse. They had a discussion with Judge Lynn Johnson who told them to go with Mr. Ammons to receive their subpoenas. They left the courtroom with Mr. Ammons, but Anthony and Gregory refused to get on an elevator with Mr. Ammons and several police officers. Anthony started to walk away. Mr. Ammons grabbed him by the arm, used profanity and threatened the brothers with jail if they changed their story. The confrontation continued into the stairwell, with Mr. Ammons and Anthony using curse words in their exchange. Several people witnessed this altercation. Mr. Ammons and the officers subsequently accompanied the brothers to Mr. Ammons' office, and had subpoenas served on Anthony and Gregory. After leaving, the brothers discussed what the nature of their testimony would be.

Based on the foregoing factual determinations and Gregory Rhone's trial testimony,[2] Judge Ellis made these legal conclusions:

---

2. Gregory Rhone did not testify at the post-trial proceedings before Judge Ellis.

defendant had not been deprived of his constitutional right to have his witnesses testify in his behalf; defendant was not entitled to try to discourage the State's witnesses from testifying against him; the prosecutor's strong words spoken under provocation, though unnecessary and unprofessional, did not violate defendant's constitutional right to have his witnesses present because the Rhone brothers were witnesses for the State; and none of defendant's constitutional or statutory rights "were violated by prosecutorial misconduct."

II.

Defendant contends that his right to present witnesses under the sixth amendment of the United States Constitution as applied to the states through the fourteenth amendment due process clause was violated by the prosecutor's threats to have the Rhone brothers charged with perjury; by the trial court's threats to hold them in contempt if they did not obey their subpoenas; and by the trial court's admonition to the Rhone family members not to harass or intimidate James because of his testimony. We disagree.

[1] A defendant's sixth amendment right to present his own witnesses to establish a defense is a fundamental element of due process of law, and is therefore applicable to the states through the due process clause of the fourteenth amendment. *Washington v. Texas*, 388 U.S. 14, 18 L. Ed. 2d 1019 (1967). In *Webb v. Texas*, 409 U.S. 95, 34 L. Ed. 2d 330 (1972), the Court determined that this right had been violated when the trial court singled out the sole witness whom the defendant called, and engaged in a "lengthy admonition on the dangers of perjury," *id.* at 97, 34 L. Ed. 2d at 333, replete with threats of additional prison time and lost parole chances if the witness lied. Because the judge's extensive lecture "could well have exerted such duress on the witness' mind as to preclude him from making a free and voluntary choice whether or not to testify," *id.* at 98, 34 L. Ed. 2d at 333, the Court concluded that his "threatening remarks, directed alone at the single witness for the defense, effectively drove that witness off the stand and thus deprived the petitioner of due process of law under the Fourteenth Amendment." *Id.*

We addressed at length the problem of a trial judge's admonitions to a witness in the context of defendant's cross-examination of a witness for the prosecution in *State v. Rhodes*, 290 N.C. 16, 224 S.E.2d 631 (1976). While recognizing in *Rhodes* that, in the

absence of the jury, a trial judge has some discretionary latitude in cautioning a witness to testify truthfully and in pointing out the possibility of a perjury prosecution, *id.* at 23, 224 S.E.2d at 635-36, we emphasized the potential harm in this practice:

> [T]he judge's righteous indignation engendered by his "finding of fact" that the witness has testified untruthfully may cause the judge, expressly or impliedly, to threaten the witness with prosecution for perjury, thereby causing him to change his testimony to fit the judge's interpretation of the facts or to refuse to testify at all. Either choice could be an infringement on the defendant's Sixth Amendment rights to confront a witness for the prosecution for the purpose of cross-examination or to present his own witnesses to establish a defense.

Id. at 24, 224 S.E.2d at 636. Furthermore, a judge's admonition to the witness regarding perjury may discourage defense counsel from eliciting essential testimony from the witness, "particularly . . . when the judge anticipates a line of defense and indicates his opinion that the testimony necessary to establish it can only be supplied by perjury; *a fortiori*, if the judge's warnings and admonitions to the witness are extended to the attorney, coercion can occur." *Id.* at 26, 224 S.E.2d at 637. Applying these principles in *Rhodes*, we determined that even in the absence of the jury, the trial judge's lengthy and critical expressions of opinion about the witness's credibility violated the defendant's due process rights because "the judge improperly projected himself into this case in a manner calculated to alter counsel's trial strategy." *Id.* at 31, 224 S.E.2d at 640.

Relying on *Webb* and *Rhodes*, this Court in *State v. Locklear*, 309 N.C. 428, 306 S.E.2d 774 (1983), reversed the defendant's conviction because the trial judge's repeated admonitions out of the jury's presence to a hesitant, equivocal prosecution witness that she testify truthfully coupled with threats of contempt and perjury proceedings "probably caused the witness to change her testimony." *Id.* at 437, 306 S.E.2d at 779. The defendant was charged with discharging a firearm into a dwelling house. The prosecution witness whose home was fired upon was defendant's former girlfriend. Critical to our reasoning in *Locklear* was that after the last of many warnings by the trial judge, "the witness testified that it was defendant's car outside her house and that defendant was the person she saw outside her house at the time she heard the objects strike her

home. It can be fairly inferred that this testimony resulted from the admonitions of the judge to [the witness]." *Id.* at 437, 306 S.E.2d at 779.

[2] Notwithstanding the results reached in the foregoing precedents, which rest largely upon the facts then before the Court, the cases recognize that a judicial warning to a witness about contempt sanctions or perjury prosecutions is not a *per se* due process violation. As we said in *Rhodes*, "a trial judge may, if the necessity exists because of some statement or action of the witness, excuse the jurors and, *in a judicious manner*, caution the witness to testify truthfully, pointing out to him generally the consequences of perjury." *Rhodes*, 290 N.C. at 23, 224 S.E.2d at 636 (emphasis in the original) (citations omitted). Federal courts have also recognized that judicial perjury warnings do not automatically invoke *Webb*-type due process concerns. In *United States v. Harlin*, 539 F.2d 679 (9th Cir. 1976), the trial court in the absence of the jury said to counsel for appellant's co-defendant: " 'I assume you have advised [your client] of the penalties of perjury . . . and that if it appears that a defendant is lying, the Court can take that into account, too.' " *Id.* at 680. The next day, appellant's counsel told the trial court that the appellant would not testify because of the court's prior admonition to the co-defendant's counsel. *Id.* at 681. The appellant argued on appeal that the trial court's statements to co-defendant's counsel intimidated appellant to the point that he wouldn't testify, thereby denying him due process. *Id.* Determining that the appellant's due process rights were not violated, the Ninth Circuit assumed that *Webb* applied to warnings directed at a co-defendant's counsel and concluded that a mere warning of the consequences of perjury does not constitute a violation of due process. Rather, for a due process violation to lie, the admonition must be threatening and coercive, indicating that the court expects perjury. *Id.*

The *Webb* limitations on judicial behavior have also been applied to prosecutorial conduct. *United States v. Morrison*, 535 F.2d 223 (3d Cir. 1976) (prosecutor's repeated warnings to a prospective defense witness about the possibility of a federal perjury charge infringed on the defendant's constitutional right to have the witness testify in his behalf); *United States v. MacCloskey*, 682 F.2d 468 (4th Cir. 1982) (United States Attorney's statement to a prospective witness's attorney that the witness would be "well advised to

remember the Fifth Amendment" destroyed her choice to testify freely).

As with judicial admonitions, the constitutionality of a prosecutor's conduct is determined by the attendant circumstances, and not all prosecutorial threats of perjury proceedings constitute due process violations. In *United States v. Teague*, 737 F.2d 378 (4th Cir. 1984), the United States Attorney phoned a witness's attorney and advised him that if the witness perjured himself, the pretrial diversion agreement would be revoked. Though the court appeared to have misgivings about the prosecutor's conduct, that the witness testified favorably to the defendant and was never directly threatened by any government agent led the court to conclude that the prosecutor's efforts to prevent perjury did not prejudice the defendant so as to require a new trial under *Webb*.

Whether judicial or prosecutorial admonitions to defense or prosecution witnesses violate a defendant's right to due process rests ultimately on the facts in each case. Such admonitions should be administered, if at all, judiciously and cautiously. This is particularly true with regard to prosecutorial conduct because, as here, it generally occurs outside the context of the trial itself, is not a part of the official court proceedings, and is not subject to judicial supervision and control. Witnesses should not be discouraged from testifying freely nor intimidated into altering their testimony. Neither should defense counsel be intimidated or discouraged from eliciting essential and relevant testimony on either direct or cross-examination. *Webb*, 409 U.S. at 98, 34 L. Ed. 2d at 333; *Rhodes*, 290 N.C. at 23-26, 224 S.E.2d at 636. On the other hand, to avoid injustice resulting from perjury, judges may out of the jury's presence judiciously warn a witness against it. *Rhodes*, 290 N.C. at 23, 224 S.E.2d at 636. So may prosecutors when they learn that a potential state's witness is considering changing testimony because of pressure from third parties. *Cf. Teague*, 737 F.2d 378.

[3] In all these kinds of cases the reviewing court should examine the circumstances under which a perjury or other similar admonition was made to a witness, the tenor of the warning given, and its likely effect on the witness's intended testimony. If the admonition likely precluded a witness "from making a free and voluntary choice whether or not to testify," *Webb*, 409 U.S. at 98, 34 L. Ed. 2d at 333, or changed the witness's testimony to coincide with the judge's or prosecutor's view of the facts, *Rhodes*, 290 N.C. at

24, 224 S.E.2d at 636; *Locklear*, 309 N.C. 428, 306 S.E.2d 774, then a defendant's right to due process may have been violated. On the other hand, a warning to a witness made judiciously under circumstances that reasonably indicate a need for it and which has the effect of merely preventing testimony that otherwise would likely have been perjured does not violate a defendant's right to due process. Defendants have no due process or other constitutional right to present perjured testimony. *Nix v. Whiteside*, 475 U.S. 157, 89 L. Ed. 2d 123 (1986). The knowing presentation of such testimony by the State is itself a violation of defendant's right to due process. *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963); *Mooney v. Hollohan*, 294 U.S. 103, 79 L. Ed. 791 (1935).

III.

Applying the foregoing principles to the facts here, we conclude that defendant's right to due process was not violated by the trial judge's in-court admonitions to witnesses Gregory and Anthony Rhone and to the family of the witness James Rhone or by the prosecutor's out-of-court admonitions to the Rhone brothers concerning their intended testimony.

[4] We see nothing whatsoever improper in the trial judge's admonitions complained of on this appeal. When Anthony and Gregory appeared before him before trial, they were admonished simply to respond as the law required to the subpoenas issued to them or else be subject to the court's contempt powers. The admonition was fully justified in light of these witnesses' apparent belief, of which the judge was advised, that they need not comply with the subpoenas on any day after the date upon which the subpoenas were returnable.

[5] The judge's warnings to the Rhone family members following James Rhone's testimony were also justified. The trial judge had been advised of a pattern of familial calls to the Rhone brothers, urging them not to testify against defendant solely because of the family relationship between them and him. It was, therefore, proper for the judge to warn the family members against harassing, intimidating or interfering with James Rhone inasmuch as his testimony was given contrary to their urgings and this kind of conduct on their part would be in violation of law. See N.C.G.S. § 14-226.

Trial judges have broad discretionary authority to do what is reasonably necessary to regulate trials conducted before them

so that proper procedures are followed, the law is not violated, witnesses where necessary are protected, and, in short, "an even keel" is maintained.

> "The presiding judge is given large discretionary power as to the conduct of the trial. Generally, in the absence of controlling statutory provisions or established rules, all matters relating to the orderly conduct of the trial or which involve the proper administration of justice in the court, are within his discretion."

Rhodes, 290 N.C. at 23, 224 S.E.2d at 636. We think the trial judge's admonitions in this case were well within his discretionary authority to control the trial.

Not only were both judicial admonitions appropriate under the circumstances, there is not the slightest indication in the record that either or both of them intimidated any witness for the prosecution into altering testimony or into testifying more favorably for the State than they otherwise would have.

[6] We do not condone Mr. Ammons' out-of-court conduct toward the Rhone brothers, particularly his use of profanity and some physical force, however slight it might have been. We agree with the hearing judge below that such conduct was "unnecessary and unprofessional."

We conclude, nonetheless, that defendant's right to due process was not thereby violated. First, unlike many of the cases we have reviewed, Mr. Ammons' conduct was not directed at persons who originally intended to testify on behalf of the accused. Gregory and James Rhone initially agreed to testify for the prosecution. Anthony Rhone, from his earliest contact with Mr. Ammons, maintained that defendant was guilty of the crimes charged. It was not until others appealed to the Rhone brothers' family loyalty with statements such as "blood is thicker than water" that they made statements tending to exculpate defendant and considered testifying for him. Defendant, however, even after these exculpatory statements were made, never intended to call them as his witnesses. Rather he intended merely to use these statements, as he did use them, to cross-examine the witnesses when they testified for the State. We are not presented with a case where prosecutorial conduct likely precluded a witness, otherwise prepared to testify for a defendant, from doing so.

Neither did the prosecutor's conduct result in any of the witnesses testifying more favorably for the State than they otherwise would have. After telling the jury about Mr. Ammons' conduct toward them on cross-examination, the Rhone brothers all consistently maintained their testimony implicating defendant in the crimes charged was true. At the post-trial hearing they reaffirmed this position. Their testimony was consistent with information they had given to Mr. Ammons at early stages of the State's preparation of the case against defendant.

In summary, when we consider the witnesses' original statements to Mr. Ammons implicating defendant, the initial agreements to testify against him, defendant's intention not to call the Rhone brothers as witnesses, family pressures leading the brothers temporarily to change their stories for defendant's benefit, and the parents' advice to the brothers, we conclude, as did the court below, that the prosecutor's conduct toward these witnesses, while inappropriate and unprofessional, did not result in the denial of defendant's right to due process under the sixth and fourteenth amendments. In defendant's trial, therefore, we find

No error.

STATE OF NORTH CAROLINA *EX REL.* UTILITIES COMMISSION v. NANTAHALA POWER AND LIGHT COMPANY

No. 93PA89

(Filed 7 February 1990)

1. Electricity § 3 (NCI3d); Utilities Commission § 22 (NCI3d)—tax savings—decrease in rates—rulemaking procedure

The Utilities Commission acted within its authority when it ordered affected utilities through a rulemaking rather than a ratemaking procedure to decrease their rates to reflect savings resulting from reduced corporate tax rates in the Tax Reform Act of 1986 since (1) the tax reduction affected all utilities uniformly; (2) a large number of utilities were affected, making individual hearings for all inappropriate; and (3) no

adjudicative facts were in dispute so as to require a trial-type hearing for each individual utility.

Am Jur 2d, Public Utilities §§ 177, 232, 240.

2. **Utilities Commission § 43 (NCI3d)— rates—tax savings—different treatment of electric and telephone utilities—equal protection**

A Utilities Commission rulemaking order requiring affected utilities, including Nantahala, to pass on to ratepayers the benefits of savings generated by the Tax Reform Act of 1986 did not violate Nantahala's equal protection rights because the local telephone operating companies were not required to pass on all of the tax savings to their ratepayers where the reasons given by the Commission for treating the local telephone operating companies differently from other utilities bears a rational relationship to a legitimate public interest.

Am Jur 2d, Public Utilities §§ 177, 232, 240.

3. **Utilities Commission § 24 (NCI3d)— tax savings—refund to ratepayers—no retroactive ratemaking**

Where a provisional order of the Utilities Commission required utilities to place in a deferred account beginning on a future date the excess tax revenues collected over what the utilities would have to pay in taxes as a result of savings generated by the Tax Reform Act of 1986, the Commission's final order requiring that the funds in the deferred account be refunded to the ratepayers did not constitute retroactive ratemaking.

Am Jur 2d, Public Utilities §§ 177, 232, 240.

ON appeal and discretionary review pursuant to N.C.G.S. § 7A-31 of the decision of the Court of Appeals, 92 N.C. App. 545, 375 S.E.2d 515 (1989), reversing orders of the Utilities Commission (Commission). Heard in the Supreme Court 14 November 1989.

Lacy H. Thornburg, Attorney General, by Karen E. Long, Assistant Attorney General, for the Attorney General, appellant.

North Carolina Utilities Commission Executive Director Robert P. Gruber, by Chief Counsel, Antoinette R. Wike, and Staff Attorney, A. W. Turner, Jr., for Public Staff—North Carolina Utilities Commission, appellant.

Hunton & Williams, by Edward S. Finley, Jr., for Nantahala Power and Light Company, appellee.

FRYE, Justice.

[1] The issue in this case is whether the Utilities Commission may pass on to the ratepayers the benefits of the Tax Reform Act of 1986 (TRA-86) through a rulemaking procedure rather than a ratemaking procedure. The Court of Appeals held "there is no authority either in our statutes or in the case law that allows rates to be adjusted by a rulemaking process." *Utilities Commission v. Nantahala Power and Light Company*, 92 N.C. App. 545, 553, 375 S.E.2d 515, 520 (1989). The Court of Appeals reversed the orders of the Utilities Commission as applied to Nantahala Power and Light Company (Nantahala). We now reverse the Court of Appeals and hold that the Commission properly ordered the affected utilities, through a rulemaking procedure, to lower their rates to reflect the savings generated by the TRA-86.

One effect of the TRA-86, which was signed by the President on 22 October 1986, was to lower corporate tax rates from 46% to 34% effective 1 July 1987. On 23 October 1986, the Commission issued Docket No. M-100, Sub 113, which was entitled Order Initiating Investigation. While the docket numbering designation given this order was that of a rulemaking action, the order itself did not specifically say that the Commission was instituting a rulemaking action. The order was provisional in nature, generally requiring the affected utilities to determine the savings generated by the TRA-86 and place this amount in a deferred account pending further orders of the Commission. In this order, the Commission noted:

> This reduced tax rate when effectuated will have an immediate and favorable impact on the cost of providing the aforementioned public utility services to consumers in North Carolina. It is incumbent upon this Commission to take the appropriate action as required so as to preserve and flow through to ratepayers, as a reduction to public utility rates, any and all cost savings realized in this regard which would otherwise accrue solely to the benefit of the companies' stockholders.

The Commission further explained that it "opens this docket to examine and quantify the benefits to be derived by each utility . . . arising from this tax reform," in part because of the applicability

of the TRA-86 to all the utilities and the short period of time remaining until it became effective.

The Commission then ordered:

1. That effective January 1, 1987, the federal income tax and the related gross receipts tax components of the rates and charges of all electric, telecommunications, and natural gas distribution companies and all water and sewer companies with annual operating revenues in excess of $250,000 subject to the jurisdiction of this Commission shall be, and hereby are, ordered to be billed and collected on a provisional rate basis pending final disposition of this matter.

2. That effective January 1, 1987, each and every utility subject to the provisions of this Order shall place in a deferred account the difference between revenues billed under rates then in effect, including provisional components thereof, and revenues that would have been billed had the Commission in determining the attendant cost of service based the federal income tax component thereof on the Internal Revenue Code as now amended by the Tax Reform Act of 1986, assuming all other parameters entering into the cost of service equation are held constant.

3. That each and every utility subject to the provisions of this Order shall determine the dollar amount of the impact of the Tax Reform Act of 1986 on its annual level of income tax expense included in its North Carolina jurisdictional cost of service consistent with ordering paragraph No. 2 above and file same with the Chief Clerk of the Commission no later than November 30, 1986. Said filing shall include all workpapers and a statement of all assumptions made in complying with the foregoing requirements. Further, each affected utility in conjunction with the foregoing shall file proposed rate adjustments giving effect to the reduction in its cost of service arising from the Tax Reform Act of 1986. The Commission will consider any additional information or comments any party may wish to offer.

On 10 November 1986, the Public Staff filed a motion recommending that each utility subject to the 23 October 1986 Order determine the dollar amount of impact which the TRA-86 had on it based on the test year for that utility as set in the utility's

last general rate case. The Commission adopted the Public Staff's motion in an Order Ruling On Motion issued 4 December 1986.

Nantahala filed a compliance with the Commission's order on 15 January 1987. In that filing, Nantahala stated that it "strenuously objects to a requirement that it flow through as an (sic) reduction in its rates any decrease in federal income tax expense arising from the Tax Reform Act of 1986." Nantahala based this objection on the fact that it was currently receiving only about an 8% rate of return while, in Nantahala's last general rate case, the Commission authorized it to collect a 12.52% rate of return. Nantahala contended that the rates should only be adjusted when all components of the cost of service were examined rather than be adjusted based on the decrease of an isolated component of cost of service such as this tax decrease. Nantahala urged the Commission not to flow through the savings from this tax decrease unless it examined whether this decrease was offset by other items in the cost of service and whether the overall cost of service had actually decreased.

The Commission filed a final order on 20 October 1987, and this order was amended by an Order Modifying Order of October 20, 1987. The final effect of these two orders was that Nantahala and the other affected utilities had to calculate "[t]he rate reductions related to the tax savings from TRA-86" and "file only one set of tariffs in this docket decreasing rates effective January 1, 1988, to reflect the 34% federal corporate income tax rate." Two Commissioners dissented from the order of 20 October 1987. Commissioner Tate stated that our statutes only allow rates to be set in general rate cases or in complaint cases. She explained that this procedure was neither a rate case nor a complaint case, and yet it decreased rates. Commissioner Cook concurred in the part of the order which affected Nantahala and dissented from the portion of the Order which flowed through less than 100% of the tax savings to the telephone subscribers.

Some utilities were not affected by this final order because they had either voluntarily complied with the order or were currently involved in rate cases. The telephone companies as a group were allowed to offset part of their savings with revenue reductions previously ordered by the Commission, and, therefore, they were not affected by this final order. Water and sewer companies were likewise, as a group, treated differently from the rest of the utilities

in this order. Of all the utilities affected by the final order, only Nantahala appealed the Commission's action to the Court of Appeals.

The Court of Appeals reversed the orders of the Utilities Commission as applied to Nantahala. The Public Staff and the Attorney General both filed petitions with this Court for discretionary review of the opinion of the Court of Appeals, and these petitions were allowed on 5 April 1989. We now determine whether there is error in the decision of the Court of Appeals.

The Court of Appeals concluded that the Commission should have handled this matter in accordance with N.C.G.S. § 62-133, § 62-136, or § 62-137 which are the statutes setting out the procedures used in general rate cases or complaint proceedings. *Utilities Commission v. Nantahala Power and Light Company*, 92 N.C. App. at 551, 375 S.E.2d at 520. The court noted that the Public Staff and Attorney General contended that the adjustment of the rates in this case can be carried out by rulemaking as authorized by N.C.G.S. § 62-31. *Id.* The court then distinguished this Court's holding in *Utilities Commission v. Edmisten, Attorney General*, 294 N.C. 598, 242 S.E.2d 862 (1978) (*Edmisten III*), which the Public Staff and Attorney General used to support the Commission's actions. *Utilities Commission v. Nantahala Power and Light Company*, 92 N.C. App. at 551-53, 375 S.E.2d at 518-19. We conclude that the Court of Appeals interpreted the utility statutes and *Edmisten III* too narrowly and that *Edmisten III* does provide authority for changing rates in rulemaking proceedings in special circumstances such as in this case.

Chapter 62 of our General Statutes is entitled "Public Utilities" and sets out the organization and the operating procedures of the Utilities Commission. N.C.G.S. § 62-23 is entitled "Commission as an administrative board or agency." This statute provides in part:

> This Commission is hereby declared to be an administrative board or agency of the General Assembly created for the principal purpose of carrying out the administration and enforcement of this Chapter, and for the *promulgation of rules and regulations* and fixing utility rates pursuant to such administration . . . . The Commission shall separate its administrative or executive functions, its rule making functions, and its functions judicial in nature to such extent as it deems practical and advisable in the public interest.

N.C.G.S. § 62-23 (1989) (emphasis added). The general powers of the Utilities Commission are set out in N.C.G.S. § 62-30: "The Commission shall have and exercise such general power and authority to supervise and control the public utilities of the State as may be necessary to carry out the laws providing for their regulation and all such other powers and duties as may be necessary or incident to the proper discharge of its duties." N.C.G.S. § 62-30 (1989).

N.C.G.S. § 62-31 is even more explicit in granting rulemaking authority to the Commission. This statute provides: "The Commission shall have and exercise full power and authority to administer and enforce the provisions of this Chapter, and to *make and enforce reasonable and necessary rules and regulations to that end.*" N.C.G.S. § 62-31 (1989) (emphasis added). These statutes clearly authorize the Utilities Commission to promulgate rules for the utilities which it regulates. N.C.G.S. § 62-2 further defines the policy which the Commission is to carry out through the exercise of this power. In a list of eight policies of the Utilities Commission found in that statute, number one is "[t]o provide fair regulation of public utilities in the interest of the public." N.C.G.S. § 62-2(1) (1989).

While the Court of Appeals did not question the Commission's general rulemaking authority, the court concluded that, as it interpreted our statutes, rates could not be changed through a rulemaking procedure. We find the authority for the Commission to use its rulemaking power in this case in the statutes cited above and in this Court's approval of the rulemaking procedure used in *Edmisten III*. In *Edmisten III*, this Court upheld the Commission's order promulgating a rule which allowed natural gas companies to participate in exploration and drilling programs to find new sources of natural gas. The companies would then make application for rate adjustments to allow recovery of the costs of these programs. *Edmisten III*, 294 N.C. at 601, 242 S.E.2d at 865. This Court held that the Commission did not err in failing to declare this proceeding to be a general rate case and in failing to allow rate hearings. *Id.* at 608, 242 S.E.2d at 868-69.

The Court of Appeals distinguished *Edmisten III* in three ways. *Utilities Commission v. Nantahala Power and Light Company*, 92 N.C. App. at 553, 375 S.E.2d at 519. These distinctions, however, are not sufficient to distinguish the present case from *Edmisten III* and to support a holding that rates cannot be changed in rulemaking procedures under the proper circumstances.

The first distinction which the Court of Appeals made was that the original intent of the Commission in its rulemaking procedure in *Edmisten III* was not to raise the rates, but to study "the feasibility of increasing the supplies of natural gas to North Carolina." *Id.* (quoting *Edmisten III*, 294 N.C. at 600, 242 S.E.2d at 864). The court found that this was a distinction between *Edmisten III* and the present case because the stated purpose of the Commission in the present case was to lower rates. *Utilities Commission v. Nantahala Power and Light Company*, 92 N.C. App. at 553, 375 S.E.2d at 519. We do not find this to be a legitimate distinction. While the purpose of the Commission in *Edmisten III* was to increase the supply of natural gas to North Carolina, the ultimate effect was to raise the rates paid by the ratepayers to the extent necessary to pay for the added cost of exploration for natural gas. The purpose of the proceeding in the present case was not to set rates but to take the effect of the reduction in tax rates and flow it through to the ratepayers. Likewise, the proceeding in *Edmisten III* was not to set rates but to pass on to the ratepayers the actual cost of finding new supplies of natural gas which were needed in North Carolina. The difference in the stated purpose does not require a different result in these two cases.

The Court of Appeals also concluded that *Edmisten III* is different from the present case because the final outcome of the hearings in *Edmisten III* was the promulgation of a "rule." *Id.* While in the present case the Commission did not call its final order a "rule," all parties involved in the proceedings had proper notice that the Commission was engaging in a rulemaking proceeding. The procedure used by the Commission was clearly rulemaking procedure, and the docket number given to the proceedings was that of a rulemaking docket. Nantahala does not contend that it was not properly notified of the nature of the proceeding; its argument was that the wrong type of procedure was being instituted. The failure to formally call the procedure a rulemaking procedure in the body of the order and the failure to label a portion of the final order a "rule" do not change the Commission's actions from that of rulemaking, particularly in view of the fact that all the parties seemed to be well informed as to what the Commission was doing.

The Court of Appeals finally distinguished *Edmisten III* from the present case because *Edmisten III* provided for a possible increase or decrease in rates while the present case provides only

for a decrease. *Id. Edmisten III* permitted recovery of the costs of Commission-approved projects, limited "to the amount by which reasonable costs of the programs exceeded revenues received from them." 294 N.C. at 604, 242 S.E.2d at 866. In the event that revenues exceeded reasonable costs, rates would be adjusted downward by an amount sufficient to amortize the excess revenues over a specified period. *Id.* The Court of Appeals noted that in the present case the Commission promulgated no corresponding rule which would allow the utilities to raise rates if taxes were raised. Again we conclude that this distinction does not require a different result between *Edmisten III* and the present case. In *Edmisten III*, the approved exploratory activity itself could result in either revenues exceeding expenses or expenses exceeding revenues, thus requiring a rule to provide for either contingency. In the present case, the only matter before the Commission was a tax decrease. Whether Congress might at some time in the future enact a substantial increase in taxes is too speculative and tenuous to require the attention of the Commission in this proceeding. Should corporate tax rates be increased so that they uniformly and substantially increase taxes for utilities in the same manner as taxes were decreased by the TRA-86, the Commission could, on its own initiative, as it did here, or at the urging of the utilities it regulates, as in *Edmisten III*, determine in a rulemaking proceeding whether and to what extent rates should be increased to offset the increase in taxes.

The Court of Appeals cited extensively from Commissioner Tate's dissent to the Commission's order of 20 October 1987. That dissent cited *North Carolina Utilities Commission v. Edmisten* (*Edmisten II*). The dissent included the following language from that case:

> If by virtue of some change in the tax law, it develops that the company did not incur the anticipated expense for the payment of which it collected revenues in prior months, its rates for present and future service may not be cut, on that account, below what it otherwise would be entitled to charge for the present or future service.

Edmisten II, 291 N.C. 451, 469, 232 S.E.2d 184, 194-95 (1977). The quote from *Edmisten II* is inapplicable to the present case. In *Edmisten II* the Commission authorized the utility to add a surcharge to the rates of its present and future customers which

the majority of the Court concluded was to cover excess fuel costs incurred in providing service to customers in two prior months. While disagreeing with the Attorney General that this was retroactive ratemaking, the majority of the Court, nevertheless, held that the Commission had no authority to add this surcharge for past excess fuel costs. After explaining the basic theory of utility ratemaking, Justice Lake, writing for the majority, used the above-quoted language to illustrate an accepted rule. The rule is that a utility may not be denied the right to charge a *current* rate sufficient to recover its *current* cost plus a fair return on its used and useful property for the reason that, in a *previous* period, its cost of service was less because it did not incur an expected expense, i.e., taxes.

In the present case, the Commission's orders do not change current or future rates based on costs of service for previous months. Rather, the orders relate to rates for the same periods covered by the tax decrease. The Commission wisely took immediate action, filing the original order just one day after the TRA-86 was signed into law and prior to the effective date of the tax reductions. The Commission on 23 October 1986 ordered the utilities to place in a deferred account, beginning 1 January 1987, the difference between revenues billed under the old rates and revenues which would be billed after the tax reduction went into effect. The 1987 order simply disposed of those funds by requiring that they be refunded to the customers. The Commission's order here was prospective rather than retroactive. Therefore, assuming the correctness of the language in *Edmisten II* concerning revenues collected in prior months for nonincurred expenses, it does not apply here.

While we conclude that *Edmisten III*, rather than *Edmisten II*, is controlling on the authority of the Commission to alter rates in a rulemaking proceeding, our conclusion finds further support in the decisions of the United States Supreme Court and in scholarly discourses on administrative law. As stated earlier, the real issue here is whether rates can be changed in a rulemaking procedure under the statutes which govern the workings of the Commission or whether the Commission must hold full-fledged general rate hearings or more limited complaint proceedings every time a rate is altered regardless of the circumstances necessitating the change. While the Commission is not covered by our Administrative Procedure Act found in N.C.G.S. Chapter 150B ["The following are specifically exempted from the provisions of this Chapter . . . the Utilities Commission." N.C.G.S. § 150B-1 (Cum. Supp. 1989)],

the Commission is still an administrative agency of the state government, and general tenets of administrative law are applicable to its operation except where modified by statute. Several United States Supreme Court cases and numerous scholarly works have addressed the difference in rulemaking procedures, such as those in the present case, and adjudicatory procedures, such as general rate cases and complaint cases, and when an individual hearing is necessary. *E.g., United States v. Florida East Coast Railway Company*, 410 U.S. 224, 35 L. Ed. 2d 223 (1973); *Bi-Metallic Investment Company v. State Board of Equalization*, 239 U.S. 441, 60 L. Ed. 372 (1915); Bonfield, *State Administrative Rule Making* (1986); K. Davis, *Administrative Law Treatise* (2d ed. 1979); Daye, *North Carolina's New Administrative Procedure Act: An Interpretive Analysis*, 53 N.C. L. Rev. 833 (1975); and R. Pierce, S. Shapiro & P. Virkuil, *Administrative Law and Process* (1985). While the cases cited above are not binding precedent for our case, the analysis of the difference in rulemaking and adjudicatory procedures and when a hearing is necessary is directly applicable to the present case.

In *Florida East Coast*, two railroad companies brought an action to set aside rates established by the Interstate Commerce Commission in a rulemaking proceeding. *United States v. Florida East Coast Railway Company*, 410 U.S. at 225, 35 L. Ed. 2d at 227. The facts of *Florida East Coast* are very similar to those in the present case. The railroad companies argued that the rates could not be changed in a rulemaking proceeding, but rather required a full oral hearing much like our general rate case hearings. *Id.* at 234, 35 L. Ed. 2d at 223. The United States Supreme Court held that a full oral hearing was not necessary. *Id.* at 246, 35 L. Ed. 2d at 239. After reviewing several of its own decisions, the Court drew the conclusion that "these decisions represent a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other hand." *Id.* at 245, 35 L. Ed. 2d at 239. The Court further noted that the final orders which the Interstate Commerce Commission adopted were "applicable across the board to all of the common carriers." *Id.* at 246, 35 L. Ed. 2d at 239. The Court also concluded that while the Interstate Commerce Commission relied on factual inferences on which to base its order, "[t]he factual inferences were used in the formulation of a basically legislative-type judgment, for prospective application

only, rather than in adjudicating a particular set of disputed facts." *Id.* at 246, 35 L. Ed. 2d at 240. In evaluating the holding of *Florida East Coast* as applied to the present case, a full rate hearing or even a complaint hearing is not necessary when the rule promulgated applies uniformly to all utilities which are similarly affected and no adjudicative-type facts need to be decided even though rates may be changed.

In his article on the North Carolina Administrative Procedure Act, Professor Daye distinguished adjudication from rulemaking as follows:

> The touchstone for distinguishing adjudication from rulemaking is that adjudication involves a specifically named party and a determination of particularized legal issues and facts with respect to that party. Rulemaking, by contrast, involves general categories or classes of parties and facts and policies of general applicability.

Daye, 53 N.C. L. Rev. at 868. When considering this definition, the holding in *Florida East Coast*, and the facts of this case, we conclude that the only facts involved in this case were legislative facts. The order by the Commission in the present case did not involve any facts which were in dispute. The corporate tax rate had been lowered by the TRA-86, and, consequently, the ratepayers would be overpaying if their rates were set so that the utilities could recover taxes at the higher rate which was in effect before the reduction. These facts are legislative facts, not adjudicative facts, and are applied uniformly to all of the utilities affected by the order. These facts are the type which are appropriately handled in a rulemaking-type proceeding. The facts which Nantahala contends are in dispute, mainly the fact that Nantahala is currently collecting a rate of return which is less than that which it was allowed to collect as a result of its last general rate hearing, pertain to Nantahala alone and not to the other utilities affected by this order. Moreover, the fact that Nantahala is currently collecting a rate of return less than that previously authorized by the Commission has nothing to do with the change in the tax laws. Nantahala's failure to realize its allowed rate of return was a problem for Nantahala before the TRA-86 was enacted. Therefore, the facts which Nantahala claims should prevent it from having to follow the Commission's order are adjudicative-type facts which should

be decided in an individualized proceeding such as a complaint hearing or a general rate case.

The procedure used by the Commission was very similar to that used by the Federal Energy Regulatory Commission (FERC) as it was faced with the identical situation when the TRA-86 went into effect. FERC issued a Notice of Proposed Rulemaking in Docket No. RM87-4-000 on 12 March 1987 and later codified as Order 475. Conservation of Power, Water Resources, 18 C.F.R. § 35.27 (1989). This Notice and the Order applied only to electric utilities even though the TRA-86 applied uniformly to all utilities. The Rule did not apply to natural gas pipeline companies because they already had tax trackers included in their rate settlements, and FERC decided to deal with oil pipeline rates on a case-by-case basis. In discussing why it was using this approach, FERC explained in the Notice that the last corporate income tax reduction had been in 1978 when the rates were decreased from 48% to 46%. At that time FERC did not issue a statement of policy or a final rule. It merely considered this tax rate change on a case-by-case basis. The Commission explained that the situation is different in this case because the TRA-86 represents a dramatic decrease in the corporate income tax rates. As did our Commission, FERC saw the need to respond quickly to this change in the tax rates. In its Notice, FERC stated:

> The Commission believes that the Federal corporate income tax rate decrease mandated by the Tax Reform Act of 1986 may result in significant overcollections by a public utility after July 1, 1987, if the public utility fails to adjust its rates to reflect this decrease. For this reason, the Commission is proposing to institute a procedure to encourage public utilities to voluntarily file rate reductions with the Commission . . . .

52 Fed. Reg. 8616, 8618 (1987).[1]

The Iowa Utility Board handled the effect of the TRA-86 in much the same way as our Commission. The Board passed a rule which instructed utilities which were not currently involved in pending contested cases to lower their rates to reflect the changes

---

1. Nantahala argues that the North Carolina Utilities Commission should have made compliance voluntary rather than mandatory. While the Commission could have sought voluntary compliance with the TRA-86, it clearly was authorized to make compliance mandatory. We note from the record that most of the other utilities voluntarily reduced their rates to reflect the savings generated by the TRA-86.

caused by the TRA-86 and ordered those utilities with pending contested cases to do the same thing. *Iowa Electric Light & Power v. Utilities Board*, 442 N.W.2d 99, 100 (Iowa 1989). The issue in that case involved whether the Board could treat the two groups of utilities differently and use different data from the companies to determine what reduction the utilities should pass on to the ratepayers. *Id.* The Court held that there was a reasonable basis for treating the groups differently. The reasonable basis was in part due to the need to act quickly so that the savings could be passed on quickly to the ratepayers. *Id.* The Iowa Supreme Court held that it was proper for the Board to promulgate a rule implementing the rate reductions for those utilities which were not involved in a rate case and to order the utilities which were involved in current rate cases to lower their rates to reflect the savings brought on by the TRA-86. *Id.* at 101. In so holding, the Court concluded, "The choice of whether to develop a policy by rule, contested case, or both, rests within the informed discretion of the administrative agency." *Id.*

From a review of our holding in *Edmisten III*, the holding in *Florida East Coast*, the guidance found in scholarly works, and the actions of other agencies dealing with the same issue, we conclude that the Commission was acting within its authority when it ordered the affected utilities, including Nantahala, to determine the amount of savings resulting from the TRA-86 and to pass these savings on to the ratepayers. The Commission properly formulated a rule which applied uniformly to the affected utilities which were similarly situated. The circumstances surrounding this procedure made it appropriate for the Commission to use a rulemaking procedure because: 1) the tax reduction affected all utilities uniformly; 2) a large number of utilities were affected, making individual hearings for all inappropriate; and 3) no adjudicative-type facts were in dispute so as to require a trial-type hearing for each individual utility.

[2] In this appeal, Nantahala argues two other issues which the Court of Appeals did not reach. These issues are: 1) whether the Commission's actions violated Nantahala's equal protection rights because some utilities, primarily the local telephone operating companies, were not required to pass on all of the tax savings to their ratepayers; and 2) whether the refund order by the Commission constituted retroactive ratemaking. We conclude that neither of these issues has merit.

As mentioned above, the local telephone operating companies were allowed, as a group, to offset part of their tax savings with revenue reductions previously ordered by the Commission. Nantahala contends that it too had non-tax offsets which the Commission should have recognized just as it did for the telephone companies. We see no violation of equal protection on the part of the Commission in excluding these groups from the order.

The Commission fully discussed in its order of 20 October 1987 its reasons for excluding the local telephone exchanges from that order. The Commission pointed out that, while the Public Staff and the Attorney General both proposed that the local telephone operating companies be included in the order, it found to do so would be impractical. The Commission stated:

> The impracticality of following this proposal is that there are numerous local telephone operating companies in North Carolina and the circumstances are different for many of them. To require the flow through of the federal tax savings without allowing an offset for these access charge reductions ordered by the Commission would likely place some LEC's in a position of having to immediately file for rate increases. Therefore, subscribers of these affected telephone companies could experience a decrease and then an increase in their local rates. Such up and down effects on rates disrupt reasonable budgeting practices by both homes and businesses and should be avoided if the net gain to the customers is not significant.

While the local telephone operating companies were singled out as a group for different treatment, there were factors surrounding this group, which the Commission made clear in its orders, that made them subject to different treatment from the electric utilities. Nantahala argues that the Commission's distinctions were arbitrary and not rationally related to a legitimate governmental interest. We conclude that the reasons given by the Commission for treating the local telephone operating companies differently from the other utilities bears a rational relationship to a legitimate public interest. That is all that is necessary to satisfy the requirements for equal protection in the area of economic regulation. *New Orleans v. Dukes*, 427 U.S. 297, 49 L. Ed. 2d 511 (1976).

[3] Nantahala's argument that the Commission's final order requiring Nantahala to refund a portion of previously collected revenues constitutes retroactive ratemaking likewise has no merit. What

Nantahala is referring to is the portion of the final order which instructs the affected utilities to refund a part of the provisional rates, which were an overcollection of taxes, collected between 1 January 1987 and 20 October 1987 when the final order was issued.

Retroactive ratemaking has been defined as "[a]djustments to future rates to rectify undue past profits . . . ." *Madison Gas & Electric v. Public Service Commission*, 150 Wis. 2d 186, 195, 441 N.W.2d 311, 316 (1989). It has also been defined as occurring "when an additional charge is made for past use of utility service, or the utility is required to refund revenues collected, pursuant to then lawfully established rates, for such past use." *State ex rel. Utilities Commission v. N.C. Natural Gas Corp.*, 323 N.C. 630, 641, 375 S.E.2d 147, 153 (1989) (quoting *Edmisten II* at 468, 232 S.E.2d at 194). The final order in this case does not fit either definition. In the provisional order of 23 October 1986, the Commission ordered the utilities to place in a deferred account beginning on 1 January 1987 the excess tax revenues collected over what the utility would have to pay in taxes as a result of the savings generated by the TRA-86. The 29 October 1987 order simply provided that the funds in the deferred account be refunded to the ratepayers. This does not constitute "adjustments to future rates to rectify undue past profits," and this is not retroactive ratemaking as defined by *Edmisten II. See State ex rel. Utilities Commission v. C.F. Industries, Inc.*, 299 N.C. 504, 263 S.E.2d 559 (1980).

The decision of the Court of Appeals is reversed and the orders of the Commission as applied to Nantahala are reinstated.

Reversed.

SCOTT D. BURGESS v. YOUR HOUSE OF RALEIGH, INC.

No. 235PA89

(Filed 7 February 1990)

1. Rules of Civil Procedure § 12 (NCI3d)— motion to dismiss— failure to state claim for relief

A complaint may be dismissed pursuant to Rule 12(b)(6) if no law exists to support the claim made, if sufficient facts

to make out a good claim are absent, or if facts are disclosed which will necessarily defeat the claim.

Am Jur 2d, Pleading § 226.

2. **Statutes § 5.1 (NCI3d)— statutory construction—intent of legislature**

Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning. But where a statute is ambiguous, judicial construction must be used to ascertain the legislative will.

Am Jur 2d, Statutes §§ 145, 146, 194, 195.

3. **Master and Servant § 7.5 (NCI3d)— Handicapped Persons Act—inapplicability to person infected with AIDS virus**

A person who is infected with the AIDS virus (HIV), but who is otherwise asymptomatic, is not entitled to employment protection under the provisions of the N. C. Handicapped Persons Act because (1) a person infected with HIV is not a "handicapped person" within the meaning of the Act in that he does not have a physical or mental impairment which limits a "major life activity" as that term is defined by N.C.G.S. § 168A-3(4), nor is he regarded as having such an impairment; (2) the legislature did not intend that the definition of "handicapped person" would include a person solely because he suffers from a communicable disease since such an interpretation would render meaningless the communicable disease exemption of N.C.G.S. § 168A-5(b)(3); and (3) subsequent legislative history indicates that the legislature did not intend to cover the subject of communicable diseases such as HIV when it enacted the Handicapped Persons Act.

Am Jur 2d, Job Discrimination § 124.

ON discretionary review pursuant to N.C.G.S. § 7A-31(a) prior to a determination by the Court of Appeals of an order entered by *Herring, J.*, at the 27 November 1988 Session of Superior Court, WAKE County, which granted defendant's motion for dismissal pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Heard in the Supreme Court 13 November 1989.

Erdman, Boggs & Harkins, by Harry H. Harkins, Jr., and Crisp, Davis, Schwentker, Page & Currin, by Lynn Fontana, for plaintiff-appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Richard T. Boyette, and Moore & Van Allen, by William D. Dannelly, for defendant-appellee.

Tharrington, Smith & Hargrove, by Burton Craige, for North Carolina Civil Liberties Union Legal Foundation; and Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Julian D. Bobbitt, Jr. and Maureen Kelley O'Connor, for North Carolina Medical Society and American Medical Association, amici curiae.

MEYER, Justice.

We note from the outset that the issues raised in this case would, if the action had been commenced after the effective date of recent amendments to the North Carolina Communicable Disease Act, N.C.G.S. § 130A-148(h)-(j) (1989), be decided under that act. These provisions, which establish protections for those persons who test positive for the HIV virus, became effective 1 October 1989, subsequent to the filing of plaintiff's complaint and to entry of the order of the trial court granting defendant's motion for dismissal. Thus, for purposes of this appeal, plaintiff's rights must be determined under the law as it existed prior to the passage of the recent amendments to the Communicable Disease Act.

Plaintiff was employed by defendant restaurant as a short-order cook. In November 1987, plaintiff tested positive for the Human Immunodeficiency Virus (HIV), which is the agent currently recognized to be responsible for the Acquired Immune Deficiency Syndrome (AIDS). This condition is referred to as being "seropositive" for the virus. Upon learning that plaintiff had tested positive for this virus, defendant discharged plaintiff from employment. It is undisputed that plaintiff was fired solely because he tested positive for HIV. Plaintiff brought suit against his former employer, alleging that his discharge from employment for this reason constituted a discriminatory practice under the provisions of the North Carolina Handicapped Persons Protection Act, N.C.G.S. § 168A-1 to -12 (1987) (Handicapped Persons Act), because plaintiff's seropositive status enabled him to fit the act's definition of a qualified handicapped person. In his prayer for relief, plaintiff sought injunctive relief, reinstatement to his former position, back pay, and

attorney's fees. Defendant answered, denying plaintiff's assertion that infection with HIV constitutes a "handicap," and further moved to dismiss plaintiff's complaint under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure to state a claim upon which relief could be granted. The trial court granted defendant's motion, and plaintiff appealed to the Court of Appeals. On 8 June 1989, this Court *ex mero motu* allowed discretionary review prior to determination by the Court of Appeals.

AIDS may be described as the final stage of complications of infection by the Human Immunodeficiency Virus. Once introduced into the body, the HIV virus attacks and changes the structure of white blood cells which are crucial in order for a person's immune system to fight off disease. Leonard, *AIDS and Employment Law Revisited*, 14 Hofstra L. Rev. 11, 17-18 (1985). Soon after infection, antibodies to the virus develop. The infected white blood cells, unable to perform their normal immune system functions, reduce the body's capability to fight off opportunistic disease or render it incapable of doing so. *Id.* The debilitating effects of AIDS come, not from the virus itself, but from these opportunistic diseases that the immune system cannot fight.

The HIV virus is known to be transmitted through blood or semen during sexual intercourse, by contaminated intravenous needles, by the transfusion of tainted blood, and through prenatal exposure. As of April 1989, more than 94,000 cases of AIDS had been reported in the United States, and of that number, 820 had been reported in North Carolina. U.S. Centers for Disease Control, *HIV/AIDS Surveillance Report* (May 1989). The United States Centers for Disease Control estimates that the number of new cases in 1991 alone will exceed 52,000, and it projects a cumulative total of 270,000 cases by the year 1991. Padraig O'Malley, *The AIDS Epidemic: Private Rights and the Public Interest* (1989). AIDS has presented a myriad of legal issues, particularly in the employment context. Much debate has focused on the threshold question of whether AIDS or infection with the HIV virus should be defined as a handicap under either state or federal handicap antidiscrimination statutes. "One of the medical facts which makes AIDS a significant workplace issue is that a person may experience HIV infection in its various stages and be virtually asymptomatic, or have symptoms which . . . are not actually disabling." Leonard, *AIDS and Employment Law Revisited*, 14 Hofstra L. Rev. 11, 19 (1985).

[1] The central issue before this Court is whether a person who is infected with HIV, but who is otherwise asymptomatic, is entitled to protection under the provisions of the North Carolina Handicapped Persons Act, and specifically whether plaintiff has stated a claim upon which relief can be granted under the act. In ruling upon a Rule 12(b)(6) motion, the trial judge must treat the allegations of the complaint as admitted. *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979). Plaintiff's complaint therefore stated a proper cause of action under the act unless the court could hold, as a matter of law, that his seropositive status did not constitute a handicap as contemplated by the statute. A complaint may be dismissed pursuant to Rule 12(b)(6) if no law exists to support the claim made, if sufficient facts to make out a good claim are absent, or if facts are disclosed which will necessarily defeat the claim. *Forbis v. Honeycutt*, 301 N.C. 699, 273 S.E.2d 240 (1981).

[2] In order to determine whether plaintiff has alleged a good claim, we must interpret the provisions of the Handicapped Persons Act. Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning. *Utilities Comm. v. Edmisten, Atty. General*, 291 N.C. 451, 232 S.E.2d 184 (1977). But where a statute is ambiguous, judicial construction must be used to ascertain the legislative will. *Young v. Whitehall Co.*, 229 N.C. 360, 49 S.E.2d 797 (1948). The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent. *Buck v. Guaranty Co.*, 265 N.C. 285, 144 S.E.2d 34 (1965). This intent "must be found from the language of the act, its legislative history and the circumstances surrounding its adoption which throw light upon the evil sought to be remedied." *Milk Commission v. Food Stores*, 270 N.C. 323, 332, 154 S.E.2d 548, 555 (1967). Upon careful and thorough analysis of the Handicapped Persons Act, we conclude that both the plain language of its provisions and the legislative history surrounding it indicate that the legislature did not intend to protect persons infected with HIV under this particular act.

For many decades, North Carolina has adhered to the employment-at-will doctrine, which provides that "[w]here a contract of employment does not fix a definite term, it is terminable at the will of either party, with or without cause." *Smith v. Ford Motor Co.*, 289 N.C. 71, 80, 221 S.E.2d 282, 288 (1976) (citing *Still v. Lance*, 279 N.C. 254, 182 S.E.2d 403 (1971)). This doctrine has

recently been narrowly eroded by statutory and public policy limitations on its scope. *See, e.g., Coman v. Thomas Manufacturing Co.*, 325 N.C. 172, 381 S.E.2d 445 (1989); *Sides v. Duke University*, 74 N.C. App. 331, 328 S.E.2d 818, *disc. rev. denied*, 314 N.C. 331, 333 S.E.2d 490 (1985). The North Carolina Handicapped Persons Act is a statutory enactment intended to protect handicapped employees from discriminatory employment practices. In the act's statement of purpose, the legislature provides that:

> The purpose of this Chapter is to encourage and enable all handicapped people to participate fully to the maximum extent of their abilities in the social and economic life of the State, to engage in remunerative employment, to use available public accommodations and public services, and to otherwise pursue their rights and privileges as inhabitants of this State.

N.C.G.S. § 168A-2(a) (1987).

We recognize that the Handicapped Persons Act is a remedial statute. *Burgess v. Brewing Co.*, 298 N.C. 520, 259 S.E.2d 248 (1979). Nevertheless, our interpretation of this act must be responsive to two countervailing considerations—the desire to give effect to the statutory objectives and the need to keep the scope of the act within the boundaries intended by the General Assembly.

[3] In order to state a cause of action for violation of the right to employment protected by the act, plaintiff must initially establish that he is a "handicapped person" whose rights are protected by the statute. The Handicapped Persons Act defines a "handicapped person" as one who (1) has a physical or mental impairment which limits one or more "major life activities," (2) has a record of such an impairment, or (3) is regarded as having such an impairment. N.C.G.S. § 168A-3(4) (1987). In order to receive employment protection under the act, a person must additionally fit the definition of a "qualified handicapped person":

> With regard to employment, a handicapped person who can satisfactorily perform the duties of the job in question, with or without reasonable accommodation, . . . provided that the handicapping condition does not create an unreasonable risk to the safety or health of the handicapped person, other employees, the employer's customers, or the public[.]

N.C.G.S. § 168A-3(9)(a) (1987).

Plaintiff contends that he has alleged facts sufficient to show that he qualifies not only as a "handicapped person" under the act, but also as a "qualified handicapped person" because his HIV infection does not pose a risk to others in the workplace setting. For the reasons set out below, we hold that plaintiff has failed to show that infection with HIV entitles him to protection as a "handicapped person" as that term is defined by the act. Since plaintiff cannot make this threshold showing, we need not examine the additional issue of whether plaintiff is a "qualified handicapped person" as defined by the act.

We further hold that because plaintiff's alleged handicap is a communicable disease, he is not protected under the Handicapped Persons Act because the act contains a provision exempting communicable diseases from protection as handicaps.

Plaintiff asserts that, in interpreting the provisions of our act, we may utilize decisions of other state courts construing similar antidiscrimination statutes which have been enacted in other jurisdictions. To date, forty-seven states and the District of Columbia have enacted statutes prohibiting employment discrimination on the basis of disability or handicap. Few of these statutes have specifically addressed whether HIV, or communicable diseases in general, are to be included within the definition of "handicap," but plaintiff asserts that the trend among courts construing these acts has been to grant protection to persons infected with HIV. *See, e.g., Raytheon Co. v. Fair Emp. & Housing Com'n.*, 261 Cal. Rptr. 197, 212 Cal. App. 3d 1242 (1989); *Cronan v. New England Tel. & Tel. Co.*, 41 Fair Empl. Prac. Cas. (BNA) at 1273 (Sup. Ct. Mass. 1986). We have examined the various statutes and have discovered that there is little uniformity among them and minimal case law interpreting their scope. *See* Parry, *AIDS as a Handicapping Condition—Part II*, 10 Mental & Physical Disability L. Rep. 2, 4 (1986). Because of this lack of uniformity and because of differences we have discerned in their wording and purpose as compared to the North Carolina act, we conclude that case law from other jurisdictions is of little value to us in our interpretation of the North Carolina act.

Plaintiff also requests that we utilize and follow judicial interpretations of the North Carolina act's federal counterpart, the Rehabilitation Act of 1973, 29 U.S.C. 794, in construing the provisions of the North Carolina act. We concede that the definitions

of "handicapped person" and "qualified handicapped person" in the North Carolina Handicapped Persons Act are virtually identical to the definitional provisions of the federal act and that, in fact, the North Carolina act was patterned after the federal act. Because of these similarities, plaintiff requests that we rely upon cases construing the federal act that tend to support his point of view, that is, that communicable diseases such as AIDS and its related conditions are handicaps, and consequently to decide this case in his favor. *See School Bd. of Nassau County v. Arline*, 480 U.S. 273, 94 L. Ed. 2d 307, *reh'g denied*, 481 U.S. 1024, 95 L. Ed. 2d 519 (1987) (schoolteacher suffering from a communicable disease—tuberculosis—held to be protected under federal act).[1] However, in construing the intent of our legislature in enacting the North Carolina Handicapped Persons Act, it is important to note that two significant provisions distinguish our state act from the federal act. First, the North Carolina act has a more restrictive definition of a "handicapped person" in that it defines "major life activities" more narrowly than the federal act defines the term. Second, North Carolina's act contains a communicable disease exemption which is absent from the federal act. These differences lead us to conclude that case law construing the provisions of the federal Rehabilitation Act cannot guide us in our interpretation of the North Carolina act.

---

1. In that case, the federal act's inclusion of the term "working" as a "major life activity" was a significant factor in the United States Supreme Court's holding that a limitation on an individual's ability to work as a result of the negative reactions of others to an impairment, even though it did not impair that person's physical and mental capabilities, was discrimination of the type which Congress intended to protect against in the Rehabilitation Act. However, the Court expressly declined to consider the question of whether a person infected with a contagious disease such as HIV could be considered a "handicapped person" solely because of the contagious disease. In this case, the plaintiff had a record of physical disability in addition to having a contagious disease.

In response to this unanswered question, the Rehabilitation Act was amended in March 1988 by the Civil Rights Restoration Act to clarify the application of the Rehabilitation Act's definition of "individual with handicaps" with respect to communicable diseases. The amendment provides that the term "individual with handicaps"

> does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job.

29 U.S.C. § 706(8)(C) (Cum. Supp. 1989).

The first distinguishing characteristic is the difference in the federal act and the North Carolina act in defining the term "major life activities." As we stated above, both acts define a "handicapped person" as a person who (1) has a physical or mental impairment which limits one or more "major life activities," (2) has a record of such an impairment, or (3) is regarded as having such an impairment. N.C.G.S. § 168A-3(4) (1987). Major life activities are defined in N.C.G.S. § 168A-3(4)(b) as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, and learning."

As an initial matter, we note that the parties are in agreement that plaintiff has a physical impairment in that he has a viral infection that affects his hemic and lymphatic systems. Defendant disagrees, however, with plaintiff's assertion that he has, or is regarded as having, a physical impairment *which limits a "major life activity."* Plaintiff contends that his ability to work has been impaired by the fact that he was not permitted to continue his employment with defendant after it was determined that he was infected with HIV, and that he therefore fits within the definition of a "handicapped person" because he is regarded as having an impairment that limits a major life activity, "working." Plaintiff claims that the negative perception of others renders him a "handicapped person" within the meaning of the act. He concludes that this Court should incorporate the term "working" into the North Carolina act's definition of "major life activities" because, by its terms, the list of functions is illustrative rather than exhaustive.

We note that the federal act, unlike the North Carolina act, does indeed list "working" as one of the major life activities that may be found to have been limited by a physical or mental impairment. However, the drafters of the North Carolina act specifically removed the term "working" from the senate bill as originally enacted. *See* S. 272, Committee Substitute (adopted 30 May 1985). The specific exclusion of "working" from this list is significant because it is the only activity listed by the federal act that was not included in our state act. As this Court has recognized, "by modifying the language borrowed from [a] federal act, the North Carolina legislature must have intended to alter its meaning to some extent." *Edmisten, Attorney General v. Penney Co.*, 292 N.C. 311, 316, 233 S.E.2d 895, 898 (1977). The deletion of the term "working" is some indication that the General Assembly intended for the Handicapped Persons Act to be more narrow in scope than

its federal counterpart. Plaintiff concedes that his ability to perform his usual work at the defendant restaurant is not actually impaired by his HIV infection. He is in fact asymptomatic. As an asymptomatic carrier of HIV, plaintiff has failed to show that he has any condition that would substantially limit his ability to perform any of the physical or mental tasks listed in the Handicapped Persons Act as major life activities.

Plaintiff additionally argues that infection with HIV is a physical impairment which limits other activities which he contends are "major life activities"—his ability to bear a healthy child and his ability to engage in sexual relationships for fear of transmitting the virus. Because he has a physical impairment which limits one or more "major life activities," plaintiff argues, he qualifies under the Handicapped Persons Act's first definition of a "handicapped person," as set out above. We disagree with plaintiff's assertion that these limitations fall within the scope of the act's definition of "major life activities." The activities plaintiff enumerates are not of the same nature as those listed in the statute, that is, essential tasks one must perform on a regular basis in order to carry on a normal existence.

In sum, we conclude that plaintiff has failed to meet his burden of showing that he is a "handicapped person" as defined by the North Carolina act because he does not have a physical or mental impairment which limits a "major life activity," as that term is defined by our statute, nor is he regarded as having such an impairment. Because he does not qualify as a "handicapped person" under the act, he necessarily cannot qualify as a "qualified handicapped person" because that definition assumes, as an initial matter, that one is handicapped.

The second set of provisions which distinguishes the North Carolina act from the federal act consists of a series of exemptions to the North Carolina act, one of which provides that it is not a discriminatory action for an employer to discharge a handicapped person "because the person has a communicable disease which would disqualify a non-handicapped person from similar employment." N.C.G.S. § 168A-5(b)(3) (1987). As an initial matter, we note that it is undisputed that plaintiff suffers from a communicable disease. "Although a seropositive person does not show symptoms of . . . AIDS, and may never develop such symptoms, he or she does carry the virus and can transmit it to others." Green, *The Transmis-*

sion of AIDS, AIDS and the Law: A Guide for the Public 28, 30 (1987). Plaintiff contends that it is the negative perceptions of others, rather than the fact that he has HIV, that render him a "handicapped person" under the statute. However, we recognize that it is in fact plaintiff's infection which produces the negative perceptions. Thus, in the final analysis, it is the infection itself which plaintiff contends constitutes his handicap.

Although the Handicapped Persons Act, as we have noted above, does define the terms "handicapped person" and "qualified handicapped person," it does not define what constitutes a "handicap." It is therefore a matter of statutory interpretation as to whether the term incorporates communicable diseases within its ambit. To resolve this ambiguity, we must construe the language in question in light of the applicable canons of statutory construction. The intent of the legislature controls the interpretation of a statute. *Realty Co. v. Trust Co.*, 296 N.C. 366, 250 S.E.2d 271 (1979). "A construction which operates to defeat or impair the object of the statute must be avoided if that can reasonably be done without violence to the legislative language." *State v. Hart*, 287 N.C. 76, 80, 213 S.E.2d 291, 295 (1975). To this end, the words and phrases of a statute must be interpreted contextually, in a manner which harmonizes with the other provisions of the statute and which gives effect to the reason and purpose of the statute. *In re Hardy*, 294 N.C. 90, 240 S.E.2d 367 (1978); *State v. Harvey*, 281 N.C. 1, 187 S.E.2d 706 (1972).

Proper application of the above principles of statutory interpretation compels us to conclude that our legislature did not intend that the definition of "handicapped person" would include a person solely because he suffers from a communicable disease. The act specifically provides that an employer *may* discharge a handicapped person if "the person has a communicable disease *which would disqualify a non-handicapped person* from similar employment." N.C.G.S. § 168A-5(b)(3) (1987) (emphasis added). There are two aspects to the exemption: (1) that the person has a communicable disease, and (2) that the communicable disease itself would disqualify a non-handicapped person. The exemption means that the existence of a communicable disease is to be treated as a basis for exemption from the application of the act if it would disqualify a non-handicapped person. The person suffering from the communicable disease must have an additional disability which qualifies as a handicap. Nothing else constituting a handicap has been shown here.

Carrying this analysis one step further, we conclude that the legislature did not intend for a communicable condition itself to be a protected handicap because such an interpretation would render the communicable disease exemption meaningless. "[A] statute must be construed, if possible, so as to give effect to every provision, it being presumed that the Legislature did not intend any of the statute's provisions to be surplusage." *Jolly v. Wright*, 300 N.C. 83, 86, 265 S.E.2d 135, 139 (1980) (citations omitted).

Such an interpretation would additionally be absurd. If one removes the words "communicable disease" in the provision and replaces them with the word "handicap," so that the exemption reads, "[i]t is not a discriminatory action for an employer . . . to discharge a handicapped person because the person has a [handicap] which would disqualify a non-handicapped person from similar employment," the provision would make no sense, because one cannot, by definition, simultaneously be both handicapped and non-handicapped. A statute is presumed not to have been intended to produce absurd consequences, but rather to have the most reasonable operation that its language permits. *Cameron v. Highway Com.*, 188 N.C. 84, 123 S.E. 465 (1924). Our reading of the statute harmonizes the communicable disease exemption with the remaining provisions of the Handicapped Persons Act and gives full effect to the reason and purpose of the statute.

Our interpretation of the plain language of the statute is bolstered by subsequent legislation on this subject. Legislative history is a factor to consider in determining legislative intent. *Milk Commission v. Food Stores*, 270 N.C. 323, 154 S.E.2d 548. Courts may use subsequent enactments or amendments as an aid in arriving at the correct meaning of a prior statute by utilizing the natural inferences arising out of the legislative history as it continues to evolve. *Jolly v. Wright*, 300 N.C. 83, 265 S.E.2d 135; *Childers v. Parker's, Inc.*, 274 N.C. 256, 162 S.E.2d 481 (1968); *Cab Co. v. Charlotte*, 234 N.C. 572, 68 S.E.2d 433 (1951). The subsequent legislative history on this subject consists of a series of efforts to enact AIDS-specific antidiscrimination provisions, an endeavor which ultimately resulted in the passage of a bill rewriting portions of the North Carolina Communicable Disease Act, N.C.G.S. § 130A-148(h)-(j) (1989 N.C. Sess. Laws ch. 698, effective 1 October 1989). While we recognize that plaintiff is not protected by this act because plaintiff's action was filed and the order of dismissal was entered before the pertinent amendments became effective,

we may nevertheless examine these subsequent legislative efforts in an attempt to derive the scope and purpose of the earlier legislation in question. The 1989 amendments to the Communicable Disease Act do not repeal, expressly or by implication, any of the provisions of the earlier Handicapped Persons Act. They deal with a subject that was not intended to be covered by the earlier legislation.

The Handicapped Persons Act was enacted into law in 1985. In the 1987 session, the North Carolina General Assembly amended the Communicable Disease Act. One of the proposed amendments, which was embodied in House Bill 458, contained an anti-discrimination provision specifically designed to protect individuals infected with HIV:

> Except as provided in subsection (h), no test or test result for AIDS virus infection shall be required, performed or utilized to determine suitability for employment, housing or public services, or for the use of places of public accommodation, . . . or public transportation.

H.R. 458 § 16(f), Committee Substitute (19 May 1987).

House Bill 458 passed the House and was sent to the Senate. A subcommittee of the Senate Committee on Human Resources proposed a substitute which deleted the above antidiscrimination provisions. *See* H.R. 458, Committee Substitute (adopted 1 July 1987).

The Committee on Human Resources approved and sent to the Senate floor a Committee Substitute for House Bill 458 which would have amended N.C.G.S. § 168A-3(4) (the Handicapped Persons Act) to include in the definition of the term "physical or mental impairment," "any communicable disease or communicable condition," and which would additionally have repealed N.C.G.S. § 168A-5(b)(3), the communicable disease exemption. *See* H.R. 458 § 16(h), Senate Committee Substitute (adopted 30 July 1987). This proposed amendment was not adopted.

As a result, the final bill, which was enacted as chapter 782 of the 1987 Session Laws, contained neither the House antidiscrimination provisions nor the Senate subcommittee amendments. This legislative history demonstrates that the General Assembly specifically addressed the particular question at issue here and affirmatively chose not to include persons infected with the HIV virus within the scope of the Handicapped Persons Act.

Those persons discriminated against on the basis of AIDS infection remained unprotected under North Carolina law until the 1989 session of the General Assembly. The legislature enacted Senate Bill 282 (1989 N.C. Sess. Laws ch. 698), which rewrote sections of N.C.G.S. § 130A-148, the Communicable Disease Act. These new provisions, which became effective 1 October 1989, contain a comprehensive AIDS antidiscrimination provision.

The new law specifically prohibits discrimination in continued employment of an infected employee, but further provides that an employer will not be prohibited from denying employment to an applicant if that applicant tests positive for the AIDS virus. N.C.G.S. § 130A-148(i)(2) (1989). It further permits an employer to take "appropriate employment action, including reassignment or termination of employment," if continued employment would "pose a significant risk to the health of the employee, co-workers, or the public, or if the employee is unable to perform the normally assigned duties of the job." N.C.G.S. § 130A-148(i)(4) (1989). Chapter 698, section 2 of the 1989 Session Laws specifically exempts restaurants altogether from the discrimination in continued employment provisions of the new law until 1 July 1991, at which time the general provisions of the act become applicable to restaurants.

The new legislation represents a specific, comprehensive declaration of the extent to which AIDS infection may affect employment decisions. It is the product of extensive efforts to balance the interests of the infected employee with the concerns, whether legitimate or illusory, of employers faced with the perceived risk of liability as a result of employing a person with the HIV virus.

It is apparent that our legislature did not intend to cover the subject of communicable diseases such as HIV when it passed the Handicapped Persons Act. The General Assembly will undoubtedly continue to wrestle with the legal dilemma presented by the AIDS controversy. The legislature provides a uniquely appropriate forum for the evaluation of these issues. As of the time of the filing of plaintiff's complaint and the entry of the order of dismissal, the statutory protections now being afforded simply did not exist. Courts may not extend a statute to cover cases not within its scope or purpose, however meritorious they may be. *State v. Ingle*,

214 N.C. 276, 199 S.E. 10 (1938). We affirm the order of the trial court granting defendant's motion for dismissal.

Affirmed.

EARL ELLIS AND ELLIS BROKERAGE COMPANY, INC. v. NORTHERN STAR COMPANY AND THOMAS W. KENNEY

No. 192PA89

(Filed 7 February 1990)

1. **Libel and Slander § 5.2 (NCI3d)— letter impeaching trade —libelous per se**

A letter sent by defendant potato processor's vice president to customers of plaintiff food brokerage company which referred to a price list for Northern Star potato products distributed by plaintiff and stated that "we at Northern Star did not authorize such a price list" impeached plaintiff in its trade as a food broker and was libelous per se.

Am Jur 2d, Libel and Slander §§ 102, 104.

2. **Libel and Slander § 15 (NCI3d)— statement by plaintiff's customer—competency to show injury to business**

Testimony by plaintiff food broker's employee that, after having received a libelous letter from defendant potato processor stating that it did not authorize a price list distributed by plaintiff, a customer stated that "he was going to look for other sources to get his potatoes because he didn't know whether he could trust [plaintiff or defendant] either one" was properly admitted to show the customer's state of mind in relying on defendants' misrepresentations in the letter and was sufficient to support the jury's finding that defendants' letter proximately caused injury to plaintiffs' business.

Am Jur 2d, Libel and Slander §§ 360, 472.

3. **Unfair Competition § 1 (NCI3d)— libel per se impeaching business activity—unfair trade practice**

A libel per se of a type impeaching a party in its business activities is an unfair or deceptive act in or affecting commerce

in violation of N.C.G.S. § 75-1.1, which will justify an award of damages under N.C.G.S. § 75-16 for injuries proximately caused.

Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 772, 774.

4. **Unfair Competition § 1 (NCI3d)— unfair trade practice—question of law**

Whether an act found by the jury to have occurred is an unfair or deceptive practice which violates N.C.G.S. § 75-1.1 is a question of law for the courts.

Am Jur 2d, Libel and Slander §§ 360, 484.

5. **Unfair Competition § 1 (NCI3d)— unfair trade practice—determination by appellate court**

It does not invade the province of the jury for the Supreme Court to determine as a matter of law on appeal that acts expressly found by the jury to have occurred and to have proximately caused damages are unfair or deceptive acts in or affecting commerce under N.C.G.S. § 75-1.1.

Am Jur 2d, Libel and Slander §§ 360, 484.

6. **Unfair Competition § 1 (NCI3d)— letter impeaching trade—jury finding of libel and damages—unfair trade practice as matter of law**

The jury's findings that defendants libeled plaintiff food brokerage company by a letter impeaching it in its trade, thereby causing it actual injury and damages, required entry of judgment for plaintiff as a matter of law on its unfair and deceptive trade practice claim.

Am Jur 2d, Libel and Slander §§ 360, 484.

7. **Libel and Slander § 18 (NCI3d); Unfair Competition § 1 (NCI3d)— libel and unfair trade practice—punitive or treble damages**

Where libel and unfair trade practice claims arose from a letter sent by defendants, plaintiffs were not entitled to both punitive damages for the libel and treble damages under N.C.G.S. § 75-16 but could elect whether to recover punitive or treble damages.

Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices § 711.

Justice MEYER dissenting.

Justice WHICHARD joins in this dissenting opinion.

ON appeal from the judgment of *Brewer, J.*, entered in Superior Court, WAKE County, on 4 November 1988. Pursuant to N.C.G.S. § 7A-31(a) and Rule 15(e)(2) of the North Carolina Rules of Appellate Procedure, discretionary review prior to a determination by the Court of Appeals was allowed by the Supreme Court *ex mero motu* on 16 May 1989. Heard in the Supreme Court on 13 September 1989.

Graham & James, by Mark Anderson Finkelstein, for the plaintiffs.

Morris, Bell & Morris, by William C. Morris, Jr., for the defendants.

MITCHELL, Justice.

The questions presented on appeal include (1) whether a letter sent by the defendants to some of the plaintiffs' business contacts is libelous *per se*, and (2) whether libel *per se* of a plaintiff relating to the conduct of its business constitutes an unfair or deceptive act affecting commerce in violation of N.C.G.S. § 75-1.1. We conclude that the letter in question was properly found to be libelous *per se*. We further conclude that libel *per se* of a plaintiff as to the conduct of its business does violate N.C.G.S. § 75-1.1 and, when the libel proximately causes injury to the business, gives rise to a cause of action under N.C.G.S. § 75-16.

At trial, evidence tended to show that the plaintiff Ellis Brokerage Company, Inc. is a food broker. The company's function as a food broker is to convince large-quantity food buyers, such as hospitals and school systems, to place orders with the company's clients who are in the business of selling foods. The company's sole full-time employee is the individual plaintiff Earl Ellis. The defendant Northern Star Company is a Minnesota-based potato processor, and the defendant Thomas Kenney is Northern Star's senior vice-president for sales. Ellis Brokerage Company became a broker for Northern Star in 1981, and over the years built Northern

Star's sales in eastern North Carolina from no sales at all to approximately $640,000 annually.

On 20 June 1986, Ellis received Northern Star potato pricing information from Kenney over the telephone. On 23 June 1986, Ellis sent price lists based on this information to several potential buyers.

On 29 August 1986, Northern Star terminated its brokerage contract with Ellis Brokerage Company. On 5 September 1986, Kenney wrote the following letter for Northern Star to several of the buyers who had received the 23 June price list from Ellis:

> Dear Sir;
>
> We have recently received copies of a price list sent to you from Ellis Brokerage Company regarding pricing on Northern Star potato products. These prices were noted for *bids only*, delivered by Northern Star.
>
> We at Northern Star Company did not authorize such a price list and therefore cannot honor the prices as quoted on June 23, 1986.
>
> . . . .
>
> Sincerely,
>
> Thomas W. Kenney
> Senior Vice-President Sales

The plaintiffs then brought this action contending the letter is libelous *per se* and an unfair or deceptive act affecting commerce under N.C.G.S. § 75-1.1. The plaintiffs' amended complaint also alleged breach of a covenant of good faith, breach of contract through unreasonable termination, tortious interference with business relations, and unjust enrichment or restitution. The defendants counterclaimed for breach of fiduciary duty and breach of contract. The breach of contract claim and counterclaim were settled prior to trial. At the close of the plaintiffs' evidence, the trial court granted the defendants' motions for directed verdicts on all but the libel claims. The jury found that the defendants had maliciously libeled the plaintiff Ellis Brokerage Company, and awarded compensatory and punitive damages. The jury also found, however, that the defendants had not libeled the individual plaintiff Earl Ellis.

We note at the outset that, since the jury expressly found that the defendants acted with actual malice, this case does not

present the issue of whether damages may be presumed in libel *per se* actions absent a finding of malice, as this Court has held in previous cases. *See, e.g., Flake v. News Co.*, 212 N.C. 780, 785, 195 S.E. 55, 59 (1938), *quoted in Renwick v. News and Observer & Renwick v. Greensboro News*, 310 N.C. 312, 316, 312 S.E.2d 405, 408, *cert. denied*, 469 U.S. 858, 83 L. Ed. 2d 121 (1984). Certain cases decided by the Supreme Court of the United States give rise to a question as to whether North Carolina can continue the common law presumption of damages in libel *per se* actions absent express findings of malice. *See, e.g., Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 86 L. Ed. 2d 593 (1985); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 41 L. Ed. 2d 789 (1974); *Walters v. The Sanford Herald, Inc.*, 31 N.C. App. 233, 228 S.E.2d 766 (1976); Halpern, *Of Libel, Language, and Law: New York Times v. Sullivan at Twenty-Five*, 68 *N.C.L. Rev.* 273 (1990); Christie, *Underlying Contradictions in the Supreme Court's Classification of Defamation*, 1981 *Duke L.J.* 811.

I.

We first address the defendants' contentions that the trial court erred in denying their motions for directed verdict and judgment notwithstanding the verdict as to the plaintiffs' libel and punitive damages claims. Since the jury found the defendants had not libeled Earl Ellis, we consider these contentions only as they relate to the libel claim by Ellis Brokerage Company.

North Carolina has long recognized three categories of libel:

> (1) Publications which are obviously defamatory and which are termed libels per se; (2) publications which are susceptible of two reasonable interpretations, one of which is defamatory and the other is not; and (3) publications which are not obviously defamatory, but which become so when considered in connection with innuendo, colloquium and explanatory circumstances. This type of libel is termed libel per quod.

Flake v. News Co., 212 N.C. 780, 785, 195 S.E. 55, 59 (1938); *see Renwick v. News and Observer & Renwick v. Greensboro News*, 310 N.C. at 316, 312 S.E.2d at 408 (quoting *Arnold v. Sharpe*, 296 N.C. 533, 537, 251 S.E.2d 452, 455 (1979)).

Further,

> a publication is libelous *per se*, or actionable *per se*, if, when considered alone without innuendo: (1) It charges that a person has committed an infamous crime; (2) it charges a person with having an infectious disease; (3) it tends to subject one to ridicule, contempt, or disgrace, or (4) it tends to impeach one in his trade or profession.

Flake v. News Co., 212 N.C. at 787, 195 S.E.2d at 60-61 (citing cases), *cited in Renwick v. News and Observer & Renwick v. Greensboro News*, 310 N.C. at 317, 312 S.E.2d at 408-09.

[1] The plaintiffs contend that the defendants' letter of 5 September 1986 is libelous *per se*. The defendants, on the other hand, argue that the letter is not defamatory at all or, alternatively, it is susceptible of both defamatory and nondefamatory interpretations. We conclude that the letter is libelous *per se*. The language "[w]e at Northern Star did not authorize such a price list," taken in the context of the entire letter, can only be read to mean that Ellis Brokerage Company, acting in its capacity as broker for Northern Star, did an unauthorized act. Whether that act was publishing certain unauthorized prices within a price list or publishing the entire price list itself without authorization is of no import; either reading is defamatory and impeaches Ellis Brokerage in its trade as a food broker.

Whether a publication is one of the type that properly may be deemed libelous *per se* is a question of law to be decided initially by the trial court. *See Flake v. News Co.*, 212 N.C. at 786, 195 S.E.2d at 409, *quoted in Renwick v. News and Observer & Renwick v. Greensboro News*, 310 N.C. at 317-18, 312 S.E.2d at 409; *Sasser v. Rouse*, 35 N.C. 142, 143 (1851). Here, the trial court properly treated the defendants' letter as a publication of that type and allowed the libel *per se* claim of Ellis Brokerage Company to be decided by the jury.

[2] At trial, Earl Ellis testified to a discussion he had with Bill Flemming of Henderson Fruit & Produce, one of Ellis Brokerage Company's customers. Ellis testified that Flemming stated he had received one of Northern Star's letters. Flemming told Ellis, after receiving the letter, that "he was going to look for other sources to get his potatoes because he didn't know whether he could trust me or Northern Star either one." Although the defendants objected to Ellis' testimony concerning Flemming's statement, the trial court properly admitted the testimony as showing Flemming's state of

mind, since it was directly pertinent to the question of Flemming's reliance upon the defendants' misrepresentations. *See Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 472, 343 S.E.2d 174, 181 (1986); N.C.R. Evid. 801(c), 803(3); 1 Brandis on North Carolina Evidence 3d §§ 141, 161 (1988 & Supp. 1989). While Flemming's statement as described by Ellis could be taken as an indication that Flemming did not think he could trust Earl Ellis personally, Earl Ellis and Ellis Brokerage Company were, to the extent pertinent to this issue, one and the same; Earl Ellis was the sole employee of Ellis Brokerage Company. The testimony of Earl Ellis concerning Flemming's statement was sufficient to support the jury's finding that the defendants' letter proximately caused injury to Ellis Brokerage Company's business.

Based on the evidence and upon proper instructions, the jury found that the defendants had libeled Ellis Brokerage Company and that the company was entitled to compensatory and punitive damages. The defendants' assignments of error relating to the verdict and judgment against them for their having libeled Ellis Brokerage Company are without merit and are overruled.

II.

[3] The second issue before the Court is whether libel *per se* in a business setting is an unfair or deceptive act in or affecting commerce in violation of N.C.G.S. § 75-1.1. With certain qualifications discussed below, we answer this question in the affirmative. Again, since the jury found no libel of the plaintiff Earl Ellis by the defendants, we consider and answer this question only with regard to the plaintiff Ellis Brokerage Company.

This Court has previously examined the substance and purpose of N.C.G.S. § 75-1.1 prohibiting unfair or deceptive acts in or affecting commerce. *See, e.g., Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d 397 (1981). We have concluded, for example, that both false advertising and fraud violate that statute. *Winston Realty Co. v. G.H.G., Inc.*, 314 N.C. 90, 331 S.E.2d 677 (1985) (false advertising); *Hardy v. Toler*, 288 N.C. 303, 218 S.E.2d 342 (1975) (fraud). In limitation, we have held that certain transactions already subject to pervasive and intricate statutory regulation, such as securities transactions, were not intended by the legislature to be included within the scope of the statute. *Skinner v. E.F. Hutton & Co.*, 314 N.C. 267, 333 S.E.2d 236 (1985). In the present case, however, we conclude that no such limitation applies. Instead, like fraud and false adver-

tising, a libel *per se* of a type impeaching a party in its business activities is an unfair or deceptive act in or affecting commerce in violation of N.C.G.S. § 75-1.1, which will justify an award of damages under N.C.G.S. § 75-16 for injuries proximately caused. *See Talbert v. Mauney*, 80 N.C. App. 477, 343 S.E.2d 5 (1986). To recover, however, a plaintiff must have "suffered actual injury as a proximate result of defendant's deceptive statement or misrepresentation." *Pearce v. American Defender Life Ins. Co.*, 316 N.C. at 471, 343 S.E.2d at 180. The trial court erred in granting the defendants' motion for directed verdicts in their favor on this claim.

III.

[4,5] Given the peculiar posture in which this case comes before us on appeal, we next find it necessary to consider whether the jury's findings that the defendants libeled Ellis Brokerage Company by impeaching it in its trade, thereby proximately causing it actual injury and damages, require, as a matter of law, entry of judgment for Ellis Brokerage Company on its unfair or deceptive acts claim. Whether an act found by the jury to have occurred is an unfair or deceptive practice which violates N.C.G.S. § 75-1.1 is a question of law for the court. *Hardy v. Toler*, 288 N.C. at 308-09, 218 S.E.2d at 345-46. "Ordinarily it would be for the jury to determine the facts, and based on the jury's finding, the court would then determine as a matter of law whether the defendant engaged in unfair or deceptive acts or practices in the conduct of trade or commerce." *Id.* at 310, 218 S.E.2d at 346-47. Therefore, it does not invade the province of the jury for this Court to determine as a matter of law on appeal that acts expressly found by the jury to have occurred and to have proximately caused damages are unfair or deceptive acts in or affecting commerce under N.C.G.S. § 75-1.1.

[6] Since the trial court erroneously directed a verdict against Ellis Brokerage Company on its unfair or deceptive practices claim, the jury was not instructed on the requirement of proximate causation necessary to support an award of damages for that claim. However, the jury was instructed that in order to award more than nominal damages for the defendants' libel of Ellis Brokerage Company, the jury must find "actual damages . . . to [the] business reputation of the Plaintiff caused by the libel." As Ellis Brokerage Company's libel and unfair trade claims both were based on exactly the same proximate results of exactly the same act of the defend-

ants, we conclude that the jury was sufficiently instructed on, and by its special verdict did find, damages to Ellis Brokerage Company proximately caused by the defendants' letter. We conclude as a matter of law, upon the facts found by the jury after proper instructions in this case, that the defendants' act did violate N.C.G.S. § 75-1.1. The order of the trial court directing a verdict against Ellis Brokerage Company on its unfair or deceptive practices claim must therefore be reversed and this case, given the peculiar posture in which it has come before us, is remanded for entry of judgment for the plaintiff Ellis Brokerage Company on that claim.

For reasons similar to those we have just discussed, however, the individual plaintiff Earl Ellis is entitled to no relief as a result of the trial court's error in directing a verdict against him on his unfair or deceptive practices claim. After proper instructions by the trial court, the jury found as a fact that the defendants' act of mailing the letter had not libeled Earl Ellis individually by impeaching him in his trade. As the plaintiff Earl Ellis alleged no other act of the defendants in support of his unfair or deceptive practices claim, the jury's findings against him in this regard on the libel claim necessarily were findings rejecting the facts alleged by him in his unfair or deceptive practices claim. Therefore, the plaintiff Earl Ellis is entitled to no relief on appeal.

IV.

[7] There remains a question as to the proper damages to be awarded to Ellis Brokerage Company. The company contends that it should be entitled to both punitive damages for the libel and the treble damages automatically assessed under N.C.G.S. § 75-16. We disagree. The libel and unfair trade claims both arose from the defendants' letter. Plaintiffs may in proper cases elect to recover either punitive damages under a common law claim or treble damages under N.C.G.S. § 75-16, but they may not recover both. *See Bicycle Transit Authority v. Bell*, 314 N.C. 219, 230, 333 S.E.2d 299, 306 (1985); *Mapp v. Toyota World, Inc.*, 81 N.C. App. 421, 426-27, 344 S.E.2d 297, 301, *disc. rev. denied*, 318 N.C. 283, 347 S.E.2d 464 (1986); *Marshall v. Miller*, 47 N.C. App. 530, 542, 268 S.E.2d 97, 103 (1980), *modified and aff'd*, 302 N.C. 539, 276 S.E.2d 397 (1981). The jury awarded Ellis Brokerage Company $32,500 in actual damages and $12,500 in punitive damages for the libel. Under N.C.G.S. § 75-16, the $32,500 in actual damages would be trebled, for a sum of $97,500. On remand of this case, the trial court must

allow Ellis Brokerage Company to elect its remedy: either a total of $45,000 for the combined libel award; or a total of $97,500 under N.C.G.S. § 75-16.

Affirmed in part; reversed in part; and remanded for further proceedings not inconsistent with this decision.

Justice MEYER dissenting.

I respectfully dissent from the majority's holding that the letter sent by defendant company to several of plaintiffs' business associates constitutes libel *per se* because it contains the assertion, "[w]e at Northern Star Company did not authorize such a price list." I do not believe that the phrase in question, when given its ordinary, everyday meaning, can only be interpreted as defamatory. Rather, the most that can be said is that the words can fairly and reasonably be interpreted in two ways, one of which is defamatory and the other of which is not.

In order to find a publication to be libelous *per se*, a court must construe the writing alone, without innuendo, colloquium or explanatory circumstances and find that the publication (1) charges that a person has committed an infamous crime; (2) charges a person with having an infectious disease; (3) tends to impeach a person in that person's trade or profession; or (4) otherwise tends to subject one to ridicule, contempt or disgrace. *Renwick v. News and Observer and Renwick v. Greensboro News*, 310 N.C. 312, 312 S.E.2d 405, *reh'g denied*, 310 N.C. 749, 315 S.E.2d 704, *cert. denied*, 469 U.S. 858, 83 L. Ed. 2d 121 (1984); *Flake v. News Co.*, 212 N.C. 780, 195 S.E. 55 (1938). "[D]efamatory words to be libelous *per se* must be susceptible of *but one meaning* and of such nature that the court can presume as a matter of law that they tend to disgrace and degrade the party or hold him up to public hatred, contempt or ridicule, or cause him to be shunned and avoided." *Flake*, 212 N.C. at 786, 195 S.E. at 60 (emphasis added). I cannot conclude that this letter is susceptible of but one interpretation, which is defamatory when considered alone without innuendo or explanatory circumstances. The worst that can be said of the letter is that it is reasonably susceptible of a defamatory meaning. *See Renwick*, 310 N.C. 312, 312 S.E.2d 405. I find that the letter is, at the very least, equally susceptible of a nondefamatory interpretation. It therefore cannot be libelous *per se*.

> The principle of common sense requires that courts shall understand [publications] as other people would. The question always is how would ordinary men naturally understand the publication. The fact that supersensitive persons with morbid imaginations may be able, by reading between the lines of [a publication], to discover some defamatory meaning therein is not sufficient to make it libelous.

Flake, 212 N.C. at 786, 195 S.E. at 60 (citations omitted).

The assertion, "[w]e at Northern Star Company did not authorize such a price list," when read by a typical recipient of this letter, could very reasonably be interpreted to mean that there was a simple breakdown in communications or an inadvertent mistake in the price list through the fault of either or both parties. I concede that if such a statement imputes a lack of qualities which the public, in this case the buyers of defendant's product, has a right to expect of a plaintiff in its calling, it is properly labeled libel *per se*. Such would be the case if defendant indicated that plaintiffs habitually published price lists without defendant's authorization, or repeatedly made mistakes in the transmission of those prices. However, the fact that defendant informed its customers that on one occasion its broker sent a price list that defendant did not authorize does not rise to the level of accusing that broker of incompetence or untrustworthiness, nor would a typical buyer automatically reach that conclusion.

Our case law defines the applicable category of libel *per se* as those publications which tend to "impeach a person in that person's trade or profession." *Renwick*, 310 N.C. at 317, 312 S.E.2d at 409. Although this category could be interpreted as encompassing a wide spectrum of perceived wrongs, my research of North Carolina case law reveals that our courts have tended to recognize more blatantly derogatory statements than the one at issue here as defamatory *per se* in the business context. The words must contain an imputation which is *necessarily* harmful in its effect on plaintiffs' business. *See, e.g., Badame v. Lampke*, 242 N.C. 755, 89 S.E.2d 466 (1955) (where plaintiff alleged that defendant, a business competitor, spoke words over the telephone to a customer which imputed to plaintiff the reputation of engaging in "shady deals," the words were slander *per se*); *Lay v. Publishing Co.*, 209 N.C. 134, 183 S.E. 416 (1936) (it was libel *per se* for newspaper to publish that plaintiff was the leader of a strike and had been arrested

for trespassing on mill property); *Broadway v. Cope*, 208 N.C. 85, 179 S.E. 452 (1935) (statement by butcher that his competitor had slaughtered a mad-dog-bitten cow was defamatory *per se*); *Pentuff v. Park*, 194 N.C. 146, 138 S.E. 616 (1927) (newspaper article labeling minister an "immigrant ignoramus" and calling him discourteous to those who disagreed with him on the subject of evolution affected his calling and was libelous *per se*); *U v. Duke University*, 91 N.C. App. 171, 371 S.E.2d 701, *disc. rev. denied*, 323 N.C. 629, 374 S.E.2d 590 (1988) (statements by defendant to plaintiff's colleague that plaintiff was a liar, deceitful, absolutely useless, and a fraud impeached plaintiff in his profession and constituted slander *per se*); *Talbert v. Mauney*, 80 N.C. App. 477, 343 S.E.2d 5 (1986) (allegations that president of bank published statements that one of borrowers forged his letters of credit and that he was drug dealer constituted allegations of slander *per se*); *Morris v. Bruney*, 78 N.C. App. 668, 338 S.E.2d 561 (1986) (defendant's statements that plaintiff was immature, unintelligent, and unfit as mother were not slander actionable *per se* as statements made to affect plaintiff in her trade or business as nursery school worker); *Matthews, Cremins, McLean, Inc. v. Nichter*, 42 N.C. App. 184, 256 S.E.2d 261, *cert. denied*, 298 N.C. 569, 261 S.E.2d 123 (1979) (letters, which were sent to television stations and which asserted that advertising agency breached its contracts and failed to pay its bills, tended to injure agency's business reputation, making the letters libelous *per se*).

The trial court treated defendant's letter as libel *per se* and charged the jury that if it found that the letter was "understood by the third person in a defamatory way, that is, that the statement reasonably tended to impeach or injure the Plaintiff in his trade or profession," then it would be the jury's duty to answer the issue "yes." In my opinion, defendant's letter was clearly *not* defamatory *per se*, and the issue should *not* have been submitted to the jury.

Instructions on middle-tier libel, libel *per quod*, or both would have been appropriate in this case had they been properly alleged in plaintiffs' complaint. However, plaintiffs' complaint failed to bring the letter within the second class of libel, since it did not allege that the letter is susceptible of two interpretations, one defamatory, and that the defamatory meaning was intended and was so understood by those to whom the publication was made. *Renwick*, 310 N.C. at 316-17, 312 S.E.2d at 408; *Cathy's Boutique v. Winston-*

Salem Joint Venture, 72 N.C. App. 641, 325 S.E.2d 283 (1985). Further, the complaint failed to bring the letter within the libel *per quod* category because plaintiffs did not allege special damages. *Renwick*, 310 N.C. at 317, 312 S.E.2d at 408. While certain allegations of the complaint might be interpreted to allege special damages, the complaint refers to those allegations as supporting only a libel *per se*. If, as I have concluded, the writing does not constitute libel *per se*, defendant is entitled to remand of this case directing the entry of an order granting its motion for directed verdict on the libel issue.

Justice WHICHARD joins in this dissenting opinion.

RANDY L. HARWOOD v. AARON J. JOHNSON, SECRETARY OF THE NORTH CAROLINA DEPT. OF CORRECTION, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES; BRUCE B. BRIGGS, CHAIRMAN OF THE NORTH CAROLINA PAROLE COMMISSION, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES; LOUIS R. COLOMBO, WANDA J. GARRETT, JEFFREY T. LEDBETTER, AND A. LEON STANBACK, JR., MEMBERS OF THE NORTH CAROLINA PAROLE COMMISSION, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES; GWEN O. WILLIAMS, PAROLE CASE ANALYST, IN HER OFFICIAL AND INDIVIDUAL CAPACITIES; AND JAMES F. BAME, SUPERINTENDENT OF THE ROWAN COUNTY PRISON UNIT, IN HIS OFFICIAL CAPACITY ONLY

No. 37PA89

(Filed 7 February 1990)

1. **State § 4.2 (NCI3d); Constitutional Law § 17 (NCI3d)— action by prisoner—failure to grant parole—sovereign immunity**

Plaintiff could not bring a state action for money damages or a 42 U.S.C. § 1983 claim for money damages arising from the State's failure to release him on parole under N.C.G.S. § 15A-1371(f) against the Secretary of the Department of Correction, the chairman and the members of the Parole Commission, the Superintendent of the Rowan County Prison Unit, and his case analyst in their official capacities as public officials or a public employee. The state action was barred by sovereign immunity and state officials acting in their official capacities are not persons under 42 U.S.C. § 1983.

Am Jur 2d, Civil Rights §§ 17-21; Pardon and Parole §§ 10, 75, 86, 92, 95.

2. Convicts and Prisoners § 2 (NCI3d); Constitutional Law § 17 (NCI3d)— action by inmate—failure to grant parole—claim stated against individual members of Parole Commission

Plaintiff sufficiently stated a claim under 42 U.S.C. § 1983 alleging that the individual members of the Parole Commission acted under color of state law to deprive him of his liberty without due process of law by disregarding the mandate of N.C.G.S. § 15A-1371(f) with respect to the parole of prisoners.

Am Jur 2d, Civil Rights §§ 17-21; Pardon and Parole §§ 10, 75, 86, 92, 95.

3. Jails and Jailers § 1 (NCI3d); Public Officers § 9 (NCI3d); Constitutional Law § 17 (NCI3d)— failure to grant parole—action against superintendent of prison unit, Secretary of Correction, case analyst—dismissed

Plaintiff did not state a claim under 42 U.S.C. § 1983 against the Superintendent of the Rowan County Prison Unit, plaintiff's case analyst, or the Secretary of the Department of Correction in his individual capacity arising from the State's failure to grant him parole under N.C.G.S. § 15A-1371(f) because he did not sue the superintendent in his individual capacity; the case analyst had no authority to grant or deny parole and there was no allegation that she withheld information from the Commission or misled its members; and the duties of the Department of Correction do not include supervising the Parole Commission's granting or denying of paroles.

Am Jur 2d, Civil Rights §§ 17-21; Pardon and Parole §§ 10, 75, 86, 92, 95.

4. Convicts and Prisoners § 2 (NCI3d); Constitutional Law § 17 (NCI3d)— failure to grant parole—action against Parole Commission as individuals—claims sufficient

Plaintiff's complaint against the members of the Parole Commission as individuals for violations of 42 U.S.C. § 1983 in their failure to grant him parole under N.C.G.S. § 15A-1371(f) was sufficient to withstand a motion to dismiss.

Am Jur 2d, Civil Rights §§ 17-21; Pardon and Parole §§ 10, 75, 86, 92, 95.

5. Jails and Jailers § 1 (NCI3d)— failure to grant parole—negligence claim against Secretary of Correction—dismissed

Plaintiff's claim against the Secretary of Correction in his individual capacity for negligently supervising the Parole Commission in the denial of his parole under N.C.G.S. § 15A-1371(f) was properly dismissed because the Secretary of Correction had no duty to supervise the Commission's granting or denying of plaintiff's parole.

Am Jur 2d, Penal and Correctional Institutions §§ 174-177, 189.

6. Public Officers § 9 (NCI3d)— failure to grant parole—negligence action against case analyst—dismissed

Plaintiff did not state a claim against a case analyst for the Parole Commission arising from the denial of defendant's parole where plaintiff alleged that defendant misrepresented to him the actions of the Commission, but defendant had no authority to release plaintiff on parole; plaintiff did not allege how the misrepresentation to him caused his continued incarceration; and there was no allegation that defendant misled or withheld information from the members of the Commission who could authorize plaintiff's release.

Am Jur 2d, Penal and Correctional Institutions §§ 174-177, 189.

7. State § 4.2 (NCI3d)— failure to grant parole—negligence claim—dismissed

The plaintiff did not state a claim against the Chairman of the N.C. Parole Commission as an individual for failure to supervise other members of the Commission, or against other officials in their individual capacity arising from denial of his parole, because those public officials cannot be held individually liable for damages caused by mere negligence in the performance of their statutory duties.

Am Jur 2d, Penal and Correctional Institutions §§ 174-177, 189.

8. False Imprisonment § 2 (NCI3d)— failure to grant parole—claims sufficiently alleged

Plaintiff sufficiently stated a claim against members of the Parole Commission for false imprisonment where plaintiff

alleged that defendants acted in accordance with a practice or policy to disregard the mandate of N.C.G.S. § 15A-1371(f) with respect to the parole of prisoners; that members of the Commission did not adhere to the mandate of N.C.G.S. § 15A-1371(f) on their own initiative or when they were notified by plaintiff; and that plaintiff was not released until approximately one month after a court order finding that plaintiff was not timely released in accordance with N.C.G.S. § 15A-1371(f) and ordering his immediate release.

Am Jur 2d, False Imprisonment §§ 28, 32; Penal and Correctional Institutions §§ 176, 209, 210.

ON appeal and discretionary review pursuant to N.C.G.S. §§ 7A-30, 7A-31 and 7A-32 from the decision of the Court of Appeals, 92 N.C. App. 306, 374 S.E.2d 401 (1988), affirming in part, reversing in part and remanding in part, the judgment of *Sitton, J.*, entered in the Superior Court, BUNCOMBE County. Heard in the Supreme Court 14 September 1989.

Michael S. Hamden and Marvin Sparrow for North Carolina Prisoner Legal Services, Inc., plaintiff-appellant.

Lacy H. Thornburg, Attorney General, by Jacob L. Safron, Special Deputy Attorney General, for defendant-appellees.

William G. Simpson, Jr. for amicus curiae North Carolina Civil Liberties Union Legal Foundation.

FRYE, Justice.

This is a civil action in which plaintiff seeks declaratory relief and money damages from various defendants for their failure to release him, on parole, six months prior to his maximum release date, in accordance with N.C.G.S. § 15A-1371(f). The Court of Appeals held that the trial court erred in dismissing plaintiff's claim for monetary damages against defendant Williams (the parole case analyst) on grounds of negligence, willful and deliberate conduct, and false imprisonment, but was correct in dismissing the complaint as to all other defendants. We now hold that the complaint states a claim for relief,[1] under 42 U.S.C. § 1983 and for false imprison-

1. The claim is for monetary damages. Declaratory relief has not been argued, apparently due to plaintiff's release on parole and the termination of his prison sentence.

ment, against members of the Parole Commission named in their individual capacities.

After introduction of the parties, plaintiff's complaint, filed in the Superior Court, Wake County, set forth the following facts:

On 29 April 1980, Randy Harwood was convicted on two counts of breaking and entering and one count of carrying a concealed weapon. He was sentenced to a prison term of ten to fourteen years. Mr. Harwood was scheduled to complete the maximum term of his sentence on 23 December 1986. Since Mr. Harwood was incarcerated prior to the Fair Sentencing Act, he alleged that the Parole Commission was required to release him on parole, six months prior to his maximum release date, pursuant to N.C.G.S. § 15A-1371(f). Section 1371(f) provides:

> Mandatory Parole at End of Felony Term.—No later than six months prior to completion of his maximum term, the Parole Commission *must* parole every person convicted of a felony and sentenced to a maximum term of not less than 18 months of imprisonment, unless:
>
> (1) The person is to serve a period of probation following his imprisonment;
>
> (2) The person has been re-imprisoned following parole as provided in G.S. 15A-1373(e); or
>
> (3) The Parole Commission finds facts demonstrating a strong likelihood that the health or safety of the person or public would be endangered by his release at that time.

N.C.G.S. § 15A-1371(f) (1988) (emphasis added). Mr. Harwood alleged that he was entitled to be released, on parole, on 14 June 1986[2] since none of the three exceptions in the statute applied to him. He was not released on that date.

On 10 August 1986, and again on 4 September 1986, Mr. Harwood, still incarcerated, wrote the Parole Commission citing § 1371(f) and inquired into being released on parole. Plaintiff's case analyst, defendant Gwen Williams, replied in conclusory terms that the Parole Commission had broad discretion in determining parole

---

2. The Court of Appeals' opinion refers to the release date as 13 June 1986, however, the complaint alleges the release date as 14 June 1986. Nevertheless, defendant alleges later that a court determined that his detention and incarceration after 13 June 1986 was unlawful.

eligibility and that plaintiff or the public would be endangered by his parole.

On 29 August 1986, Mr. Harwood filed a petition for writ of habeas corpus to the Superior Court, Rowan County, alleging that his detention after 13 June 1986 was unlawful.

On 16 October 1986 the writ issued, and on 22 October 1986 a hearing on Mr. Harwood's initial petition was held. At the hearing the State conceded and the court found that none of the exceptions in § 1371(f) applied to Mr. Harwood's case. The court ruled that the Parole Commission failed to follow the mandatory provisions of N.C.G.S. § 15A-1371(f), and that the detention and incarceration of plaintiff after 13 June 1986 was unlawful. The court then ordered the immediate release of plaintiff on parole and directed the Parole Commission to expedite the process. Mr. Harwood was released on parole on 21 November 1986, such parole to terminate on 23 December 1986.

Mr. Harwood subsequently filed this action against the Secretary of the North Carolina Department of Correction, the Chairman and the members of the Parole Commission, and a parole case analyst, personally and in their official capacities, seeking declaratory relief and damages for the unlawful imprisonment. Plaintiff also named as a defendant the Superintendent of the Rowan County Prison Unit, in his official capacity only. Plaintiff specifically alleged claims for relief for compensation for losses sustained due to his unlawful detention, for violation of his rights, and for the mental anguish caused by defendants. The trial court, after considering the briefs and arguments of counsel, concluded that defendants' motion to dismiss should be granted and dismissed plaintiff's complaint.

The Court of Appeals affirmed the trial court's dismissal as to all claims against all defendants, with the exception of certain claims against defendant Williams, the parole case analyst.

Plaintiff gave notice of appeal to this Court on the grounds that the Court of Appeals' decision involved substantial constitutional questions arising under the Fourteenth Amendment of the United States Constitution and article I, section 19 of the North Carolina Constitution. In the alternative, plaintiff petitioned this Court for discretionary review. Defendant Williams petitioned this Court for discretionary review of the Court of Appeals' decision reversing the trial court's dismissal of plaintiff's claims against her. Plaintiff's and defendant Williams' petitions for discretionary review were allowed by this Court on 2 March 1989.

The essential question before this Court by virtue of plaintiff's appeal and our grant of both petitions for discretionary review is whether plaintiff's complaint states any claim for relief cognizable in the courts of this State. The Court of Appeals concluded that all of plaintiff's state claims were barred by the doctrine of sovereign immunity with the exception of the claims against the case analyst, which were found to be cognizable due to the allegations that she willfully and deliberately denied plaintiff's rights, and because the case analyst is a public employee rather than a public official. As to plaintiff's federal law claims under 42 U.S.C. § 1983, the Court of Appeals held that the actions of the parole case analyst did not deprive plaintiff of a constitutional right since she had no authority to grant or deny parole. As to the remaining defendants, the Court of Appeals held that plaintiff could not prevail in a § 1983 action because plaintiff failed to allege that these defendants' actions constituted more than "mere negligence."

For clarity we shall treat the claims against the parties in their official capacities separately from the individual claims. We consider first the allegations against the parties in their official capacities.

I. Official Capacities

A. State Claims

[1] Plaintiff alleges that all named defendants acted in their official capacities in handling his release. As the Court of Appeals noted, with the exception of defendant Williams, a public employee, all of the defendants' official capacities involved employment as public officials with the State of North Carolina.

Plaintiff alleges that defendant Williams, "on behalf of the Parole Commission," responded in writing to plaintiff's inquiries, making certain conclusory representations. We treat this as an allegation that defendant Williams was acting in her official capacity as an employee of the Parole Commission. If suit cannot be maintained against members of the Commission in their official capacities, then neither can it be maintained against defendant Williams for actions taken in her official capacity as an employee pursuant to the orders of the Commission. We thus conclude that, with respect to the doctrine of sovereign immunity, plaintiff's purported claim against defendant Williams in her official capacity must be treated in the same manner as the claim against the members of the Parole Commission because she was acting pursuant to their direction.

North Carolina has a well-established common law doctrine of sovereign immunity which prevents a claim for relief against the State except where the State has consented or waived its immunity. *Electric Co. v. Turner*, 275 N.C. 493, 168 S.E.2d 385 (1960). The Department of Correction is a state agency created for the performance of essentially governmental functions, and a suit against this department is a suit against the State. *Pharr v. Garibaldi*, 252 N.C. 803, 115 S.E.2d 18 (1960). N.C.G.S. § 143B-264 provides that "[t]he Department of Correction shall be organized initially to include the Parole Commission, the Board of Correction, the Division of Prisons . . . the Division of Adult Probation and Parole, and such other divisions as may be established under the provisions of the Executive Organization Act of 1973." N.C.G.S. § 143B-264 (1987). A suit against defendants in their official capacities, as public officials or a public employee of the Parole Commission acting pursuant to its direction, is a suit against the State. Since the State has not consented to being sued in this forum for violations by the Parole Commission, this suit cannot be maintained against defendants in their official capacities.[3]

Since the doctrine of sovereign immunity applies, a suit cannot be maintained in the superior court against defendants in their official capacities. The decision of the Court of Appeals affirming the dismissal of the complaint as to the Secretary of the Department of Correction, the Chairman and Members of the Parole Commission, and the Superintendent of the Rowan County Prison Unit, in their official capacities, is affirmed. The decision of the Court of Appeals reversing the dismissal of the complaint as to defendant Williams acting in her official capacity is reversed.

B. 42 U.S.C. § 1983 Claim

The United States Supreme Court held that, in a suit for monetary damages, "neither a State nor its officials acting in their official capacities are 'persons' under § 1983," although in a suit for injunctive relief these officials would be "persons" under § 1983. *Will v. Michigan Department of State Police*, 491 U.S. ---, ---, 105 L. Ed. 2d 45, 58 (1989). To the extent that plaintiff alleges that defendants acted in their official capacities as officials of the

3. Counsel advised the Court during oral argument that plaintiff filed claims against defendants before the Industrial Commission based on a waiver of governmental immunity pursuant to the Tort Claims Act. We do not undertake to decide the validity of those claims since they are not a part of the record in this case.

State, the complaint fails to state a claim for relief for monetary damages, under 42 U.S.C. § 1983. *See id.* To the extent that the Court of Appeals' opinion may be read as prohibiting such a claim, it is affirmed.

II. Individual Capacities

A. 42 U.S.C. § 1983 Claim

[2] Plaintiff contends that the Court of Appeals erred in affirming defendants' motion to dismiss the claims brought under 42 U.S.C. § 1983. A motion to dismiss should be granted when it appears that plaintiff is not entitled to *any* relief under any facts which could be presented in support of his claim. *Presnell v. Pell*, 298 N.C. 715, 260 S.E.2d 611 (1979).

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1982).

In his complaint, plaintiff alleges that all defendants acted under color of state law to deprive him of his liberty without due process of law. He specifically alleges that all defendants acted under color of state law and, upon information and belief, in accordance with a practice or policy of the Parole Commission to disregard the mandate of N.C.G.S. § 15A-1371(f) with respect to the parole of prisoners. Section 1371(f) provides that "the Parole Commission *must* parole every person . . ." when certain conditions are met. N.C.G.S. § 15A-1371(f) (emphasis added). The mandatory language of the statute creates a liberty interest protected by the due process clause, since it creates a presumption that parole release will be granted if there are no findings that fall within the stated exceptions. *Board of Pardons v. Allen*, 482 U.S. 369, 96 L. Ed. 2d 303 (1987); *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 60 L. Ed. 2d 668 (1979).

Under the allegations of the complaint, which for our purposes must be taken as true, plaintiff should have been released on parole on 14 June 1986. He was not released on that date although the

State later conceded that none of the exceptions in N.C.G.S. § 15A-1371(f) applied to him. Notwithstanding efforts on the part of Mr. Harwood to secure his release, he was not released on parole until some thirty days after the court ordered his immediate release and more than five months after 14 June 1986.

While defendants may be able to place a different light upon the circumstances, the allegations are at least sufficient at this stage to permit plaintiff to come forward with evidence to support his claim that the delay in releasing him on parole was caused by the actions of these individuals acting in accord with a practice or policy of the Parole Commission to disregard the mandate of N.C.G.S. § 15A-1371(f). These allegations, if shown to be true, would entitle plaintiff to relief pursuant to 42 U.S.C. § 1983 since this statute clearly established a statutory right of which members of the Commission as reasonable officials should have been aware. Since the facts as alleged would entitle plaintiff to some relief, plaintiff's complaint was sufficient to withstand a motion to dismiss as to individual members of the Parole Commission.

[3] Dismissal of the § 1983 claim was proper, as to defendant Bame, since he was not sued in his individual capacity. As to defendant Williams, the case analyst, the allegations are insufficient to show that she violated any protected right of the plaintiff since she had no authority to grant or deny his parole and since there is no allegation that she withheld information from the Commission or misled its members. Thus, the trial court properly granted the motion to dismiss as to her.

The duties of the Department of Correction include providing the necessary custody, supervision, and treatment to control and rehabilitate criminal offenders and juvenile delinquents, thereby reducing the rate and cost of crime and delinquency. N.C.G.S. § 143B-261 (1987). The duties do not include supervising the Parole Commission's duties of granting and denying paroles. The Parole Commission has the exclusive authority to grant or deny paroles. N.C.G.S. § 143B-266(a) (1987). As Secretary of the Department of Correction, defendant Johnson had no authority to grant or deny plaintiff's parole nor did he have authority to supervise the Commission's granting or denying of plaintiff's parole. Therefore, dismissal as to him was proper.

[4] The Chairman and other members of the Parole Commission had a duty to grant plaintiff's parole in compliance with the statute.

Because their failure to do so was alleged to have been in accordance with a practice or policy of disregarding the mandate of the statute, the complaint is sufficient to withstand a motion to dismiss. It remains to be determined, upon summary judgment, or at trial, whether plaintiff can forecast or prove that some or all of the individual members of the Parole Commission violated plaintiff's due process rights by acting in accordance with a practice or policy of disregarding the mandate of N.C.G.S. § 15A-1371(f) as alleged in the complaint. The Court of Appeals erred by affirming the dismissal of plaintiff's § 1983 claim against the Chairman and other members of the Parole Commission in their individual capacities.

B. State Claims

1. Negligence Claim

[5] Plaintiff alleges that defendant Johnson, the Secretary of Correction, negligently failed to supervise the Parole Commission to ascertain that the Commission's policies or practices were in accordance with the law. As indicated earlier, defendant Johnson had no duty to supervise the Commission's granting or denying plaintiff's parole. Therefore, the granting of the motion to dismiss plaintiff's state claims as to defendant Johnson in his individual capacity was correctly affirmed by the Court of Appeals.

[6] Plaintiff alleges that defendant Williams misrepresented to him the actions taken by the Commission and that this misrepresentation caused his continued unlawful incarceration. Defendant Williams, however, had no authority to release plaintiff on parole and plaintiff does not allege how her misrepresentation to him caused his continued incarceration. As noted earlier, there is no allegation that defendant Williams misled or withheld information from the members of the Commission who could authorize plaintiff's release.

[7] Plaintiff further alleges that defendant Briggs failed to properly supervise other members of the Commission and this was a cause of his continued unlawful incarceration. Defendant Briggs, as Chairman and a member of the Parole Commission, had the authority, along with other members of the Commission, to grant plaintiff's parole. However, we agree with the Court of Appeals that these public officials cannot be held individually liable for damages caused by mere negligence in the performance of their statutory duties.

2. False Imprisonment Claim

[8] In addition, plaintiff alleges that as a result of defendants' acts and omissions he was falsely imprisoned. He alleges, among other things, that all defendants acted in accordance with a practice or policy to disregard the mandate of N.C.G.S. § 15A-1371(f) with respect to the parole of prisoners. False imprisonment is the unlawful and total restraint of the liberty of a person against his will. *See generally Black v. Clark's Greensboro, Inc.*, 263 N.C. 226, 139 S.E.2d 199 (1964); *Riley v. Stone*, 174 N.C. 588, 94 S.E.2d 434 (1917).

Plaintiff alleges that members of the Commission did not adhere to the mandate of N.C.G.S. § 15A-1371(f) on their own initiative nor did they adhere to it when they were notified by him. Also, when the court made findings that plaintiff was not timely released in accordance with § 1371(f), the court ordered his immediate release and ordered the Commission to expedite the process. Plaintiff was not released until approximately one month after the court's order. These allegations are sufficient to show an unlawful and total restraint of plaintiff's liberty against his will by the members of the Parole Commission. If plaintiff can establish that the members of the Parole Commission falsely imprisoned him by deliberately disregarding the mandate of N.C.G.S. § 15A-1371(f) with respect to the parole of prisoners, as he alleges, he is entitled to monetary relief. For the reasons stated earlier in this opinion, these allegations are insufficient to establish a false imprisonment claim against the remaining defendants.

3. Law of the Land Claim

We do not reach the question of a state constitution deprivation since plaintiff has stated a claim for relief pursuant to 42 U.S.C. § 1983.

Conclusion

Plaintiff alleged facts sufficient to withstand the motion to dismiss the false imprisonment and § 1983 claims brought against the Chairman and members of the Parole Commission, in their individual capacities; all defendants are shielded by the doctrine of sovereign immunity for the state claims brought against them in their official capacities; a § 1983 claim for monetary damages cannot be brought against any of the defendants in their official capacities; and, since plaintiff sufficiently alleged an adequate federal

claim for relief under § 1983, it is unnecessary to reach plaintiff's constitutional claim under our Law of the Land Clause.

The decision of the Court of Appeals is affirmed in part, reversed in part, and the case is remanded to the Court of Appeals for further remand to the Superior Court for reinstatement of the false imprisonment and § 1983 claims against defendants Briggs, Colombo, Garrett, Ledbetter, and Stanback in their individual capacities only.

Affirmed in part; reversed in part; and remanded.

STATE OF NORTH CAROLINA v. LARRY CARTER

No. 464A88

(Filed 7 February 1990)

1. Criminal Law § 687 (NCI4th)— question to defendant—requested instruction for jury not to consider—no error in refusal to give

The trial court in a first degree murder prosecution did not abuse its discretion in refusing to give defendant's requested instruction that the jury should not consider a question the State asked defendant as to whether he had stated "that he would kill anyone for his friend Butch Jackson" because defendant denied making the statement and the State elicited no evidence to show that defendant made the statement since the trial court was not required to recapitulate the evidence, and the court's ruling was based upon its reasoned decision that the requested instruction might constitute an expression of opinion and that it was a proper subject matter for argument to the jury.

Am Jur 2d, Witnesses §§ 524, 527.

2. Criminal Law § 86.2 (NCI3d)— thirteen-year-old convictions—improper cross-examination of defendant—harmless error

The trial court in a first degree murder case erred in permitting the State to cross-examine defendant about two thirteen-year-old assault convictions pursuant to N.C.G.S. § 8C-1, Rule 609(b) because they involved the use of violence, since

a defendant's prior convictions are admissible under Rule 609 only to impeach his credibility and not to show his character, and this principle was violated by the trial court's conclusion that the convictions were more probative than prejudicial because they involved violence. However, the admission of this evidence was not prejudicial because there was no reasonable possibility that a different result would have been reached at trial had the court disallowed use of the prior assault convictions.

Am Jur 2d, Witnesses §§ 582, 584.

3. **Constitutional Law § 30 (NCI3d)— criminal records of state's witnesses—disclosure not required**

Defendant's statutory and due process rights were not violated when the trial court denied his motion to require the State to inform him of the criminal records of the prosecution witnesses. N.C.G.S. § 15A-903.

Am Jur 2d, Depositions and Discovery §§ 45, 81.

APPEAL of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by *Herring, J.*, at the 2 May 1988 Criminal Session of Superior Court, CUMBERLAND County. Heard in the Supreme Court 13 November 1989.

Lacy H. Thornburg, Attorney General, by Charles M. Hensey, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Staples Hughes, Assistant Appellate Defender, for defendant-appellant.

WHICHARD, Justice.

Defendant was convicted of murder in the first degree in a non-capital trial. The trial court imposed a sentence of life imprisonment. Of the three errors alleged, we find none prejudicial.

Evidence presented by the State tended to show that on Saturday evening, 6 June 1987, a number of patrons convened at the Royal Flush, a private club in Fayetteville. Among them were defendant and his wife and their friends, the Locklears and the Flints. Sometime after the band finished playing around 1:15 a.m., a fight broke out between two patrons. This drew the involvement

of a number of other patrons, and the resulting melee spilled outside onto a front porch and into the yard. At the heart of the scuffle were Pinkie Vinson and Charles Wood, who ended up wrestling with one another on the ground. Vinson's friends pulled him off Wood and restrained him against a wall in front of the building. Wood had moved off twenty to twenty-five feet toward the roadway. Defendant was seen to walk off the porch holding a lock-blade knife and to approach Wood. Linwood West, the guest of a club member, testified that he moved between the two, who were exchanging words, and spoke to defendant in an effort to cool them down.

Jerome Walker and Kenneth Holt, who were standing by the wall with Vinson, Vinson himself, and Linwood West all testified that defendant then approached Wood, reached around West, and slashed Wood's throat. A member of the band who watched the assault from the top of his van saw only the back of the man who wielded the knife, but he verified the identity of West as the man who stood between the assailant and the victim. Defendant was observed to turn away calmly, put something in the right front pocket of his pants, and then reenter the club. Wood died in an ambulance on the way to the hospital.

Defendant testified that after the last dance he went outside briefly, intending to look for his wife in their car, but was deterred by the original melee. He reentered the club through the front door and told his friends he wanted to leave. The group initially left together, but defendant returned for his cigarettes and was prevented from rejoining his friends by the arrival of the police.

After police officers made preliminary inquiries of the patrons remaining inside the club, defendant asked Butch Jackson to give him a ride to the Kettle Pancake House, where he believed his friends, the Locklears and Flints, had gone with his wife. Police officers found him there around 3:00 a.m., and he voluntarily returned with them to the club. He remained in the custody of officers and was placed under arrest around 6:00 a.m.

Laboratory tests performed upon defendant's shoes, pants, and shirt revealed spots of blood. Human blood also was found inside the right front pocket of his pants. Only one spot was large enough to test for type. This proved to be type O, the victim's blood type, which is present in forty-five percent of the population.

[1] Defendant's first argument concerns his request for the trial court to include in its charge to the jury the following instruction:

> The State asked the question of the defendant whether he had ever stated "that he would kill anyone for his friend Butch Jackson." The defendant denied making any such statement. The State has in no manner elicited any type of evidence to support that this was ever said in any manner by the defendant. The jury is instructed to in no way consider this question by the State.

The requested instruction referred to this portion of defendant's cross-examination:

> Q. Did you see Butch Jackson outside?
>
> A. I could not tell who was outside. There was a lot of people outside pushing and shoving.
>
> Q. All that fighting—
>
> A. A lot of hollering at each other.
>
> Q. You only spent one or two minutes outside and then went back inside—
>
> A. Yes, sir.
>
> Q. —to get your friends? Butch Jackson is a friend of yours, isn't he?
>
> A. I have met Butch Jackson a couple of times.
>
> Q. Didn't you state that, at the pig pickin' [after the killing], that Butch Jackson was a friend of yours and you'd cut anybody for a friend of yours?
>
> A. No, sir.
>
> Q. It didn't happen?
>
> A. No, sir.

The trial court denied defendant's request. The prosecutor subsequently included in his closing argument the following speculation about a motive for defendant's murder of Charles Wood:

> Now, I can't tell you why Larry Carter came out of that bar and pulled that knife out and walked up to Charles Wood and slit his throat. Maybe it was because he saw his friend

> Butch Jackson standing there between them, with Butch, and people talked about Butch having his hands in Charles' face. And you know how some people have to talk with their hands. I guess maybe I'm one of them. Maybe he saw Butch with his hands in Charles's face and he said (demonstrating.) But by the time he got over there, Butch had stepped to the side and Linwood West, a completely innocent bystander, a completely neutral party, steps in and he sees two people that look like they're getting ready to fight and he tries to stop them. And for some reason, I don't know why—maybe it was because he didn't get a lick in earlier, or maybe it was because he thought Charles was the troublemaker and Charles was involved in all the fights that night, or maybe it was because he wanted to take up for his friend Butch Jackson, or maybe it was because he's just damn mean—he reached out and took Charles Wood's life from him. Just like that.

Although defendant failed to object at this point, he later reiterated his motion requesting the above instruction, attaching a statement given by Jackson to officers that he had not gone outside the bar and that although he had seen defendant at the club before, he did not know his name. The trial court refused to give the instruction requested by defendant, saying:

> Well, there are several reasons why I decline to give it. One of them is the rule that prohibits the trial court from expressing an opinion. And if I give it in the form requested, I'm afraid I would be expressing an opinion.
>
> Secondly, I'm of the opinion that that's proper subject matter for argument to the jury, not necessarily for the Court to instruct. I believe that the requested instruction . . . will be otherwise covered generally by a compilation or consideration of the other instructions given, therefore, the request is denied.

We hold that the trial court ruled correctly. Trial judges are not required to state, summarize or recapitulate the evidence, N.C.G.S. § 15A-1232 (1988), although they *may elect* in their discretion to do so. *State v. Williams*, 315 N.C. 310, 323 n.1, 338 S.E.2d 75, 83 n.1 (1986). The exercise of such discretion will not be reviewed except upon a showing of abuse, and it will not be reversed except upon a showing that the ruling was 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).

The trial court here clearly indicated a rational basis for its decision not to give the requested instruction, and we find its reasons sound. An evaluation of the weight and persuasiveness of the evidence is uniquely the task of the fact-finder. *E.g., State v. Davenport*, 225 N.C. 13, 16, 33 S.E.2d 136, 138 (1945). The trial court must avoid the hazard of offering to the jury any opinion on a question of fact the jury must decide. N.C.G.S. § 15A-1222 (1988). An opinion as to the *in*sufficiency of the evidence of a friendship between defendant and Jackson would have violated this rule. Moreover, counsel are free to argue facts in evidence and all reasonable inferences that can be drawn therefrom. *See State v. Huffstetler*, 312 N.C. 92, 112, 322 S.E.2d 110, 123 (1984), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985). Wide latitude is allowed counsel in arguing hotly contested cases, and the parameters of that privilege are, like a decision to recapitulate the evidence, left largely to the court's discretion. *See, e.g., State v. Artis*, 325 N.C. 278, 323, 384 S.E.2d 470, 496 (1989). Defendant's denial that he had made any statement that he would kill for a friend was "conclusive" and thus voided the possibility that the statement itself was a fact in evidence. *See State v. Black*, 283 N.C. 344, 350, 196 S.E.2d 225, 229 (1973). However, other evidence of a relationship between defendant and Jackson was before the jury, including defendant's asking for and being given a ride by Jackson to the Kettle Pancake House in search of his wife and friends, which sufficed to support a reasonable inference of friendship that underlay the State's closing argument.

[2] Defendant next contends that the trial court erred in its rulings on the admissibility of evidence of prior convictions under N.C.R. Evid. 609(b), which provides:

> Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein is not admissible unless the proponent

gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

N.C.G.S. § 8C-1, Rule 609(b) (1988).

In accordance with the mandate of Rule 609(b), the prosecution notified defendant of the State's intent to use eleven of defendant's convictions, eight of which were more than ten years old. Defendant moved to prohibit the use of these eight convictions, and the trial court allowed his motion as to three—two convictions for the illegal sale of beer and one for operating a motor vehicle without an operator's license. However, the trial court allowed the prosecutor to impeach defendant with the remaining convictions for assault and making an affray, reasoning that "the remaining convictions are convictions involving the use of violence; that the only purpose for admission through cross-examination would be to impeach the credibility or truthfulness of the defendant." It concluded that "in the interest of justice the probative value of these latter convictions substantially outweigh[s] any prejudicial effect that might be born by reason of elicitation of cross-examination of the defendant."

Pursuant to *Boykin v. Alabama*, 395 U.S. 238, 23 L. Ed. 2d 274 (1969), the trial court subsequently allowed defendant's motion in limine to prohibit the use of three of the remaining old convictions and one recent conviction based upon guilty pleas. The result of these rulings was that the following convictions were approved for the prosecution's use in cross-examining defendant:

1) Misdemeanor Assault, 6 March 1975;

2) Assault with a Deadly Weapon, 13 May 1975;

3) Operating a Motor Vehicle in a Careless Manner, 2 January 1979; and

4) Assault by Pointing a Gun, 19 May 1980.

The latter two convictions were plainly within the time period permitted by Rule 609(a) and thus admissible, but defendant now contends that permitting the State to impeach his credibility with the two thirteen-year-old assault convictions was prejudicial error.

Like other evidentiary rules that control the introduction of evidence of prior conduct reflecting upon a witness' truthfulness, N.C.G.S. § 8C-1, Rule 608 (1988), or upon motive, opportunity, in-

tent, preparation, plan, knowledge, identity, absence of mistake, or accident, N.C.G.S. § 8C-1, Rule 404(b) (1988), Rule 609(b) requires the trial court to engage in a balancing of the probative value of the evidence against its prejudicial effect. This balancing requirement is notably missing from Rule 609(a), under which all convictions less than ten years old are admissible without regard to any "rational relevance to untruthfulness." 1 Brandis on North Carolina Evidence 3d § 112 at 484 (1988). However, when the witness is the accused, the balancing requisite for Rules 608, 404(b) and 609(b) reflects the concern that the extrinsic evidence not reflect more upon the defendant's propensity to commit the kind of offense for which he is being tried than upon the particular purpose of the rule invoked. *See State v. Morgan*, 315 N.C. 626, 635-36, 340 S.E.2d 84, 90-91 (1986) (focus of evidence admissible under Rule 608(b) upon whether conduct is of type indicative of actor's character for truthfulness or untruthfulness; under Rule 404(b) evidence of other acts of the accused may not be introduced unless for some purpose other than to suggest that because the defendant is a person of criminal character, it is more probable that he committed the crime for which he is on trial); *State v. Tucker*, 317 N.C. 532, 543, 346 S.E.2d 417, 423 (1986) (only legitimate purpose for which defendant's prior convictions admissible under Rule 609(b) is to impeach his credibility).

Rule 609(b) is to be used for purposes of impeachment. The use of this rule is necessarily limited by that focus: it is to reveal not the character of the witness, but his credibility. Commentary on the use of impeachment generally, indicating, for example, that impeachment of a witness may be accomplished by "showing that the witness's character is bad," by, for example, "eliciting on cross-examination specific incidents of the witness's life tending to reflect upon his integrity or moral character," 1 Brandis on North Carolina Evidence 3d § 43 at 203, can have no justifiable application to the cross-examination of a criminal defendant. The only "legitimate purpose" for admitting a defendant's past convictions is to cast doubt upon his veracity; such convictions are not to "be considered as substantive evidence that he committed the crimes" for which he is presently on trial by characterizing him as "a bad man of a violent, criminal nature . . . clearly more likely to be guilty of the crime charged." *State v. Tucker*, 317 N.C. at 543, 346 S.E.2d at 423.

In *Tucker*, this Court recognized the application of this general and longstanding principle to Rule 609:

> [In a] prosecution for a particular crime, the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense. . . .
>
> The general rule rests on these cogent reasons: (1) 'Logically, the commission of an independent offense is not proof in itself of the commission of another crime.' *Shaffner v. Commonwealth*, 72 Pa. 60, 13 Am. R. 649; *People v. Molineux*, 168 N.Y. 264, 61 N.E. 286, 62 L.R.A. 193. (2) Evidence of the commission by the accused of crimes unconnected with that for which he is being tried, when offered by the State in chief, violates the rule which forbids the State initially to attack the character of the accused, and also the rule that bad character may not be proved by particular acts, and is, therefore, inadmissible for that purpose. *State v. Simborski*, 120 Conn. 624, 182 A. 221; *State v. Barton*, 198 Wash. 268, 88 P.2d 385. (3) 'Proof that a defendant has been guilty of another crime equally heinous prompts to a ready acceptance of and belief in the prosecution's theory that he is guilty of the crime charged. Its effect is to predispose the mind of the juror to believe the prisoner guilty, and thus effectually to strip him of the presumption of innocence.' *State v. Gregory*, 191 S.C. 212, 4 S.E.2d 1. (4) 'Furthermore, it is clear that evidence of other crimes compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues, and thus diverts the attention of the jury from the charge immediately before it. The rule may be said to be an application of the principle that the evidence must be confined to the point in issue in the case on trial.'

Tucker, 317 N.C. at 543-44, 346 S.E.2d at 424 (quoting *State v. McClain*, 240 N.C. 171, 173-74, 81 S.E.2d 364, 365-66 (1954)).

Federal courts have interpreted the use of the analogous F.R. Evid. 609 similarly.[1] Convictions for offenses like the offense for

---

1. The official commentary to N.C.R. Evid. 609(b) notes that its subsection (b) is literally identical to its federal model but that subsection (a) differs significantly: where the federal Rule 609(a) allows impeachment with evidence of conviction only of offenses involving dishonesty or false statement, the North Carolina analogue permits *any* sort of criminal offense to be the subject of inquiry for that purpose. Official Commentary, N.C.R. Evid. 609 (1988).

which a defendant is on trial are "presumptively barred" in federal trial courts because "[t]he jury, despite limiting instructions, can hardly avoid drawing the inference that the past conviction suggests some probability that defendant committed the similar offense for which he is currently charged." *United States v. Beahm*, 664 F.2d 414, 418-19 (4th Cir. 1981). That Rule 609(b) requires a trial court to weigh the probative value of an old conviction against its tendency to prejudice the defendant reflects the same concern: when the witness is the accused, his past convictions should be offered for what they indicate about his credibility, not for what they indicate about his character.

With this in mind, it is apparent that the "specific facts and circumstances" articulated by the trial court as underlying its determination in this case that introduction of the thirteen-year-old convictions were more probative than prejudicial violated this principle. The court singled out and permitted evidence that defendant had committed prior assaults because they involved the use of violence. The trial court's conclusory remark that the only purpose for admission through cross-examination would be to impeach the credibility or truthfulness of the defendant was not a "fact" or "circumstance" vouching for an appropriate balance of probative over prejudicial weight.

The error, however, cannot be said to have been so prejudicial that there is any reasonable possibility that a different result would have been reached at trial had the court disallowed use of the thirteen-year-old assault convictions. N.C.G.S. § 15A-1443(a) (1988). At least two eyewitnesses had a clear view of defendant's face when he reached around Linwood West and drew his blade across the victim's throat. Several others saw him gesture towards Wood immediately before the latter collapsed, and they testified as to their certainty that he was the perpetrator based upon their observations of his size and stature and the unique color of his shirt. Although suspicion was cast upon Pinky Vinson because he had been fighting with the victim only moments before and because most eyewitnesses to the murder were old and close friends of his, the witness in the best position to view and identify the murderer—Linwood West—was a stranger to him and to the club. His objectivity and proximity to the offense lent substantial weight to his testimony.

[3] Finally, defendant contends that he was denied due process of law when the trial court denied his motion to require the State

to inform him of the prosecution witnesses' criminal records. Although defendant's counsel combed the records in the office of the clerk of Cumberland County, he found no convictions that would aid him in impeaching the witnesses for the State. He thus requested the trial court to order the district attorney to share its allegedly unique access to the "Police Information Network" ("P.I.N.") system.

Defendant had neither the statutory nor the constitutional right to the information he sought. N.C.G.S. § 15A-903 does not grant the defendant the right to discover the criminal records of the State's witnesses. To the contrary, "a provision authorizing the discovery of such material was included in the draft of the original bill and subsequently deleted." *State v. Robinson*, 310 N.C. 530, 536, 313 S.E.2d 571, 575-76 (1984). Moreover,

> [t]o establish a denial of due process defendant would have had to show (1) that [the witness] *had* a significant record of degrading or criminal conduct; (2) that the impeaching information sought was withheld by the prosecution; and (3) that its disclosure considered in light of all the evidence would have created a reasonable doubt of his guilt which would not otherwise exist.

Id. at 536, 313 S.E.2d at 576 (quoting *State v. Ford*, 297 N.C. 144, 149, 254 S.E.2d 14, 17 (1979)). Defendant has not proven any one of these factors. As in *Robinson*, this assignment of error therefore must fail.

No error.

STATE OF NORTH CAROLINA v. TERESA RENEE BULLOCK

No. 469PA88

(Filed 7 February 1990)

Homicide § 30 (NCI3d) — first degree murder — premeditation and deliberation — submission of second degree murder not required

The evidence in a first degree murder case overwhelmingly supported the elements of premeditation and deliberation and did not require the trial court to instruct the jury on

the lesser included offense of second degree murder where it tended to show that defendant stated "Let's get mama" before going downstairs to initiate the fight which led to defendant suffocating her mother with a pillow; the fight was initiated by defendant when deceased was lying asleep on the couch; defendant planned to kill her mother two weeks prior to this occasion but "chickened out"; defendant placed different medications in her mother's beer and water in preparing to kill her; defendant specially prepared the pillow by wrapping it in plastic bags for the purpose of suffocating her mother; defendant killed her mother for money in that she knew her mother intended to remove her as the payee on her disability checks, and she called her grandmother to see if there were any insurance policies on the life of her mother; lethal blows were inflicted by defendant after the victim had been rendered helpless; and the victim suffered great psychological stress from "air hunger" and died a brutal death. The prior unsworn statement by a co-conspirator which was subsequently repudiated by her under oath at trial that the victim held a knife against defendant was insufficient to require an instruction on second degree murder.

Am Jur 2d, Homicide § 530.

APPEAL by defendant pursuant to writ of certiorari from judgments sentencing defendant to life imprisonment for her conviction of murder in the first degree and a term of ten years for her conviction of conspiracy, entered by *Phillips, J.*, at the 1 December 1986 session of Superior Court, NEW HANOVER County. Heard in the Supreme Court 15 November 1989.

Lacy H. Thornburg, Attorney General, by J. Michael Carpenter, Special Deputy Attorney General, and Debra Graves, Associate Attorney General, for the state.

H. Kenneth Stephens for defendant-appellant.

MARTIN, Justice.

Defendant, Teresa Renee Bullock, age 19, was convicted of murder in the first degree of her mother, Annie Mae Bullock, and felonious conspiracy to commit murder. We find defendant's assignment of error to be without merit and conclude that her trial and sentencing were free of prejudicial error.

The state's evidence tended to show the following:

Early in the morning on 27 April 1986, officers of the Wilmington Police Department responded to a telephone call from defendant stating that she had found her mother dead in an upstairs closet of her apartment. Upon arrival, the police discovered the badly decomposing body of Annie Mae Bullock, age 36. The body was transferred that same day to Chapel Hill where Assistant Chief Medical Examiner Dr. James Michael Sullivan performed an autopsy. The autopsy revealed that the cause of death was suffocation.

Living in the apartment at 1027 Eighth Street, Wilmington, North Carolina, were: Annie Mae Bullock and two of her children, Teresa and Geneva, age 17; a cousin, Fontella Whitaker, age 19; and a friend, Sabrina Wallace, age 19. Teresa's two-year-old child, Geneva's two-month-old infant and Sabrina's one-year-old baby were also residing in the apartment.

On 3 May 1986, Fontella Whitaker went to the police station and informed the police that Teresa Bullock had murdered her mother on 25 April 1986. Fontella admitted her involvement in the case and turned state's witness. Geneva Bullock and Sabrina Wallace also agreed to testify for the state against defendant in return for lesser charges being filed against them. In the next two days, defendant was arrested and indicted for murder in the first degree and conspiracy.

At trial, Geneva Bullock recalled that on the morning of 25 April 1986 defendant woke her up saying "Let's get mama." They went downstairs and found Ms. Bullock lying on the couch with her face to the wall. She was listening to the stereo. Defendant deliberately turned the stereo off and the television on. Ms. Bullock said she wanted to listen to the stereo and cut the television off. This happened several times and Ms. Bullock finally said, "If that's going to make you feel any better, you can leave it on." Defendant replied, "No, it won't make me feel any better until you fight me like you wanted to fight me last night." Finally Ms. Bullock sat back down because "she really didn't want to argue with Teresa." Defendant then called Geneva, Fontella and Sabrina into the kitchen and asked them to help her hit her mother in the head with a Pepsi-Cola bottle. All three of the girls refused because they were afraid. Defendant asserted, "I'm not scared, I'll hit her in the head with the bottle." Defendant returned to the room where

her mother was resting, renewed the argument and hit her mother in the head with the bottle. The victim yelled, "That's enough, I'm going to call the cops. You're going to jail now." As she turned to go to the telephone, she tripped over the coffee table and fell. Defendant immediately sat on her chest to hold her down and began choking her with her hands. At some point, the victim called out to Sabrina that "if you'll help me, I'll give you a hundred dollars." Defendant asked her sister to hand her the pillow which she had specially prepared by wrapping it in plastic bags and placed on the stairs. Geneva did so and defendant held it over her mother's face for "more than ten minutes." The victim struggled for approximately three to five minutes. Defendant then announced, "Mama's dead." At some point, defendant made the other girls touch the pillow so that they would all be involved in the murder. Sabrina and Fontella assisted Teresa in carrying the body upstairs where it was placed into the hall closet and covered with sheets and clothes.

Approximately two weeks prior to the murder, Geneva recalled going to the bank with defendant to withdraw money from her account. Upon finding that the account was empty, defendant said, "I'm going to get her." Geneva testified that on that very night defendant had a pillow and said she was going to use it to get her mother. Apparently, defendant "chickened out and said she couldn't do it."

At some point prior to her death, the victim, Annie Mae Bullock, had been diagnosed as suffering from a paranoid schizophrenic disorder and had been involuntarily committed for psychiatric treatment an undetermined number of times. As a result, she was unable to perform her job duties at Textilease and began receiving social security benefits. Because of her particular disability, it was determined that Annie Mae Bullock was incapable of handling her own business affairs. Therefore, Teresa Bullock, the oldest child living in the same household, was named as payee. On 22 April 1986, three days before her death, Annie Mae Bullock went to the local Social Security office and spoke with Wayne Lloyd, a claims representative. According to Mr. Lloyd, Ms. Bullock suspected her oldest daughter of spending the checks and wished to change her named payee. Mr. Lloyd called Teresa to inform her of her mother's wishes and to ask her the whereabouts of a retroactive disability check in the amount of $5,395.00. When defendant stated that she still held the check, Mr. Lloyd asked her to return it to him as soon as possible. The check was not returned.

Fontella Whitaker testified that one or two nights before Annie Mae Bullock's death, defendant had attempted to suffocate her mother but decided against it when she realized her face was turned to the wall. Sabrina Wallace also gave evidence of several occasions upon which defendant had obtained various types of pills to put into her mother's beer or water for the purpose of putting her to sleep. On the evening before the murder, "[s]he was upstairs in her—well, she already had it mixed and she was shaking the bottle."

Defendant did not testify and presented no evidence.

The jury found defendant guilty of first-degree murder and conspiracy. At the conclusion of the penalty phase of the trial, the jury unanimously recommended that defendant be sentenced to life imprisonment on the murder conviction. Accordingly, the trial judge sentenced defendant to life imprisonment on the first-degree murder conviction and imposed a ten year sentence on the conspiracy conviction. Defendant's writ of certiorari was allowed 9 February 1989.

Defendant's sole assignment of error on appeal is that the trial court erroneously failed to instruct the jury on the lesser included offense of murder in the second degree. We hold that it did not err.

Murder in the first degree is the unlawful killing of a human being with malice and premeditation and deliberation. *State v. Judge*, 308 N.C. 658, 303 S.E.2d 817 (1983). Premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation. *State v. Myers*, 299 N.C. 671, 263 S.E.2d 768 (1980). Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation. *State v. Hamlet*, 312 N.C. 162, 321 S.E.2d 837 (1984).

The trial court charged the jury that it was its duty to return a verdict of guilty of murder in the first degree based on premeditation and deliberation or a verdict of not guilty. No instruction was given on the lesser included offense of murder in the second degree. Defendant claims there was evidence that the victim was

"armed and provoked the fatal altercation" and that, as a result, her intent to kill was "formed under the provocation of the quarrel or struggle itself . . . " and, therefore, the jury should have been given the option of finding defendant guilty of second-degree murder. This Court has held that an instruction on murder in the second degree is required only when there is evidence to sustain such a verdict. *State v. Strickland*, 307 N.C. 274, 298 S.E.2d 645 (1983). One of the purposes of this rule is to eliminate compromise verdicts. Absent evidence supporting a verdict of the lesser offense, the trial court is not required to submit such a charge.

The state argues that all the evidence, direct and circumstantial, clearly supports the elements of premeditation and deliberation. In *State v. Jackson*, 317 N.C. 1, 343 S.E.2d 814 (1986), *judgment vacated*, 479 U.S. 1077, 94 L. Ed. 2d 133 (1987), we set forth several circumstances to be considered in determining whether a killing was done with premeditation and deliberation. Among them are: (1) want of provocation on the part of the deceased; (2) the conduct and statements of defendant before and after the killing; (3) threats and declarations of 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. 317 N.C. at 23, 343 S.E.2d at 827.

Our review of the record in light of the principles established in *Jackson* clearly reveals overwhelming evidence to support premeditation and deliberation and an absence of evidence to support murder in the second degree. There is no evidence of provocation by the deceased—all three eyewitnesses testified that the fight was initiated by defendant when deceased was lying asleep on the couch. During the trial, Geneva Bullock recanted her previous statement made to the police that her mother had a knife and was holding it against her sister. There is evidence that defendant stated "Let's get mama" before going downstairs to initiate the fight which led to defendant suffocating her mother with a pillow. There is evidence that defendant planned to kill her mother two weeks prior to this occasion but "chickened out." There is evidence that defendant placed different medications in her mother's beer and water in preparing to kill her. There is evidence that defendant specially prepared the pillow by wrapping it in plastic bags for the purpose of suffocating her mother. As for motive, there is

evidence that defendant killed her mother for money: she knew her mother intended to remove her as the payee on her disability checks, she offered to split the disability check in the amount of $5,395.00 with her sister, Geneva, after the death of her mother, and she called her grandmother to see if there were any insurance policies on the life of her mother. The ill-will and previous difficulty between defendant and the victim is clearly illustrated by the above. There is evidence that lethal blows were inflicted by defendant after the victim had been rendered helpless. The pathologist testified that the victim suffered great psychological stress from "air hunger" and died a brutal death. As we have stated previously on similar facts:

> The record before us discloses a brutal and senseless murder committed without justification or excuse. There is evidence of preparation. . . . As with any victim of strangulation, death came slowly. To suggest that the murderer did not act with premeditation and deliberation, on the evidence presented, if believed, is to invite total disregard of the facts.

State v. Strickland, 307 N.C. at 293, 298 S.E.2d at 658.

Based on the overwhelming evidence supporting premeditation and deliberation, the trial court correctly instructed the jury to return a verdict of murder in the first degree or not guilty. The prior unsworn statement by a co-conspirator which is subsequently repudiated by her under oath at trial is insufficient grounds to require an instruction on murder in the second degree.

In defendant's trial we find

No error.

STATE OF NORTH CAROLINA v. EDWARD LUTHER HOLLEY

No. 131A88

(Filed 7 February 1990)

1. Rape and Allied Offenses § 6 (NCI3d) — first-degree sexual offense — instructions

There was no plain error in a prosecution for first-degree sexual offense where the jury was charged that defendant

would be guilty if he committed the alleged crime with either his finger or his tongue and defendant contended that the jury should have been charged to unanimously decide whether the defendant had committed the offense with his finger or his tongue.

Am Jur 2d, Assault and Battery § 41; Sodomy §§ 19, 21, 95.

2. **Rape and Allied Offenses § 7 (NCI3d)— first-degree sexual offense—life sentence—not cruel and unusual**

A life sentence for first-degree sexual offense does not violate the federal and state prohibitions against the imposition of cruel and unusual punishment.

Am Jur 2d, Sodomy § 15.

APPEAL as of right by the defendant from a judgment sentencing him to life in prison for first-degree sexual offense, entered by *Winberry, J.*, in the Superior Court, CHOWAN County, on 20 January 1987. Heard in the Supreme Court on 10 October 1989.

Lacy H. Thornburg, Attorney General, by Debra C. Graves, Associate Attorney General, for the State.

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

MITCHELL, Justice.

The defendant was tried and convicted on a proper bill of indictment charging him with one count of first-degree sexual offense. The trial court entered a sentence of life in prison for that offense. On appeal the defendant contends that the trial court's jury instructions were defective and that the sentence of life for a sexual crime is cruel and unusual punishment. We do not agree.

At trial the State's evidence tended to show that during the evening of 10 October 1986 and the early morning of 11 October 1986, the defendant, age thirty-three, committed sexual acts on the ten-year-old victim. The victim, the defendant's stepdaughter, testified that at different times on those dates the defendant placed his finger and his tongue inside her vagina. She testified that she cried during both encounters.

The victim's mother testified that the defendant, her husband, took advantage of the victim. She testified that the defendant had

the victim place her vagina on his mouth. At another time, the defendant put his "finger in her [the victim's] dress . . . ."

On 13 October 1986, Officer Gregory Bonner, of the Edenton Police Department, interviewed the defendant. He testified that the defendant stated that he was drunk on the night of the alleged sexual offense. The defendant admitted that his finger slipped into the victim that night while he bathed her. In addition, the defendant stated that while he was in bed with his wife, he placed his mouth on the victim's vagina thinking that she was his wife.

The State offered as corroborative evidence the testimony of Karen Fleetwood, a social worker. Fleetwood testified that the victim told her the defendant had put his finger and tongue inside her vagina.

The defendant testified in his own behalf and denied intentionally sexually abusing the victim. The defendant testified that he was asleep and awoke to find the victim sitting on his face. At first, he thought it was his wife. He denied placing his finger inside the victim's vagina.

[1] By his first assignment of error, the defendant contends that the trial court erred in its instructions on first degree sexual offense. The trial court charged in part that "a sexual act means any penetration, however slight, by an object into the genital opening of a person's body." The defendant argues that the instruction should have been more detailed in order to make it clear that the jury must not convict the defendant unless the members of the jury were unanimous as to whether the defendant penetrated the victim's vagina with his tongue or with his finger. However, the defendant failed to object to the trial court's instructions or request additional instructions at trial.

Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure provides: "[n]o party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict . . . ." Rule 10(b)(2), however, has been mitigated by our recognition of the plain error rule. *State v. Joplin*, 318 N.C. 126, 347 S.E.2d 421 (1986). Even in the absence of an objection at trial, this Court may review the trial court's jury charge for plain error. *Id.* Before deciding that an instruction amounts to plain error, however, this Court must be convinced that absent the error the jury probably would

have reached a different verdict. *Id.*; *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378 (1983).

The jury in the present case found the defendant guilty of a first-degree sexual offense after the trial court correctly instructed it to do so if it found the defendant committed the alleged crime with either his finger or his tongue. We are not convinced that the result of this trial would have been different had the trial court instructed that the jury must unanimously decide whether the defendant had committed the offense charged by penetrating the victim's vagina with his finger or with his tongue. Even if it is assumed *arguendo* that the instruction the defendant now argues for would have been correct, failure to give the instruction did not amount to plain error.

[2] By his final assignment of error, the defendant contends that a life sentence for a first-degree sexual offense violates federal and state prohibitions against the imposition of cruel and unusual punishment. We have previously held to the contrary. *State v. Spaugh*, 321 N.C. 550, 364 S.E.2d 368 (1988); *State v. Cook*, 318 N.C. 674, 351 S.E.2d 290 (1987); *State v. Higginbottom*, 312 N.C. 760, 324 S.E.2d 834 (1985). This contention is without merit.

The defendant received a fair trial free of prejudicial error.

No error.

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

BAXLEY v. PREFERRED SAVINGS BANK

No. 541P89

Case below: 96 N.C.App. 275

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 7 February 1990.

BRADY v. GREAT AMERICAN INS. CO.

No. 162P89

Case below: 92 N.C.App. 755

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 7 February 1990.

BRITT v. UPCHURCH

No. 551PA89

Case below: 96 N.C.App. 257

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 7 February 1990.

CODY v. SNIDER LUMBER CO.

No. 573PA89

Case below: 96 N.C.App. 293

Petition by defendants for writ of certiorari to the North Carolina Court of Appeals allowed 7 February 1990.

DAVIS AND DAVIS REALTY CO. v. RODGERS

No. 571P89

Case below: 96 N.C.App. 306

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 February 1990.

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

FULLER v. COPELAND FABRICS

No. 15P90

Case below: 96 N.C.App. 512

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 February 1990.

GUILFORD MILLS, INC. v. POWERS

No. 429PA89

Case below: 95 N.C.App. 417

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 7 February 1990.

HENDRICKS v. HENDRICKS

No. 22P90

Case below: 96 N.C.App. 462

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 7 February 1990.

IN RE ASSESSMENT AGAINST REYNOLDS TOBACCO CO.

No. 553P89

Case below: 96 N.C.App. 267

Petition by Secretary of Revenue for discretionary review pursuant to G.S. 7A-31 denied 7 February 1990.

IN RE ESTATE OF FLETCHER

No. 546P89

Case below: 96 N.C.App. 275

Petition by Carol Fletcher Lanier for discretionary review pursuant to G.S. 7A-31 denied 7 February 1990.

KING v. CAPE FEAR MEM. HOSP.

No. 569P89

Case below: 96 N.C.App. 338

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 February 1990.

LOWDER v. ALL STAR MILLS, INC.

No. 13P90

Case below: 96 N.C.App. 513

Petition by several defendants for discretionary review pursuant to G.S. 7A-31 dismissed 7 February 1990.

MURRAY v. JUSTICE

No. 540P89

Case below: 96 N.C.App. 169

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 7 February 1990.

STATE v. DORSEY

No. 558P89

Case below: 96 N.C.App. 513

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 February 1990.

STATE v. HAIRE

No. 555P89

Case below: 96 N.C.App. 209

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 7 February 1990.

STATE v. HINTON

No. 488P89

Case below: 95 N.C.App. 683

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 February 1990.

STATE v. JAMES

No. 548P89

Case below: 96 N.C.App. 275

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 February 1990.

STATE v. KISER

No. 6P90

Case below: 96 N.C.App. 514

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 February 1990.

STATE v. MANNING

No. 563PA89

Case below: 96 N.C.App. 502

Petition by the Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 7 February 1990.

STATE v. OUTLAW

No. 543P89

Case below: 96 N.C.App. 192

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 February 1990.

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

STATE v. SMITH

No. 544P89

Case below: 96 N.C.App. 235

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 February 1990.

STATE v. TESSENAIR

No. 51P90

Case below: 97 N.C.App. 334

Petition by defendant for writ of supersedeas and temporary stay denied 6 February 1990.

STATE v. THOMAS

No. 3P90

Case below: 96 N.C.App. 515

Motion by the Attorney General to dismiss appeal for lack of significant public interest allowed 7 February 1990. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 February 1990. Petition by defendant for writ of supersedeas denied and temporary stay dissolved 7 February 1990.

STATE OF NORTH CAROLINA v. FRED HOWARD COFFEY, JR.

No. 613A87

(Filed 1 March 1990)

1. **Criminal Law § 396 (NCI4th)— capital trial—court's comments on nature of charge—failure to mention lesser included offenses**

Where the trial court in a first degree murder case informed prospective jurors of the nature of the charge against defendant and outlined the procedures followed in a trial of a capital case, the court's failure to mention second degree murder as a possible verdict did not amount to an expression of opinion that second degree murder would not be a possible verdict.

Am Jur 2d, Homicide §§ 460, 469.

2. **Criminal Law § 34.4 (NCI3d)— evidence of other crimes—when admissible**

Evidence of other offenses is admissible so long as it is relevant to any fact or issue other than the character of the accused. N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Evidence §§ 320, 321.

3. **Criminal Law § 34.1 (NCI3d)— evidence of other crimes—exception to admissibility**

Relevant evidence of other crimes, wrongs or acts by a defendant is admissible under Rule 404(b) subject to an exception requiring its exclusion if its only probative value is to show that defendant has the propensity or disposition to commit an offense of the nature of the crime charged.

Am Jur 2d, Evidence §§ 320, 321.

4. **Criminal Law § 34.7 (NCI3d)— prior indecent act by defendant—admissibility to show motive**

In a prosecution of defendant for the murder of a ten-year-old girl, evidence that defendant admitted to the mother of a three-year-old girl and her minister that he masturbated in the presence of the three-year-old girl at a time prior to the death of the victim was admissible to support the State's theory of defendant's motive for the murder.

Am Jur 2d, Evidence §§ 324, 325.

5. Criminal Law § 34.7 (NCI3d)— felony murder—prior indecent act by defendant—admissibility to show felonious intent for kidnapping

In a prosecution of defendant for first degree murder of a ten-year-old girl allegedly committed after premeditation and deliberation and during the perpetration of the felony of kidnapping, evidence that defendant admitted to the mother of a three-year-old girl and her minister that he masturbated in the presence of the three-year-old girl at a time prior to the death of the victim was relevant and admissible to support the State's theory of kidnapping that defendant took the victim for the purpose of facilitating his commission of the felony of taking indecent liberties with a child. N.C.G.S. § 14-39(a).

Am Jur 2d, Evidence §§ 324, 325.

6. Criminal Law § 34.7 (NCI3d)— admission of prior indecent act by defendant—exclusion of others—discretion under Rule 403

The trial court properly exercised its discretion under N.C.G.S. § 8C-1, Rule 403 in allowing testimony with regard to one prior incident in which defendant was alleged to have taken indecent liberties with a child and in excluding, as needlessly cumulative, testimony that defendant had taken indecent liberties with two other children.

Am Jur 2d, Evidence §§ 324, 325.

7. Criminal Law § 73.2 (NCI3d)— statements of child—admission for limited purposes—not inadmissible hearsay

A mother's testimony that her three-year-old daughter told her that defendant had masturbated in front of her was not inadmissible hearsay where it was admitted for the limited purpose of explaining the mother's subsequent conduct. Nor was testimony by the mother's pastor that the mother had told him about the child's statement concerning defendant inadmissible hearsay where it was admitted for the limited purpose of corroborating the prior testimony of the mother.

Am Jur 2d, Evidence § 500.

8. Homicide § 21.6 (NCI3d)— felony murder—kidnapping—sufficiency of evidence

The State's evidence was sufficient to support defendant's conviction of first degree murder of a ten-year-old girl under

the theory that the murder was committed during the perpetration of the felony of kidnapping.

Am Jur 2d, Homicide § 72.

9. **Criminal Law § 627 (NCI4th); Homicide § 21.5 (NCI3d)— first degree murder—identification evidence not inherently incredible**

The State's evidence was not inherently incredible so as to be insufficient to support defendant's conviction of first degree murder of a child under the theory of premeditation and deliberation because there was an extended period between the time the witnesses observed defendant with the victim at the crime scene and their identification at trial, or because the witnesses were very young and some of them viewed him at a distance, where each of the witnesses who positively identified defendant had the opportunity to observe him for varying lengths of time in full daylight at reasonably close range.

Am Jur 2d, Homicide § 435.

10. **Constitutional Law § 31 (NCI3d)— indigent defendant—sufficiency of funds allowed for textile science expert**

An indigent defendant was not denied the opportunity to rebut the State's evidence by the trial court's ruling allowing only $250 rather than the $500 requested for employment of a textile science expert where defense counsel indicated to the trial court at the hearing on defendant's motion that $250 would be a sufficient amount for retaining an expert in textile science for the purposes for which he sought the assistance of an expert; defendant's only specific assertion of the need for the expert was that such an expert "may well have testified that 90% of all vans and autos have factory installed carpets with fibers similar to those found on the victim," but defendant failed to suggest why the amount allowed by the trial court was insufficient to allow him to discover any such evidence and introduce it through an expert; and defendant thus failed to make the requisite showing of specific need for any more funds for the assistance of an expert in textile science than the trial court allowed for this purpose.

Am Jur 2d, Criminal Law §§ 955, 1006.

11. Criminal Law § 73.3 (NCI3d)— intent to do future act—admissibility of victim's statements

Testimony as to statements made by a child murder victim to two witnesses that she planned to go fishing with "a nice gray-haired man" on the day she disappeared was admissible under N.C.G.S. § 8C-1, Rule 803(3) as evidence of the victim's mental or emotional condition at the time she made the statements.

Am Jur 2d, Evidence § 500.

12. Criminal Law § 146.1 (NCI3d)— exclusion of evidence—absence of formal offer—question not presented on appeal

Defendant's contention that the trial court improperly excluded evidence tending to show that another person committed the crime charged and that the trial court erred by preventing his making a proper record of the excluded evidence for purposes of appellate review was not before the appellate court for review where the record shows that defendant never actually attempted to introduce any evidence tending to show that another person committed the crime charged because of a conscious election against introducing evidence in order to retain his right to make the last closing argument to the jury.

Am Jur 2d, Evidence § 441; Trial §§ 128-131.

13. Criminal Law § 66.19 (NCI3d)— admissibility of identification testimony—pretrial hearing—exclusion of question about victim's clothing

In a pretrial hearing on defendant's motion to suppress identification testimony in a murder trial, the trial court did not err in refusing to allow defendant to cross-examine an identification witness about the victim's clothing at the time he saw her with defendant since the court could properly limit defendant's cross-examination of the witness to issues concerning the reliability and admissibility of his identification of defendant. N.C.G.S. § 15A-977(a).

Am Jur 2d, Evidence §§ 278, 371, 371.8, 372, 373, 1143.

14. Criminal Law § 66.18 (NCI3d)— identification testimony—suppression hearing—refusal to continue to obtain television tapes

The trial court did not err in refusing to continue the voir dire hearing on the admissibility of identification testimony

until television tapes could be secured and presented by defendant to the court after several witnesses testified that they had seen the television broadcasts showing defendant before they identified him where a full inquiry was made as to the reliability of each witness's identification of defendant; each witness who had seen the broadcasts gave some description of what they had seen and said that the broadcasts had not influenced their identification of defendant; and the evidence supported the trial court's findings and conclusions that each witness identified defendant based upon his or her independent recollection of seeing defendant with the victim and was free from any possible taint from the television broadcasts.

Am Jur 2d, Evidence §§ 278, 371, 371.8, 372, 373, 1143.

15. Criminal Law § 89.3 (NCI3d)— prior statements of witnesses —corroboration

Prior statements of three witnesses concerning their observation of the victim and defendant at a lake on the day the victim was killed did not conflict with their trial testimony and were properly admitted as corroborative of their trial testimony. Any new information contained in a witness's prior statement but not referred to in his or her trial testimony may be admitted as corroborative evidence if it tends to add weight or credibility to that testimony.

Am Jur 2d, Evidence §§ 278, 371, 371.8, 372, 373, 1143.

16. Criminal Law § 461 (NCI4th)— prosecutor's jury argument— matters not in evidence—no gross impropriety

In a prosecution of defendant for murder of a ten-year-old girl, inferences drawn by the prosecutor in his jury argument concerning a prior incident of indecent liberties with a three-year-old girl were supported by the evidence. Furthermore, assuming arguendo that the evidence and inferences drawn therefrom did not support the prosecutor's arguments that defendant did not seek counseling after being confronted about the prior incident, that only one witness viewed him on television prior to identifying him when three actually did so, and that a potential witness was not called because he could not refute the State's evidence, the statements were not so grossly

improper that the trial court abused its discretion by failing to intervene ex mero motu.

Am Jur 2d, Trial §§ 251, 258-262.

17. Criminal Law § 468 (NCI4th)— jury argument—God and providence—no gross impropriety

The prosecutor's jury argument that it was "providential" that the police were able to turn up some of the evidence which they collected was used and understood as meaning "fortuitous" and was not improper. Furthermore, the prosecutor's remarks about God were not so grossly improper that the trial court abused its discretion by failing to intervene.

Am Jur 2d, Trial §§ 251, 258-262.

18. Criminal Law § 1324 (NCI4th)— capital case—death penalty—writing signed by jury foreman—necessity for finding of insufficiency of mitigating circumstances

The jury in a first degree murder case was erroneously permitted to recommend a sentence of death without returning a writing signed by the foreman on behalf of the jury showing, inter alia, that the mitigating circumstances were insufficient to outweigh the aggravating circumstances found as required by N.C.G.S. § 15A-2000(c)(3). Therefore, the sentence of death is vacated and the case is remanded for a new sentencing hearing even though the trial court gave correct oral instructions to the jury concerning the order and form of the issues the jury must answer in determining whether to recommend a sentence of death or life imprisonment.

Am Jur 2d, Homicide §§ 541, 542, 546.

APPEAL of right by the defendant from a judgment sentencing him to death upon his conviction for first-degree murder, entered by *Snepp, J.*, in the Superior Court, MECKLENBURG County, on 20 October 1987. Heard in the Supreme Court on 14 September 1989.

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

Walter H. Bennett, Jr., for the defendant appellant.

MITCHELL, Justice.

The defendant was tried on a true bill of indictment at the 5 October 1987 Schedule A Criminal Session of Superior Court, Mecklenburg County, and was convicted of murder in the first degree. The jury recommended and the trial court entered a sentence of death. On appeal the defendant brings forward numerous assignments of error. We conclude that the defendant's trial and conviction were free from prejudicial error. We further conclude, however, that errors during the sentencing proceeding in this case require that the sentence of death be vacated and that this case be remanded to the Superior Court for a new sentencing proceeding under N.C.G.S. § 15A-2000.

The State's evidence at trial tended to show that the body of the ten-year-old victim, Amanda Ray, was found in a wooded area near a lake in Mecklenburg County on the afternoon of 19 July 1979. An autopsy revealed that her right eye was blackened and there were small bruises on the front and left lateral side of her neck. She had died of traumatic asphyxiation. Hair and fiber samples were removed from her body and from the crime scene. Microscopic examination revealed two blue fibers, eight animal hairs, and hair consistent with Amanda's head hair.

An extensive investigation was conducted during the months following Amanda's death in 1979. The investigation was reopened later, and the defendant, Fred Howard Coffey, Jr., was charged with murder and taken into custody in 1987.

The State's evidence tended to show that the victim, Amanda Ray, lived with her mother, Ann Aker, in the Woodbury Hills Apartments in Charlotte. Amanda's mother worked during the day and left the child at home. A neighbor, Shirley Burnett, looked after Amanda while her mother worked.

Several neighbors who were children at the time of Amanda's death testified for the State. Jerry Wayne Martin testified that he and Amanda went fishing at Briar Creek on 17 July 1979. While they were fishing, a tall skinny man with salt and pepper hair approached and spoke with them for fifteen to twenty minutes. Afterward, the man, who Jerry Martin testified was the defendant, walked off in the direction of the Jamestowne Apartments. The defendant's ex-wife testified that she and the defendant lived in those apartments at that time.

Tanya Ross testified that she saw Amanda at the swimming pool of the Woodbury Hills Apartments talking with the defendant on 18 July 1979. Tanya saw Amanda leave the pool area and heard her tell the defendant that she would call her mother. Amanda's mother testified that Amanda called her at work that day. Amanda said she was going fishing with a nice gray-haired man, but her mother asked her not to go. In addition, Shirley Burnett told Amanda that she could not go fishing with the gray-haired man. When Amanda came back to the pool, Tanya noticed that Amanda had on blue jean cut-off shorts and a shirt. Tanya testified that Amanda then left with the defendant.

Pamela Dowd testified that on 18 July 1979, Amanda asked her if she wanted to go fishing with a man. Pamela could not go fishing, but she saw the man. She testified that the defendant was the man Amanda asked her to go fishing with. Later, Pamela saw a white van outside the apartment complex and heard Amanda say, "I will see you later."

Wendy Johnson testified that she saw Amanda and the defendant fishing on 18 July 1979. Amanda and the defendant were still fishing when Wendy left them.

Raymond Claiborne testified that he, his brother, and his mother went fishing at a lake on 18 July 1979. At approximately 1:30 or 2:00 p.m., he saw a light blue van pull up to the lake and he saw the defendant and a girl. The girl was wearing shorts and a top. She sat in a chair and fished, but the defendant did not fish. Raymond observed the defendant, who was tall with mixed gray hair, and the girl for the rest of the afternoon. Between 5:00 and 6:00 p.m., Raymond and his family left the lake. As they left, they met a van at an intersection. The defendant was driving the van and waved them on, but he did not follow them as they left. The van the defendant was driving was a light blue Ford with horizontal blue stripes and a dark blue carpet on the inside.

Floyd Claiborne testified that he saw a man and a girl at a lake on 18 July 1979. The man was slender with gray hair. He stated that the man drove a van with a blue interior. Floyd identified the girl he saw at the lake as Amanda Ray. He testified that the defendant resembled the man with Amanda.

Mabel Tanner, Raymond and Floyd's mother, testified that she saw the defendant driving a van at the lake on 18 July 1979. She got a good look at his face at that time.

Shortly after Amanda's body was found at the lake, police officers spoke with the witnesses who had seen her there on 18 July 1979. An artist made a composite drawing of the suspect and the van the witnesses had seen, based upon their descriptions. Thereafter, the composite drawing was published in newspapers.

Having seen the composite drawing in a newspaper, Janet Ashe called the police in July of 1979. She told the police that she believed the man in the drawing was Fred Coffey, the defendant. Janet Ashe knew the defendant well. At times she had let him take her children to the park for fishing or to the swimming pool. Further, she testified about an incident in May 1979 during which her three-year-old daughter said the defendant had masturbated in front of her.

The defendant's ex-wife, Edith Coffey, testified that they lived in the Jamestowne Apartments during July 1979. At that time, they owned a small dog which frequently stayed on their sofa. In September 1986, Ms. Coffey still owned the sofa, but the dog was dead. Hair samples were taken from the sofa, which had not been cleaned since 1976, in order to match them with hair samples taken from Amanda's body.

Edith Coffey also testified that the defendant had owned a white Dodge van in 1979, and the dog at times had been in the van. Police located the van, which the defendant no longer owned, through sales records. When they discovered that the carpet in the van was the original, they took fiber samples and vacuumed the carpet.

Dr. Louis Portis, an expert in trace evidence, compared the fibers and hairs taken from the sofa and van to those taken from Amanda's body several years earlier. Dr. Portis' examination revealed that twenty-three of the sixty-six dog hairs found in the van were consistent with hairs on Amanda's clothing when her body was found. Eight dog hairs from the sofa were consistent with hairs from the van and hairs found on Amanda's clothing when her body was discovered. The carpet fibers from the van matched the fibers found on Amanda's clothing and could have had a common origin.

On 25 September 1986, Officer R. H. Bernstein of the Mecklenburg County Police Department interviewed the defendant in the Caldwell County Jail. The defendant confirmed that he had owned a small dog and a white and blue Dodge van in 1979. With reference

to Amanda Ray's death, the defendant told Bernstein "[y]ou can't prove it. You can't prove I am involved."

At trial, the defendant did not present evidence. The jury found the defendant guilty of first-degree murder based on the theory of premeditation and deliberation and the theory of felony murder during a kidnapping. A sentencing proceeding was then conducted, at the end of which the jury recommended a sentence of death. The trial court entered judgment sentencing the defendant to death.

Additional evidence and other matters relevant to the defendant's specific assignments of error are discussed at other points in this opinion.

[1] By an assignment of error, the defendant contends that the trial court committed reversible error in failing to tell prospective jurors during jury selection that a verdict finding him guilty of second-degree murder was a possibility. The defendant argues that this omission amounted to the trial court's expression of an opinion to the jury that second-degree murder would not be a possible verdict in this case.

When taken in context, however, the trial court's comments during jury selection merely informed the prospective jurors of the nature of the charge against the defendant and outlined the procedures followed in the trial of a capital case. The trial court's failure to mention lesser included offenses during jury selection did not amount to an expression of opinion. This assignment of error is without merit. *See State v. Smith*, 320 N.C. 404, 412, 358 S.E.2d 329, 333 (1987).

[2] By another assignment of error, the defendant contends that the trial court violated Rules 403 and 404(b) of the North Carolina Rules of Evidence by admitting evidence tending to show that the defendant masturbated in the presence of a three-year-old girl at a time prior to the death of the victim in this case. We do not agree.

At trial, Janet Ashe testified that she frequently allowed the defendant to take her children, as the defendant's wife was her best friend. Janet Ashe testified that in May 1979, she allowed her three-year-old daughter, Angel Ashe, to go off with the defendant. When Angel returned home, she disclosed that the defendant had masturbated in front of her. Janet Ashe confronted the defendant, and he admitted that he had exposed himself to the child

and masturbated in front of her. Janet Ashe demanded that the defendant speak with her pastor about seeking mental health counseling. Reverend James Hall, Janet Ashe's minister, testified that the defendant admitted to him that he had masturbated in front of the child but did not agree to seek counseling.

The defendant argues that Rule 404(b) of the North Carolina Rules of Evidence required the trial court to exclude evidence concerning the incident with Angel Ashe. N.C.G.S. § 8C-1, Rule 404(b) (1988). Under this assignment of error, the defendant challenges the admissibility of this evidence on the ground that its only relevance was its tendency to show the defendant's propensity to molest children. He argues that masturbation in front of a child is not sufficiently similar to the murder of a child to be relevant as evidence to show intent or motive involving the death of the victim in this case. Therefore, the defendant argues that Rule 404(b) required exclusion of such evidence.

As authority for his arguments under this assignment of error, the defendant relies upon *State v. McClain*, 240 N.C. 171, 81 S.E.2d 364 (1954), which he contends established a general rule of exclusion of evidence of a defendant's other crimes, wrongs or acts. As the trial of this case commenced after 1 July 1984, however, it was controlled by the North Carolina Rules of Evidence. Under Rule 404(b), it is not the case—as we *sometimes* stated under the authority of *McClain*—that evidence of other crimes, wrongs or acts by a defendant falls under a "general rule of exclusion" subject to certain "exceptions." *Cf.* 1 Brandis on North Carolina Evidence § 91 (3d ed. 1988) (reviewing the somewhat erratic nature of our statements of the applicable rule in our previous opinions and, at times, within 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).

[3] Recent cases decided by this Court under Rule 404(b) state a clear general rule of *inclusion* of relevant evidence of other crimes,

wrongs or acts by a defendant, 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.

> 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), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988) (quoting *State v. Morgan*, 315 N.C. 626, 637, 340 S.E.2d 84, 91 (1986)). Additionally, our decisions, both before and after the adoption of Rule 404(b), have been "markedly liberal" in holding evidence of prior sex offenses "admissible for one or more of the purposes listed [in the Rule] . . . , especially when the sex impulse manifested is of an unusual or 'unnatural' character." 1 Brandis on North Carolina Evidence § 92 (3d ed. 1988).

Prior to ruling that evidence of the Angel Ashe incident was admissible, the trial court conducted a *voir dire* hearing. During that hearing the trial court heard the testimony of Janet Ashe concerning the incident involving her daughter Angel Ashe and the defendant. During the *voir dire* hearing the State also presented evidence tending to show that on two other occasions the defendant had taken young children to the lake and exposed himself to them and fondled their genitals. At the conclusion of the *voir dire* hearing, the trial court ruled that evidence concerning the incident involving Angel Ashe was not excludable under Rule 404(b), since it tended to show the intent of the defendant to commit an underlying felony supporting the felony murder theory and tended to show a possible motive of the defendant for killing the victim. The trial court also concluded that the probative value of such evidence outweighed its prejudicial effect and, as a result, its exclusion was not required by Rule 403 of the North Carolina Rules of Evidence. The trial court further ruled, however, that the evidence tending to show that the defendant had taken indecent liberties with two other children was inadmissible, because its cumulative effect, when taken with evidence of the incident involving Angel Ashe, would be more prejudicial than probative. We conclude that the trial

court correctly ruled that Rules 403 and 404(b) did not require the exclusion of evidence concerning the incident involving Angel Ashe.

[4] The defendant was tried for the first-degree murder of Amanda Ray upon both the theory of premeditation and deliberation and the theory that the killing was committed during the perpetration of a felony. Evidence of the incident involving Angel Ashe tended to show that when Janet Ashe and her minister confronted the defendant, he admitted he had masturbated in her child's presence. From this evidence, the jury reasonably could have inferred that the confrontation with Janet Ashe and her minister after the defendant had taken indecent liberties with Angel Ashe made the defendant particularly aware of and sensitive to the fact that any young child with whom he took indecent liberties might report him. The jury also could reasonably infer that such concerns provided the defendant with a motive for killing the victim in the present case.

Ordinarily, evidence tending to support a theory of the case being tried is admissible. *See State v. McElrath*, 322 N.C. 1, 366 S.E.2d 442 (1988). In the present case, the State was not required to prove a motive for the murder of the victim. "The existence of a motive is, however, a circumstance tending to make it more probable that the person in question did the act, hence evidence of motive is always admissible where the doing of the act is in dispute." 1 Brandis on North Carolina Evidence § 83 (3d ed. 1988). Here, evidence of the incident involving Angel Ashe tended to support the State's theory of the defendant's motive for the murder, and the trial court did not err in allowing its introduction for that purpose.

[5] The trial court also admitted evidence of the incident involving Angel Ashe as evidence tending to establish the defendant's guilt of first-degree murder under the felony murder theory. Specifically, the trial court ruled that such evidence tended to show that the defendant had the necessary specific intent to establish the underlying felony relied upon by the State in this case. We conclude that the trial court did not err in this regard.

The State tried this case upon the theory that the defendant had killed the victim Amanda Ray during the perpetration of the felony of kidnapping. In order to establish the underlying felony of kidnapping, the State was required to establish that the defend-

ant took the child victim for one of the purposes specified in N.C.G.S. § 14-39(a). The State contended at trial that the defendant had taken the victim for the purpose of facilitating his commission of the felony of taking indecent liberties with a child. N.C.G.S. § 14-202.1 (1986). The testimony of Janet Ashe and Reverend Hall that the defendant had admitted to them that he masturbated in the presence of three-year-old Angel Ashe was evidence from which the jury could reasonably infer that the defendant took the victim in this case with the intent to commit indecent liberties with her. In its final instructions, the trial court correctly instructed the jury that it should limit its consideration of this evidence, when considering the defendant's guilt under the felony murder theory, to the question of whether the defendant had such a felonious intent. The evidence was relevant and admissible for this purpose, even though it also tended to show the defendant's character and propensity to commit such acts. *State v. Weaver*, 318 N.C. at 403, 348 S.E.2d at 793; N.C.G.S. § 8C-1, Rule 404(b) (1988).

[6] The defendant also argues in support of this assignment of error that the probative value of evidence concerning the incident involving Angel Ashe was substantially outweighed by the danger of unfair prejudice it created, and that the trial court was required to exclude it for this reason under Rule 403 of the North Carolina Rules of Evidence. Whether to exclude evidence under Rule 403 is a matter left to the sound discretion of the trial court. *State v. Cotton*, 318 N.C. 663, 351 S.E.2d 277 (1987); *State v. Penley*, 318 N.C. 30, 347 S.E.2d 783 (1986); *State v. Mason*, 315 N.C. 724, 340 S.E.2d 430 (1986). The trial court exercised its discretion under Rule 403 and excluded, as needlessly cumulative, testimony to the effect that the defendant had taken indecent liberties with two other children. Evidence which is probative of the State's case necessarily will have a prejudicial effect upon the defendant; the question is one of degree. *State v. Mercer*, 317 N.C. 87, 94, 343 S.E.2d 885, 889 (1986). We conclude that the trial court did not abuse its discretion under Rule 403 by allowing testimony with regard to only one of the prior incidents in which the defendant was alleged to have taken indecent liberties with children. This assignment of error is without merit.

[7] By another assignment, the defendant argues that the trial court erred in admitting portions of the evidence tending to show that the defendant had masturbated in the presence of Angel Ashe, because those portions of the evidence were in the form of inad-

missible hearsay. On two occasions during the trial, the trial court allowed witnesses to testify concerning Angel's statements. On each occasion, the trial court allowed such testimony for a narrow and proper purpose. The trial court allowed Janet Ashe, Angel's mother, to testify as to what Angel had told her about the incident for the limited purpose of explaining Janet Ashe's subsequent actions. In addition, the trial court instructed the jury that it could not consider that part of Janet Ashe's testimony as evidence tending to prove the truth of Angel's statement to her mother. Later, Reverend James Hall, the Ashes' pastor, was allowed to testify that Janet Ashe had told him about Angel's statement to her concerning the defendant. This part of Reverend Hall's testimony was admitted for the limited purpose of corroborating the prior testimony of Janet Ashe. The defendant contends that such testimony by Janet Ashe and Reverend Hall should have been excluded as hearsay. We do not agree.

In this jurisdiction, " '[h]earsay' 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). When evidence of such statements by one other than the witness testifying is offered for a proper purpose other than to prove the truth of the matter asserted, it is not hearsay and is admissible. Specifically, "statements of one person to another are admissible to explain the subsequent conduct of the person to whom the statement was made." *State v. White*, 298 N.C. 430, 437, 259 S.E.2d 281, 286 (1979) (decided prior to the enactment of the North Carolina Rules of Evidence, N.C.G.S. Ch. 8C).

Janet Ashe testified that Angel's statement about the defendant made her angry and motivated her to call the police and confront the defendant and demand that he get counseling from her pastor, James Hall. That part of Janet Ashe's testimony concerning Angel's statement to her was admitted solely to explain Janet's subsequent conduct. The statement was not admitted to prove that the defendant masturbated in the presence of the child, but to show why Janet confronted the defendant. That part of Reverend Hall's testimony concerning Angel's statement was admitted solely for the purpose of corroborating Janet Ashe's testimony in this regard. Neither the testimony of Janet Ashe nor that of Reverend Hall concerning Angel's statement was hearsay for the purpose for which it was admitted. This assignment of error is without merit.

[8] By his next assignment of error, the defendant argues that the evidence presented at trial was insufficient to support his conviction for first-degree murder based on the felony murder theory. He argues that without the testimony of Janet Ashe, there is no evidence that he took the victim with a felonious intent. The defendant reasons that Janet Ashe's testimony was inadmissible and, therefore, there was no admissible evidence of an underlying felony. As we have fully discussed, Janet Ashe's testimony that the defendant told her he had exposed himself and masturbated in the presence of her three-year-old daughter was admissible as evidence of the defendant's felonious intent in kidnapping the victim. Therefore, we conclude that there was sufficient evidence to support the defendant's conviction for first-degree murder under the felony murder theory. This assignment of error is without merit.

[9] In another assignment of error, the defendant contends that the evidence was insufficient to support his conviction for first-degree murder under the theory of premeditation and deliberation. Relying on *State v. Miller*, 270 N.C. 726, 154 S.E.2d 902 (1967), the defendant argues that the evidence at trial was insufficient to support his conviction because the testimony of all of the witnesses who purported to identify him as the man with the victim was inherently incredible. He contends this is so because of the extended period between the time when the witnesses observed him at the scene of the crime and their identification of him at trial and because the witnesses were very young and some of them viewed him at a distance. We do not agree.

In *State v. Cox*, 289 N.C. 414, 422-23, 222 S.E.2d 246, 253 (1976), we pointed out that our holding in *Miller* "was based on the general rule that evidence which is inherently impossible or in conflict with indisputable physical facts or laws of nature is not sufficient to take the case to the jury." No such situation arises from the evidence presented in this case. Each of the witnesses who identified the defendant as the man they saw with the victim shortly before her death had the opportunity to observe him for varying lengths of time in full daylight at reasonably close range. At trial, each witness positively identified the defendant as the man he or she had seen. As their testimony was not inherently incredible, the weight to be given it was for the jury to decide. *State v. Green*, 296 N.C. 183, 188, 250 S.E.2d 197, 201 (1978). The trial court did not err by submitting this case to the jury for its resolution of the question of the defendant's guilt of premeditated

and deliberate first-degree murder. This assignment of error is without merit.

[10] By another assignment of error, the defendant complains that he was denied an opportunity to rebut the State's evidence because the trial court denied him adequate access to a textile science expert. During the investigation of this case, the police located the van the defendant had owned at the time of the crime. Upon locating the van, the police took samples of fiber from its carpet in order to compare them to the fibers found on the victim. The police also collected hairs from the couch which had been in the defendant's home at the time of the crime in order to compare them to hairs found on the clothing of the victim at the time her body was discovered.

Prior to trial the defendant filed a motion for funds to hire an expert witness in hair and fiber analysis. After a hearing, the trial court granted this motion and authorized funds for this purpose. Approximately four months later, the defendant filed another motion seeking to have the trial court authorize the expenditure of up to $500 of public funds for the defendant to employ an expert witness in the field of textile science. After a hearing, the trial court granted the motion but authorized only $250 for such purpose. The defendant now argues that the trial court's rulings deprived him of proper assistance by a textile science expert sufficient to enable him to prepare his defense. We do not agree.

N.C.G.S. § 7A-450(b) allows the trial court to approve fees for the service of an expert witness to assist an indigent defendant. Before an indigent defendant is constitutionally entitled to the assistance of such an expert, however, he must make a preliminary showing of specific necessity or a particularized need for the assistance of the expert in the preparation of his defense. *State v. Bridges*, 325 N.C. 529, 531, 385 S.E.2d 337, 338 (1989). *See Ake v. Oklahoma*, 470 U.S. 68, 84 L. Ed. 2d 53 (1985). In order to establish a specific need for the assistance of an expert, the defendant must show that: (1) he will be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood that the expert assistance will materially assist him in the preparation of his case. *State v. Bridges*, 325 N.C. at 532, 385 S.E.2d at 338.

Although the defendant makes the broad statement that an expert in textile science could have materially assisted him in the preparation of his defense, he failed in the trial court and has

failed before this Court to point to any beneficial evidence that might have been obtained by such an expert. The only specific assertion made before this Court by the defendant in this regard is that: "A defense expert may well have testified that 90% of all vans and autos have factory installed carpets with fibers similar to those found on the victim." The defendant fails to suggest, however, why the $250 allowed by the trial court when it granted his motion for funds for an expert in textile science was not sufficient to allow him to discover any such evidence and introduce it through an expert. At the hearing on his motion, the defendant indicated through counsel to the trial court that $250 would be a sufficient amount for retaining an expert in textile science for the purposes for which he sought the assistance of such an expert. It is perhaps also significant to note that, although the defendant sought and was granted an order allowing funds for the assistance of an expert in hair and fiber analysis and an expert in textile science, he introduced no evidence through either such type of expert. We conclude, in any event, that the defendant has failed to make the requisite showing of specific need for any more funds for the assistance of an expert in textile science than were allowed by the trial court for this purpose. This assignment of error is without merit.

[11] In another assignment of error, the defendant contends that the trial court erred in admitting, without limiting instructions, evidence of statements made to two witnesses by the victim shortly before her death. The victim's mother testified that the victim told her by telephone on the day she disappeared that "a nice gray-haired man" was "going to take her fishing." A neighbor testified that on the day before the victim disappeared, the victim said that a nice man was going to take her fishing the next morning. The defendant asserts that the testimony concerning these statements by the victim constituted inadmissible hearsay. The trial court ruled that testimony as to these statements by the victim was admissible under Rule 804(b)(5). For the reasons stated in *State v. McElrath*, 322 N.C. 1, 366 S.E.2d 442 (1988), we conclude that the trial court correctly admitted testimony concerning the victim's statements, but based its ruling upon the wrong rule of evidence. Rule 803(3) of the North Carolina Rules of Evidence permits admission of a witness's testimony as to statements of intent by another person to prove subsequent conduct by that other person. *State v. McElrath*, 322 N.C. at 19, 366 S.E.2d at 452. The

testimony in question here fell squarely under Rule 803(3) and was admissible.

At trial, each witness testified that the victim said she planned to go fishing with "a nice gray-haired man." The victim's statements indicated a clear intent to do a future act. Therefore, testimony as to her statements was admissible under Rule 803(3) as evidence of her mental or emotional condition at the time she made the statements. *Id.*; N.C.G.S. § 8C-1, Rule 803(3) (1988).

The defendant complains that the jury was not instructed to limit its consideration of the evidence of the victim's statements. However, the defendant has suggested no limiting instruction which would have been either required or proper. Further, it does not appear from the record that the defendant requested any limiting instruction. The admission of evidence which is competent for a restricted purpose without limiting instructions will not be held to be error in the absence of a request by the defendant for such limiting instructions. *State v. Jones*, 322 N.C. 406, 414, 368 S.E.2d 844, 848 (1988). This assignment of error is without merit.

[12] In two additional assignments of error, the defendant argues that the trial court erred by excluding evidence tending to show that another person committed the crime charged, and that the trial court further erred by preventing his making a proper record of the excluded evidence for purposes of appellate review. We conclude, however, that the evidence in question was never actually offered at trial. Therefore, these issues are not properly before us for our review.

Prior to trial, the State made a motion *in limine* to exclude evidence of statements purportedly made by Joseph Franklin to authorities, which the defendant might seek to offer as evidence tending to show that Franklin committed the murder in question. At the defendant's request, the trial court deferred ruling on the State's motion. At some point, the defendant's counsel described the proposed Franklin evidence to the trial court during a recess. Apparently, the trial court advised counsel for the defendant that at that time the evidence was probably inadmissible and cautioned that any evidence the defendant was successful in introducing would, in effect, result in a waiver of his right to the final argument to the jury during closing arguments.

Near the conclusion of the State's evidence at trial, the State called Officer J. F. Styron of the Mecklenburg Police Department

to testify about statements made to him by the witnesses who had identified the defendant. During the State's direct examination of Officer Styron, the trial court conducted a *voir dire* and ruled that most of Styron's proposed testimony was inadmissible hearsay.

During the *voir dire*, counsel for the defendant asked the trial court if he could ask Officer Styron questions concerning Joseph Franklin during his cross-examination. The trial court indicated that the defendant's counsel could do so, but that the trial court would sustain an objection to such questions at that time. The trial court also indicated that the defendant was free to call Officer Styron as his own witness later, if the defendant chose to present evidence, and could attempt to ask him the questions about Franklin at that time. The trial court again cautioned the defendant, however, that should he be successful in introducing evidence, he would lose the right to make the last argument to the jury during closing arguments. Counsel for the defendant stated: "Let me think about it while they [the jurors] are coming back in."

After the jury returned, the State announced that it had no further questions of Officer Styron. The trial court then gave the defendant the opportunity to cross-examine Officer Styron, but counsel for the defendant stated that he had no questions. The defendant made no effort during the remainder of the trial to call witnesses or to introduce evidence of Joseph Franklin's purported statements to the authorities. From the record before us, it appears that the defendant made a conscious election against introducing any evidence in order to retain his right to make the last closing argument before the jury. Therefore, we conclude that the defendant never properly sought to introduce any evidence tending to show that Joseph Franklin, and not the defendant, committed the crime charged. Our conclusion in this regard is reinforced by statements made at the conclusion of the guilt-innocence determination phase of the trial by counsel for the defendant and by the trial court.

After the jury retired to consider its verdict, the following colloquy between the defendant's counsel and the trial court took place:

> THE COURT: The defense counsel wants to read a statement into the record.
>
> MR. HINSON: This is a statement about the failure to present the "Franklin" evidence. I had subpoenaed Joseph Franklin,

Jim Styron and Walter Dunn, Jim Styron formerly of the Mecklenburg County Police Department, and Walter Dunn of the City Police Department, upon learning that Joseph Franklin had been reported as the primary suspect in this case at some time in the past. I had spoken to Jim Styron, who informed me that he had before interviewed Joseph Franklin because he suspected Franklin had killed Amanda Ray. Franklin confessed to the murder of a sixteen-year-old girl in Caldwell County, for which he is now serving a life sentence. During interviews, Franklin was asked if he could have killed Amanda Ray and blocked out psychologically that he had committed the murder of Amanda Ray. According to Styron, Franklin said, yes, he could have. Styron took him to the lake, and he reportedly QUOTE turned white as a sheet. Based upon this interview, I applied for the services of a private investigator to try to prove that Franklin had access to transportation in 1979. The private investigator, after extensive efforts, was unable to show that Franklin had access to transportation in July of 1979. Franklin, I learned, is about six foot/one, weighs about a hundred sixty to a hundred seventy pounds, and has light brown hair. Franklin refused to talk without counsel present. I requested that he be delivered to this county for this trial, and this Court ordered Franklin brought here. I went to see Franklin this past Monday night. I confirmed through my own observations he is about six foot/one inches tall, a hundred sixty to a hundred seventy pounds, with light brown hair. In my opinion, there is some facial resemblance to the 1979 composite photo, which I have had in the form of a copy of a copy of a copy. I have not been able to compare him with the original composite. His face is long and thin. He has prominent ears. On Tuesday, with Franklin's counsel present, he agreed to talk to me. Franklin informed me that he had a mustache in 1979, which he has now. He did admit to wearing prescription glasses in '79 that darkened in sunlight. He also, I should add, said that his hair was shoulder length in 1979, and the mustache and the shoulder-length hair is inconsistent with the descriptions circulated in this case. He denied, however, committing the murder of Amanda Ray. He denied having a van or any other transportation, and, while he admitted the conversation with Styron, he said he did not kill Amanda Ray. He said that Styron badgered him and asked the question, "Could you have killed her and psychologically blocked it out?"

Franklin replied to Styron, "Yes, I could have, and so could you," directing that comment to Styron, but that he didn't kill Amanda Ray. He said he was taken to the lake by the officers and denies having any reaction or ever having seen the lake before. He says he is sure he did not kill Amanda Ray and would testify so if he were called as a witness in this case.

I have described these facts generally to the Court, it is my recollection, on Wednesday at the morning or lunch break, and I have also researched independently, with Mr. Carwile, the law of North Carolina on the defense of proving another committed the offense. The Court informed me it did not believe I had sufficient evidence to be permitted to present the defense, with the facts generally outlined. From my reading of the law, I believe the Court would most likely be upheld on appeal on this issue. Since attempting to present the evidence would cause us to lose the last argument, without either accomplishing anything with the jury or raising what I would deem to be a meaningful appeal issue, we elected not to present this evidence.

THE COURT: All right. Let the record reflect this. That the substance of what the defense counsel has placed in the record was related to me, and, upon the authority of *State* -v- *Cotton*, 318 N.C. 663, which held that evidence offered to show the guilt of one other than the accused is relevant and admissible if it points directly to the guilt of another party and does not merely create an inference or conjecture in this regard, and under Rule of Evidence 401, such evidence must tend both to implicate another and be inconsistent with the guilt of the defendant, on the basis of that case, I gave him the advice that, in my opinion, such evidence as he had in his possession would not be admissible in this trial. All right. Take Mr. Coffey back, Sheriff. We will await the verdict of the twelve. And that, if he attempted to introduce it, he would lose the last argument to the jury.

From the foregoing, it can be seen that the defendant never actually attempted to introduce any evidence tending to show that anyone other than the defendant committed the crime for which the defendant stood charged. Therefore, even if it is assumed *arguendo* that Styron's testimony would have resulted in such evidence,

the defendant may not now be heard to complain on appeal that such evidence was not before the jury or that the trial court did not allow him to cause the record to show what any such evidence might have been. During every criminal trial, a defendant must choose whether to present evidence or to argue last to the jury. General Rules of Practice for the Superior and District Courts, Rule 10 (1990) (adopted pursuant to N.C.G.S. § 7A-34 (1989)). In this case, the defendant faced this choice and elected not to present evidence and, thereby, retained the right to argue last. Assuming *arguendo* evidence tending to show that another person committed the crime existed, it was never formally offered by the defendant or excluded by the trial court. The defendant's assignments of error in this regard are without merit.

[13] By another assignment, the defendant argues that during the pretrial hearing on his motion to suppress testimony of witnesses identifying him as the man seen with the victim, the trial court improperly restrained the defendant from testing the recollection of witness Raymond Claiborne. The defendant's affidavit supporting his motion to suppress alleged that the pretrial identification procedures used by the police were unduly suggestive and that the witnesses' identifications of him were further tainted by their having seen photographs of the defendant published in a newspaper. The defendant attempted to ask Raymond Claiborne questions about the victim's clothing at the time he saw her with the defendant, but the trial court ruled that this line of inquiry was not relevant.

We note that the purpose of the suppression hearing was to test the witnesses' identifications of the defendant—not of the victim. N.C.G.S. § 15A-977(a) (1988). Furthermore, although cross-examination is a matter of right, the scope of cross-examination is subject to appropriate control in the sound discretion of the court. *State v. Hosey*, 318 N.C. 330, 334, 348 S.E.2d 805, 808 (1986); *see also* N.C.G.S. § 8C-1, Rule 611 (1988). Particularly in light of the allegations contained in the defendant's affidavit supporting his motion to suppress, we conclude that the scope of the defendant's cross-examination of Raymond Claiborne was appropriately limited by the trial court to issues concerning the reliability and admissibility of his identification of the defendant. This assignment of error is without merit.

[14] By another assignment, the defendant argues that the trial court improperly denied his request to continue the *voir dire* sup-

pression hearing until television tapes could be secured and presented to the court. The defendant contends that several witnesses had viewed television broadcasts showing the defendant before identifying him as the man they saw with the victim in this case. Therefore, the defendant argues that a review by the trial court of tapes of those broadcasts was necessary to the trial court's determination of the reliability of the witnesses' identifications of him. We do not agree.

The record reveals that during the suppression hearing, full inquiry was made as to the reliability of each witness's identification of the defendant. Evidence was received and considered concerning each witness with regard to "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation." *Manson v. Brathwaite*, 432 U.S. 98, 114, 53 L. Ed. 2d 140, 154 (1977). The trial court also heard testimony during the suppression hearing that certain of the witnesses had seen the television broadcasts showing the defendant before they identified him. Based upon this evidence, the trial court made findings and conclusions to the effect that each witness identified the defendant based upon his or her independent recollection of seeing him with the victim and was free from any possible taint from the television broadcasts.

Ordinarily, the decision whether to grant a continuance rests within the sound discretion of the trial court, and its ruling will not be reversed on appeal absent an abuse of discretion. *State v. Ford*, 314 N.C. 498, 502, 334 S.E.2d 765, 768 (1985). If the motion for a continuance is based on a constitutional right, however, the issue presented is not discretionary, but is a reviewable question of law. *Id.* Nevertheless, the denial of a motion to continue, regardless of its nature, will justify a new trial only upon a showing by the defendant that the denial was error and that his case was prejudiced as a result of that error. *Id.*

Here, we perceive neither error nor prejudice to the defendant resulting from the denial of his motion to continue the suppression hearing to obtain tapes of the television broadcasts in question. Unnecessarily suggestive circumstances alone do not require the exclusion of identification evidence. *State v. McCraw*, 300 N.C. 610, 268 S.E.2d 173 (1980). In the present case, each of the witnesses

who had seen the broadcasts—which were not pretrial "identification procedures"—gave some description of what they had seen and said that the broadcasts had not influenced their identification of the defendant. Each testified that his or her identification was based solely upon an independent recollection arising from observing the defendant with the victim shortly before her death. Therefore, the trial court's findings of fact were supported by competent evidence introduced at the suppression hearing. The trial court's findings fully support its conclusions of law and its ultimate determination that the witnesses' identifications of the defendant were not the result of unduly suggestive identification procedures.

The defendant was free to have a subpoena issued for the production of the tapes of the broadcasts and to use them to attempt to attack the credibility of the witnesses at the trial of this case, but it does not appear that he did so. Further, the defendant does not indicate what purpose would have been served by having the tapes at the suppression hearing, other than reminding the trial court that certain identification witnesses had seen the broadcasts—a fact already before the court. The defendant has failed to state, and we do not detect, any reason why the denial of his motion to continue the pretrial suppression hearing in order to obtain tapes of the broadcasts was error or was prejudicial to him. This assignment of error is without merit.

By another assignment, the defendant argues that the trial court erred by sustaining an objection to the following questions he asked during his cross-examination of Pamela Dowd:

> Question. And you were aware, weren't you, that the description of the van that was circulated was of a blue van?
>
> Answer. I don't remember about the van.
>
> Question. Well do you remember saying to any police officers back at that time that they had it wrong, that the color of the van was wrong?
>
> State. Objection.
>
> Court. Objection sustained.
>
> Question. Did you say anything to anybody that you can recall about the color of the van back in 1979 or '80?
>
> Answer. I can't recall.

The defendant contends that the trial court improperly limited his right to confront and cross-examine a witness against him. We disagree. As the record reflects, the defendant was allowed to rephrase his question and elicit the same information he had sought by the previous question to which the State's objection had been sustained. This assignment is without merit.

[15] By another assignment of error, the defendant argues that the trial court erred in allowing a State's witness to testify concerning prior statements taken from witnesses Raymond and Floyd Claiborne and Mabel Tanner concerning their observation of the victim and the defendant at the lake on the day the victim was killed. The defendant complains that the prior statements of the witnesses conflicted in many respects with their trial testimony and, for this reason, were not properly admitted as corroborative evidence.

A prior statement by a witness is corroborative if it tends to add weight or credibility to his or her trial testimony. *State v. Ramey*, 318 N.C. 457, 469, 349 S.E.2d 566, 573 (1986). In addition, new information contained in a witness's prior statement but not referred to in his or her trial testimony may be admitted as corroborative evidence if it tends to add weight or credibility to that testimony. *Id.* Here, the defendant has failed to specify which parts of the pretrial statements of the witnesses conflicted with their trial testimony. From the record before us we find no such conflicts. We conclude that the trial court properly admitted the prior statements of the witnesses as corroborative of their trial testimony, and this assignment of error is without merit.

By another assignment of error, the defendant argues that the trial court erred by failing to act *ex mero motu* to prevent improper arguments by the prosecutor during closing arguments to the jury. The defendant made no objection to the arguments at trial.

It is well settled that counsel are allowed wide latitude in their arguments to the jury. *State v. Johnson*, 298 N.C. 355, 368, 259 S.E.2d 752, 761 (1979). Counsel may argue all the facts and reasonable inferences arising from evidence properly admitted at trial. *State v. Maynard*, 311 N.C. 1, 14, 316 S.E.2d 197, 205, *cert. denied*, 469 U.S. 963, 83 L. Ed. 2d 299 (1984). However, counsel may not argue incompetent and prejudicial matters by injecting his own knowledge, beliefs, and personal opinions not supported

by the evidence. *State v. Johnson*, 298 N.C. at 368, 259 S.E.2d at 761. Where, as in this case, the defendant makes no objection to the argument of the prosecutor to the jury, appellate review is limited to a determination of whether the arguments by the prosecutor amounted to gross improprieties which make it plain that the trial court abused its discretion in failing to correct the prejudicial arguments *ex mero motu*. *State v. Holden*, 321 N.C. 125, 149, 362 S.E.2d 513, 529 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988).

[16] The defendant first argues that the prosecutor used evidence tending to show that the defendant masturbated in the presence of Angel Ashe to concoct a version of what occurred at the time of Amanda Ray's death which was not supported by evidence. We have reviewed the several inferences drawn by the prosecutor from the evidence concerning the incident with Angel Ashe and conclude that they were supported by the evidence. Even assuming *arguendo* that the inferences were not strictly supported by the evidence, however, the prosecutor's arguments in this regard were not so grossly improper as to require the trial court to correct them *ex mero motu*.

The defendant also complains of three other instances during which he contends the prosecutor stated facts or drew inferences not supported by the evidence. The defendant specifically contends that the prosecutor did so by his arguments to the jury that: (1) the defendant did not seek counseling after Janet Ashe confronted him about his having taken indecent liberties with her daughter; (2) only one witness viewed the defendant on television prior to identifying him (actually three witnesses did so); and (3) that a potential defense witness was not called because he could not refute the State's evidence. The defendant concedes that individually these alleged misstatements, unobjected to by him, did not warrant action by the trial court *ex mero motu*. However, the defendant argues that the cumulative effect of these misstatements required the trial court to intervene. We do not agree. Assuming *arguendo* that these statements by the prosecutor were not supported by the evidence or reasonable inferences drawn therefrom, they were not so grossly improper that the trial court abused its discretion by failing to intervene *ex mero motu*.

[17] The defendant next argues that the prosecution inflamed the jury by invoking God and providence. The prosecutor com-

mented that it was providential that the police were able to turn up some of the evidence which they collected. In this context, we conclude that the term "providence" was only used and understood as meaning fortuitous. Further, the prosecutor's remarks about God were not so grossly improper that the trial court abused its discretion by failing to intervene.

The defendant also complains that the prosecutor improperly argued that no witness had stated that the van previously owned by the defendant was not the van observed at the lake before the victim's death. The argument which the defendant now complains of was:

> Now, the one thing that I want you to think about and remember in regard to these photographs and in regard to Mabel and her two sons is that nobody said this wasn't the van. [The prosecutor pointed to pictures of the defendant's van.] They said they weren't sure, those kinds of things, qualified statements. Nobody said this wasn't the van.

The record reflects that the three witnesses were not entirely clear about their identification of the van in the photograph, and one witness testified that at one point he had told police it was not the van he had seen at the lake. However, we cannot say that the prosecutor's argument was so grossly improper or clearly calculated to prejudice the jury as to require the trial court to intervene.

We conclude that the trial court's failure to intervene *ex mero motu* during the prosecutor's argument was not reversible error. This assignment of error is without merit.

The defendant also has brought forward several additional assignments and arguments concerning the guilt-innocence determination phase of his trial. His appellate counsel, who did not represent him at trial, has exhibited commendable candor and accuracy in noting that the issues he presents, some of which are scheduled for consideration in cases pending before the Supreme Court of the United States, have been or by logical extension of our prior cases would be resolved adversely to his position by this Court. Although we acknowledge that the defendant has preserved these issues for possible further review by the Supreme Court of the United States, we conclude that these assignments of error are without merit.

[18] The jury having returned its verdict finding the defendant guilty of first-degree murder, the trial court conducted a separate sentencing proceeding as required by N.C.G.S. § 15A-2000. By an assignment of error, the defendant contends that the trial court provided the jury with a deficient written form, which was used by the jury for its written recommendation that the death penalty be imposed. The defendant argues that, as a result, the jury was erroneously permitted to recommend a sentence of death without returning a writing signed by the foreman on behalf of the jury showing *inter alia* that the mitigating circumstance or circumstances found by the jury were insufficient to outweigh the aggravating circumstance or circumstances found by the jury, as required under N.C.G.S. § 15A-2000(c)(3). We agree and, as a result, conclude that the sentence of death entered by the trial court must be vacated and we remand this case for a new sentencing proceeding.

At the conclusion of the sentencing proceeding, the trial court gave correct oral instructions to the jury concerning the order and form of the issues the jury must answer in determining whether to recommend a sentence of death or a sentence of life imprisonment. The trial court's oral instructions in this regard fully complied with our suggestions 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), concerning the proper form of the four questions to be submitted to the jury during capital sentencing and the order in which the jury should consider them. We find no fault in the trial court's oral instructions to the jury at the conclusion of the sentencing proceeding.

The writing signed by the foreman and returned by the jury, however, was insufficient to support a sentence, because at no point did it show, as required by statute: "[t]hat the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found." N.C.G.S. § 15A-2000(c)(3) (1988). Instead, the form given to the jury, in pertinent part, required the jury to answer the following questions:

> (3) Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you are sufficiently substantial to call for the imposition of the death penalty?
>
> (4) Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you

is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you?

As is apparent, the fourth question on the form given the jury to use as its writing was largely repetitious of the third question and did not require the jury to specifically determine, as required by N.C.G.S. § 15A-2000(c)(3), whether the mitigating circumstances it had found were either insufficient or sufficient to outweigh the aggravating circumstances it had found.

The State argues that the trial court's oral instructions corrected the deficient form given to the jury which it returned as its writing. Since the jury was properly instructed, the State contends that the jury must have understood the order and form of the issues it was required to resolve in recommending death or life imprisonment. Even assuming the State is correct in its assertion, however, the verdict against the defendant still must be vacated and this case remanded for a new sentencing proceeding. Our legislature has directed that: "When the jury recommends a sentence of death, the foreman of the jury *shall sign a writing* on behalf of the jury which writing *shall show*: . . . (3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found." N.C.G.S. § 15A-2000(c) (1988) (emphasis added). This requirement is mandatory, and a writing returned by the jury which fails to specifically show that the jury has determined that the mitigating circumstances are insufficient to outweigh the aggravating circumstances found will not support a sentencing recommendation or sentence in a capital case. Therefore, we vacate the sentence of death and remand this case to the Superior Court for a new sentencing proceeding pursuant to N.C.G.S. § 15A-2000.

No error in the trial.

Death sentence vacated and the case remanded for a new sentencing proceeding.

STATE OF NORTH CAROLINA v. EDWARD LEE CUMMINGS

No. 365A87

(Filed 1 March 1990)

1. **Criminal Law § 106 (NCI4th); Constitutional Law § 30 (NCI3d) — first degree murder — discovery — denied — no error**

The trial court did not err in a first degree murder prosecution by denying defendant's motion for disclosure of notes and tape recordings of interviews of potential witnesses where defendant made no assertion of any particular material which was withheld or suppressed but was merely speculating that something may have been, and it was clear from the record that the prosecutor had produced all material to date and understood his continuing duty to disclose.

Am Jur 2d, Criminal Law §§ 998, 999, 1010.

2. **Constitutional Law § 63 (NCI3d); Jury § 7.11 (NCI3d) — death qualified jury — Witt question — juror's knowledge of duties**

There was no error in jury selection for a first degree murder prosecution where, whenever the prosecutor challenged a juror for cause based on opposition to the death penalty, the trial court asked, "Is your view of the death penalty such that it would prevent or substantially impair your performing your sworn duties as a juror?" A review of the record reveals numerous explanations by the court and the prosecutor of the prospective jurors' possible duties during the sentencing phase, and an affirmative response to the question was a valid basis for allowing the prosecutor's challenge for cause. Furthermore, the court declined defendant's request to reconsider *State v. Barts*, 316 N.C. 666.

Am Jur 2d, Jury §§ 289, 290.

3. **Jury § 6.4 (NCI3d) — first degree murder — death qualification of jury — opportunity to rehabilitate denied — no error**

The trial court did not err during jury selection in a first degree murder prosecution by not allowing defendant to rehabilitate prospective jurors challenged for cause by the State on the basis of opposition to the death penalty. The recent U. S. Supreme Court decisions in *Ross v. Oklahoma*, 484 U.S. 970, and *Gray v. Mississippi*, 481 U.S. 648, are both

distinguishable, and in this case the court extended defendant the opportunity to propound additional questions through him to the jury in those situations where the juror's views were not clear.

Am Jur 2d, Jury §§ 289, 290.

4. Jury §§ 7.9, 7.10 (NCI3d)— first degree murder—prospective juror with preconceived opinions and relationship with witness—ability to set aside opinions—challenge for cause denied

The trial court did not err in a first degree murder prosecution by denying defendant's challenge for cause of a prospective juror where the voir dire tended to show that the prospective juror was a close friend and supporter of the State's witness Sheriff Barrington, had knowledge of the case based upon newspaper and television coverage, and could be potentially biased against defendant if defendant elected to offer no evidence at trial. The juror stated in response to a question by the trial court that he could lay aside any preconceived opinions he may have held as to defendant's guilt or innocence and decide the case based entirely on the evidence presented at trial.

Am Jur 2d, Jury §§ 299, 303, 304, 322.

5. Criminal Law § 34.4 (NCI3d)— murder—evidence of another murder—admissible

The trial court did not err in a first degree murder prosecution by admitting evidence of the murder of the victim's sister where defendant was charged in separate indictments with the murder of both sisters; defendant's motion to sever the cases for trial was allowed; the State elected to try defendant for the murder of Karen Puryear; defendant moved to exclude from the trial all evidence of Teresa Puryear's murder; the court denied the motion, concluding that evidence of Teresa's death was relevant to show the identity of Karen's murderer because the deaths were distinctly similar with respect to the victims, the manner of death, the manner of disposition of the bodies, and the location of the bodies; and the State introduced evidence of defendant's attitude toward Teresa prior to her disappearance, the facts of her disappearance, the discovery of her remains near the site where her sister's body

was discovered, and a description of her remains. N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Evidence §§ 321-326, 331.

6. **Criminal Law § 34.4 (NCI3d)— murder—second degree murder—continuing objection**

There was no error in a first degree murder prosecution from the court's ruling on defendant's motion for a continuing objection to evidence of another murder where defendant withdrew his motion when the trial court expressed its concern that a line objection would make it difficult to assure that all of defendant's objections were properly noted and preserved in the record.

Am Jur 2d, Trial § 176.

7. **Criminal Law §§ 73.3, 73.4 (NCI3d)— murder—hearsay—admissible**

The trial court did not err in a first degree murder prosecution by admitting the hearsay testimony of three witnesses regarding statements by the victim that defendant had beaten her, threatened to kill her, and kicked her out of his house, and that she had taken out a child support warrant against the defendant and had sought an attorney's advice regarding custody of the children. The conversations were admissible as exceptions to the hearsay rule under N.C.G.S. § 8C-1, Rule 803(3) for state of mind, emotional condition, physical condition and present sense impression.

Am Jur 2d, Homicide § 330.

8. **Homicide § 25.2 (NCI3d)— murder—instructions—premeditation and deliberation**

There was no plain error in a prosecution for first degree murder in the trial court's instruction on premeditation and deliberation where defendant contended that there was no evidence of a "lack of provocation by the victim," "use of grossly excessive force," or "infliction of lethal wounds after the victim was felled," and thus that the jury was allowed to infer premeditation and deliberation from elements unsupported by the evidence. The instruction was delivered straight from the North Carolina Pattern Jury Instructions, the elements listed were merely examples of circumstances which the jury

could use to infer premeditation and deliberation, and there was evidence to support each of the objectionable elements.

Am Jur 2d, Homicide §§ 484, 501.

9. **Criminal Law § 816 (NCI4th)— first degree murder—prior statement—instruction refused**

The trial court did not err in a prosecution for first degree murder by refusing to charge on impeachment and corroboration by prior statement where the charge was given verbatim from the Pattern Jury Instructions.

Am Jur 2d, Homicide §§ 484, 539.

10. **Homicide § 30 (NCI3d)— first degree murder—refusal to instruct on second degree murder—no error**

The trial court in a first degree murder prosecution did not err by refusing to submit second degree murder as a possible verdict where the facts indicated a coldly calculated killing planned well in advance and not a killing occurring on the spur of the moment in response to some unanticipated provocation. The mere possibility that the jury could return with a negative finding does not, without more, require the submission of the lesser included offense.

Am Jur 2d, Homicide § 530.

11. **Criminal Law § 50.2 (NCI3d)— murder—opinion of nonexpert as to articles at scene—admissible**

The trial court in a first degree murder prosecution did not err by allowing an SBI agent to compare physical evidence to other evidence which had been misplaced from the SBI lab where it was sent for testing and storage pending trial where the objects in question were the plastic bags and sheets in which two bodies were wrapped when discovered; the odor of those materials was so intense that they were moved several times following complaints; they were finally placed in an outside shed from which they disappeared; and an SBI agent who had observed the plastic bags and sheets on the day they were found and at the various times they were moved identified photographs, explained the disappearance, and noted the similarity of the missing items to items found in one victim's car. The agent's testimony was obviously based on first-

hand knowledge and observation and was clearly helpful to the jury; its credibility was for the jury to determine.

Am Jur 2d, Evidence § 453.

12. Homicide § 20.1 (NCI3d)— first degree murder—autopsy photos—admissible

The trial court did not err in a first degree murder prosecution by introducing into evidence two autopsy photographs where both photographs were introduced for purposes other than to arouse the passions of the jury, there was no unnecessary repetition, and there were no complaints of the manner in which the photographs were entered.

Am Jur 2d, Homicide §§ 417-419.

13. Searches and Seizures § 23 (NCI3d)— first degree murder—items seized pursuant to warrant—probable cause

The trial court did not err in a first degree murder prosecution by admitting evidence seized from defendant's residence and automobiles pursuant to search warrants where, under the totality of the circumstances, all three search warrants were supported by extensive and complete affidavits that established unarguable probable cause.

Am Jur 2d, Searches and Seizures §§ 64, 67-69.

14. Criminal Law § 1324 (NCI4th)— murder—sentencing—aggravating and mitigating circumstances—written list

There was prejudicial error in a first degree murder prosecution in the denial of defendant's request that proposed nonstatutory mitigating circumstances be listed in writing on the issues and recommendation form. Where a defendant makes a timely written request for a listing in writing on the form of possible nonstatutory mitigating circumstances that are supported by the evidence and which the jury could reasonably deem to have mitigating value, the trial court must put such circumstances in writing on the form. This rule shall be applied prospectively only.

Am Jur 2d, Homicide §§ 554, 555.

Justice WEBB dissenting.

APPEAL as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a death sentence entered by *Farmer, J.*, at the 6 April 1987 Criminal Session of Superior Court, HOKE County. Heard in the Supreme Court 13 September 1989.

Lacy H. Thornburg, Attorney General, by Charles M. Hensey, Special Deputy Attorney General, for the state.

Harry H. Harkins, Jr., for defendant-appellant.

MARTIN, Justice.

Defendant contends he is entitled to a new trial or, in the alternative, a new sentencing hearing. We find no error in the guilt phase but remand for a new sentencing hearing.

On Tuesday, 14 January 1986, the bodies of two white females were found by members of a crew baling pine straw. They were approximately one hundred feet apart near a pond in a wooded area of land owned by the State of North Carolina about 1.5 miles from a house owned by defendant in Hoke County. The bodies were transported to the state medical examiner's facility in Chapel Hill where Drs. Page Hudson and James Michael Sullivan performed autopsies and identified the remains as Karen Puryear and her sister, Teresa Puryear. Both victims had been shot in the back of the head with a small caliber pistol, undressed, wrapped in clear and black plastic material and sheets, and were buried in shallow graves. Both victims were also missing an extremity. Teresa Puryear's body was in a more advanced stage of decomposition.

Edward Lee Cummings was arrested on 20 January 1986 and subsequently indicted for the murders of Karen Marie Puryear and Teresa Annette Puryear on 17 February 1986. The trial was bifurcated upon motion of the defendant. This appeal only concerns the defendant's conviction for the murder of Karen Puryear.

At trial, the state presented evidence which tended to show that:

Defendant married Hazel McNeill in 1964. She lived with the couples' four children in their home in Willow Springs until August of 1984.

In May of 1974, defendant met and became involved with Faye Puryear. Mrs. Puryear had three children who were currently liv-

ing in a foster home but moved back in with her at or around this time. Karen was eleven years old, Brad was nine and Teresa was six. The relationship between Mrs. Puryear and defendant dwindled into a mere friendship. When Karen, the oldest daughter, was 14 or 15 years old, the defendant, age 37 at this time, developed an intimate relationship with her. In September of 1980, Karen became pregnant by defendant and had an abortion. In 1982, she delivered a child fathered by defendant and named him "Little Eddie." In 1983, Karen lost a child fathered by defendant as a result of crib death and, in 1984, she had another child by defendant whom she named Crystal. Karen and her children moved into defendant's Willow Springs home after it was vacated by defendant's wife and four children in 1984.

During this time, defendant had difficulty getting along with Teresa Puryear, Karen's younger sister. On 15 September 1983, Mrs. Puryear got a Juvenile Petition to keep her younger daughter in school and three days later, she reported Teresa missing. Teresa was never seen alive again.

In June of 1985, Karen left the defendant and eventually found a home of her own in Raleigh. On 10 October 1985 she lodged a criminal complaint against defendant for nonsupport. Five days later defendant took the children to his home when Karen asked him for money for medicine for one of them. Defendant refused to return the children and Karen started proceedings with Legal Services to get the children back. She, however, did not follow through with this course of action. After being served with the summons in the nonsupport case, defendant on 29 October 1985 brought the children back to Karen to go trick or treating. On 14 November 1985 Karen went to the day care center to pick up her children around 3:30 p.m. Within 10 minutes, defendant drove up in his truck. He picked up Little Eddie and drove off. Karen followed in the same direction with Crystal in her car. This is the last time anyone recalls seeing Karen Puryear alive.

On 15 November 1985 defendant told Mrs. Puryear that, on the previous day, he and Karen had taken the two children shoe shopping and Karen had asked him for $150.00. He refused and she left alone around 5:30 p.m.

Additional facts will be set forth as necessary with respect to the various issues.

Further evidence adduced at trial by the state tended to show that the defendant had killed both women because he believed he had been cheated out of possible profits from drug transactions and because of a general antagonism towards "white and Indian women." The defendant proffered no evidence. After over a month of testimony, the defendant was found guilty of murder in the first degree.

During the sentencing phase the jury found as an aggravating circumstance that the crime was especially heinous, atrocious or cruel. The jury found no mitigating circumstances. Edward L. Cummings was sentenced to death.

GUILT PHASE

I.

[1] Defendant first assigns as error the trial court's denial of his motion for disclosure of notes and tape recordings of interviews of potential trial witnesses. Prior to trial defendant filed a document entitled "Motion for Disclosure of Information Necessary to Prepare for Defense of Case" requesting: (1) all members of the Hoke County and Wake County Sheriffs' Departments and the City of Raleigh Police Department who participated in the investigation to turn over all information developed during the investigation; (2) the prosecutor to review all the material submitted and disclose any exculpatory material to defense counsel; (3) the prosecutor to disclose any oral or written statements of the defendant; and, (4) Judge Farmer to personally monitor compliance with the previous requests. Judge Farmer granted requests (2) and (3) and denied requests (1) and (4). Defendant contends that he is entitled to the disclosure of all information developed during the investigation under *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963), and failure to produce it deprived him of his due process rights to a fair trial. Defendant makes no assertions of any particular material which was withheld or suppressed but is merely speculating that something may have been. From the record it is clear that the prosecutor had produced all the material compiled to date and understood his continuing duty to disclose. Nothing erroneous or prejudicial resulted from the ruling. This assignment of error is without merit.

II.

[2] Defendant concedes that the United States Supreme Court and the North Carolina Supreme Court have upheld the practice of "death qualification" of prospective jurors under the federal and North Carolina Constitutions. *Lockhart v. McCree*, 476 U.S. 162, 90 L. Ed. 2d 137 (1986); *State v. Barts*, 316 N.C. 666, 343 S.E.2d 828 (1986). However, defendant asserts that prejudicial error was committed in the selection of his jury even under the existing law. We disagree.

The United States Supreme Court has held that the "proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment" is whether the views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52 (1985). Such sworn duties of a juror in a capital sentencing hearing include consideration of aggravating and mitigating circumstances, weighing such circumstances under the court's instructions, and exercising the guided discretion necessary for a reliable sentence. In the case at bar, whenever the prosecutor challenged a juror for cause based on opposition to the death penalty, the trial court asked, "Is your view of the death penalty such that it would prevent or substantially impair your performing your sworn duties as a juror?" If the prospective juror answered affirmatively, the court allowed the challenge for cause. Defendant contends that, at this point in the proceedings, the jurors did not know what their sworn duties would be and, therefore, were dismissed on the basis of their given response rather than on the basis of individualized findings of unfitness to serve. A review of the record reveals numerous explanations by the court and the prosecution of the prospective juror's possible duties during the sentencing phase should the trial proceed to that point.

Thus, we hold that the potential jurors had been indoctrinated into the nature of their responsibilities and that an affirmative response to the *Witt* question posed by the trial court was a valid basis for allowing the prosecutor's challenge for cause. Furthermore, this Court declines defendant's request to reconsider the constitutionality of its holding in *Barts*.

III.

[3] Defendant also asserts as error the trial court's refusal to allow him to further question or "rehabilitate" the prospective jurors who were challenged for cause by the state on the basis of opposition to the death penalty. While acknowledging that we have already decided that defendants are not entitled to engage in attempts to rehabilitate, *State v. Zuniga*, 320 N.C. 233, 357 S.E.2d 898, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987) and *State v. Oliver*, 302 N.C. 28, 274 S.E.2d 183 (1981), *appeal after remand*, 309 N.C. 326, 307 S.E.2d 304 (1983), *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987), defendant argues that the recent United States Supreme Court decisions in *Ross v. Oklahoma*, 487 U.S. 81, 101 L. Ed. 2d 80, *reh. denied*, --- U.S. ---, 101 L. Ed. 2d 962 (1988) and *Gray v. Mississippi*, 481 U.S. 648, 95 L. Ed. 2d 622 (1987), *reh. denied*, --- U.S. ---, 101 L. Ed. 2d 962 (1988), merit a reconsideration of our holding. We disagree. Both of the United States Supreme Court cases are distinguishable from the case *sub judice*. Neither case turns on what defendant requests: the opportunity to rehabilitate prospective jurors during the prosecutor's voir dire examination. The defendant is not allowed to rehabilitate a juror who has expressed unequivocal opposition to the death penalty in response to questions propounded by the prosecutor and the trial court. The reasoning behind this rule is clear. It prevents harassment of the prospective jurors based on their personal views toward the death penalty.

Here, the trial court went further and carefully extended defendant the opportunity to propound additional questions through him to the jury in those situations where the juror's views were not clear. "When challenges for cause are supported by prospective jurors' answers to questions propounded by the prosecutor and by the court, the court does not abuse its discretion, at least in the absence of a showing that further questioning by defendant would likely have produced different answers, by refusing to allow the defendant to question the juror challenged." *State v. Oliver*, 302 N.C. at 40, 274 S.E.2d at 191. Defendant has made no such showing and his argument is without merit. Our prior holdings stand.

IV.

[4] Defendant next argues that the trial court erred in denying his challenges for cause of prospective juror Walters. Defendant contends that Walters indicated that he might be biased against

defendant in the event defendant offered no evidence at trial or on the basis of Walters' friendship with Sheriff Barrington, a potential witness for the state. It is defendant's further belief that Walters should have been excused under N.C.G.S. § 15A-1212. We disagree. The trial court is not required to remove from the panel every potential juror who has any preconceived opinions as to the potential guilt or innocence of a defendant. Defendant's suggested "interpretation would remove all discretion from the trial judge in determining whether the juror could render a fair, impartial, and unbiased judgment." *State v. Wright*, 52 N.C. App. 166, 171, 278 S.E.2d 579, 584, *disc. rev. denied*, 303 N.C. 319, 281 S.E.2d 658 (1981). If the prospective juror, in the trial court's opinion, credibly maintains that he will be able to "lay aside his impression or opinion and render a verdict based on the evidence presented in court," *Irvin v. Dowd*, 366 U.S. 717, 723, 6 L. Ed. 2d 751, 756 (1961), then it is not error for the court to deny defendant's motion to remove said juror for cause. Here, the initial voir dire examination tended to show that juror Walters was a close friend and supporter of state's witness, Sheriff Barrington, had knowledge of the case based upon newspaper and television coverage and could potentially be biased against defendant if he elected to offer no evidence at trial. The transcript contains the following question presented to juror Walters by the court:

> COURT: If the court instructed you that defendant is presumed innocent in the trial of any case, does not have to present evidence, and has no burden of proof, and if he chose not to testify, if the court instructed you not to hold that against him, would you follow that instruction that I gave to you in your deliberations?
>
> JUROR #5: Yes, sir. If you told me not to hold it against him, I wouldn't.

The juror stated that he could lay aside any preconceived opinions he may have held as to defendant's guilt or innocence and decide the case based entirely upon the evidence presented at trial. We hold that the trial court did not abuse its discretion in ruling that prospective juror Walters was competent to sit. This assignment of error is overruled.

V.

[5] Defendant's most salient argument is that the trial court erroneously admitted evidence of the murder of Karen's sister, Teresa

Puryear. We disagree and find that the evidence was properly admitted as an exception pursuant to N.C.G.S. § 8C-1, Rule 404(b) (1988).

Defendant was charged, in separate indictments, with the murders of Karen and Teresa Puryear. Defendant moved to sever the cases for trial and the trial court allowed the motion, reasoning that there might be "a similar modus operandi with some factual similarities in both cases but not sufficient evidence to establish a transactional connection to warrant joinder." The state elected to first try defendant for the murder of Karen Puryear and defendant then moved to exclude from the trial all evidence of Teresa's murder. The trial court disallowed this motion while concluding that the deaths were "distinctly similar with respect to the victims, manner of death, manner of disposition of the bodies, and location of the bodies," and that evidence of Teresa's death was "relevant to show the identity of the perpetrator" of Karen's murder. As a result, the state was allowed to introduce evidence of defendant's attitude towards Teresa prior to her disappearance, the facts of her disappearance, the discovery of her remains near the site where her sister Karen's body was discovered, and a description of her remains. It is defendant's contention that this ruling amounted to error or, in the alternative, an abuse of the trial court's discretion.

Rule 404 provides, in pertinent part:

> (b) 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). This Court established the procedure to be followed when considering the admissibility of evidence under the listed exceptions in *State v. Morgan*, 315 N.C. 626, 340 S.E.2d 84 (1986). The Court said:

> In determining the admissibility of extrinsic conduct evidence pursuant to Rule 404(b), the trial judge must first determine the preliminary issue of whether the conduct is being offered pursuant to that rule. . . . Under Rule 404(b) . . . evidence regarding extrinsic acts is not limited to cross-examination and may be proved by extrinsic evidence. . . . If the trial

> judge makes the initial determination that the evidence is of the type and offered for the proper purpose under Rule 404(b), the record should so reflect.
>
> The next step in determining admissibility of the extrinsic conduct evidence under Rule 404(b) is a determination of its relevancy. As stated earlier, Rule 404(b) allows the use of extrinsic conduct evidence so long as the evidence 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.

Id. at 636-37, 340 S.E.2d at 91.

In the case at bar, Judge Farmer clearly determined, after careful deliberation, that, in his opinion, the evidence was of the type intended by the exceptions set forth in Rule 404(b) and that it was offered for the contemplated purpose. Judge Farmer made the following remarks for the record:

> As I indicated to counsel I believe when I heard the motion to sever these two cases, I issued an order to sever; that they do show a similar *modus operandi*, and have a lot of similar factual matters, but I thought it was a very close case because of the two-year span difference; that there may be some question concerning whether or not there was a transactional connection under the statute and the law in this state to warrant a joinder, so that's why I severed them.
>
> But, because of severance does not mean that [the] exception under Rule 404(b) is not applicable, because if it goes to show the identity, I think the evidence is admissible. At this point I'm going to—based upon what counsel says the evidence will show, I'm going to deny the motion to exclude at this point because I think it would be an exception under Rule 404(b).

Judge Farmer's written order dated 13 April 1987 incorporated the above legal conclusions.

The next inquiry, under *Morgan*, goes to the relevancy of the proffered evidence. The state's evidence tended to show, in part, that: Defendant was connected to this killing by his comments to Fred Jacobs while they were in the same cell in the Hoke County jail during June and July, 1986 to the effect that he killed Karen's sister because she left some drugs in the wrong place that he had given her to deliver. There was independent, cor-

roborative evidence that a black briefcase full of cocaine was found abandoned near Enfield. Teresa's body was buried within sight of Karen's body; both were within 1.5 miles of defendant's land in Hoke County; both had been killed by a bullet fired from a small caliber weapon into the brain through the back of the head; both had been shot at least one other time in a non-lethal fashion; portions of their hands and arms had been removed; both bodies were buried nude; and, both bodies were wrapped in cloth and then in layers of plastic. When alive, both women had gone through periods of growing conflict with defendant before their disappearance and defendant was a longtime acquaintance of both. The state argues that this evidence is highly relevant to show identity, opportunity, intent, plan, knowledge and the absence of mistake, accident or entrapment. We agree. The general rule is well explained in the often-quoted passage in Dean Brandis' treatise on evidence:

> [Evidence of other offenses] is inadmissible on the issue of guilt if its only relevance is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; but if it tends to prove any other relevant fact it will not be excluded merely because it shows him to have been guilty of an independent crime.

1 Brandis on North Carolina Evidence 3d § 91 (1988). There was no error in allowing the jury to hear the evidence surrounding Teresa's murder for the limited purposes for which it was admitted.

[6] It is defendant's further assertion that the court committed prejudicial error in disallowing his request to make a continuing objection to the admission of the evidence of Teresa's murder. Thus, defendant contends he was forced to make hundreds of objections and motions to strike during the trial which disrupted the trial and irritated the jury.

Immediately after Judge Farmer had decided that evidence of the killing of Teresa Puryear would be admitted pursuant to the exceptions in Rule 404(b), the following transpired:

> MR. PARISH (defense counsel): Thank you, your Honor. We would except. I do have a question now because I don't want to disrupt the flow of the trial. How—we, of course, except. How would you suggest, if you have a suggestion, that we object to preserve during the course of the trial? Could we

have a line objection to that, or do you desire that we object—I mean, we can do it without disrupting the court?—would you desire for us to object each time?

COURT: Well, I don't know if the court reporter will know what you objected to unless you do object.

MR. PARISH: All right sir. That's fine.

COURT: I don't know what the evidence is going to show.

MR. PARISH: That's fine. We can—we'll just object. Thank you sir.

The state contends that the motion was voluntarily withdrawn so that Judge Farmer was never required to rule or, in the alternative, that the ruling was discretionary and no abuse of discretion was shown. We agree that defendant withdrew his motion when the trial court expressed its concern that a line objection would make it difficult to assure that all of defendant's objections were properly noted and preserved in the record. No ruling was necessary.

VI.

[7] Defendant contends that the trial court erroneously allowed into evidence the hearsay testimony of three witnesses: Celia Mansary, Krendy Lynn, and Faye Puryear. We find no merit in any of these assignments of error.

On the morning of 22 October 1985 (approximately three weeks before her disappearance), the victim, Karen Puryear, spoke with Celia Mansary, a paralegal employed with East Central Community Services as an intake interviewer. During the course of the interview, Karen told Ms. Mansary about several occasions on which defendant had beaten her in the past and that defendant had threatened to kill her if she tried to take back her children from him. After pretrial motions and objections at trial, Ms. Mansary was permitted to testify to the above conversation and to her impression that Karen appeared terrified during the interview. Defendant contends that this testimony was allowed into evidence under N.C.G.S. § 8C-1, Rule 803(24), the residual hearsay exception. If so, the trial court committed error by failing to follow the six-prong test established by this Court in *State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985), for determining the admissibility of hearsay evidence not specifically covered by any of the other hearsay exceptions. However, we find that the testimony was admissible under

N.C.G.S. § 8C-1, Rule 803(3) and, therefore, the *Smith* test is inapplicable. When a hearsay statement is made expressly admissible by a specific exemption category, there is no necessity for the trial court to consider the catchall provisions of the other rules. *State v. McElrath*, 322 N.C. 1, 366 S.E.2d 442 (1988). Rule 803 of the North Carolina Rules of Evidence provides, in pertinent part, as follows:

> 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, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health).

N.C.G.S. § 8C-1, Rule 803(3) (1988). The scope of the conversation between Karen and Ms. Mansary during the intake interview related directly to Karen's existing state of mind and emotional condition. "Evidence tending to show state of mind is admissible as long as the declarant's state of mind is a relevant issue and the possible prejudicial effect of the evidence does not outweigh its probative value." *Griffin v. Griffin*, 81 N.C. App. 665, 669, 344 S.E.2d 828, 831 (1986); Weinstein's *Evidence* § 803(3)[03] (1984). Karen's state of mind is highly relevant as it relates directly to the status of her relationship with defendant prior to her disappearance. The probative value of this evidence outweighs any potential prejudice to defendant. This assignment is without merit.

On 14 November 1985 the victim, Karen, spoke with Krendy Lynn, a teacher at the nursery school attended by her children, Little Eddie and Crystal. During this discussion, Karen told Ms. Lynn that she had to go to the doctor because "she had a place on her chest that she had to see about; that . . . he had hit her with the end of the gun." The trial court allowed Ms. Lynn to testify as to her recollection of the conversation over the objection and motion to strike of defendant; however, Ms. Lynn was not allowed to speculate as to the identity of Karen's assailant. Defendant contends that it was error to overrule the objections since the testimony was inadmissible hearsay. Again, we find no error. Karen's statement that she planned to go to see a doctor about a place on her chest where "he" had hit her is another type of hearsay statement made admissible into evidence by N.C.G.S. § 8C-1, Rule 803(3). The statement goes directly to Karen's state of mind,

emotional status and physical condition on the very date of her disappearance. The jury was free to draw whatever reasonable inferences it chose from the testimony.

Lastly, defendant contends that it was error to allow Faye Puryear, the mother of the victim, to testify, over objection, regarding the subject of two conversations she shared with Karen. The first conversation occurred in May or June 1985 when Karen came over to her mother's house crying and saying that defendant had kicked her out of his house. We find that this statement was properly allowed into evidence as a present sense impression by the declarant. This exception to the hearsay rule is defined as follows:

> (1) Present Sense Impression.—A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

N.C.G.S. § 8C-1, Rule 803(1) (1988). Since Karen's statement was not made while she was perceiving the event, it would have to qualify as being made "immediately thereafter." Interpreting the identical Federal Rule, the federal courts have held that "there is no *per se* rule indicating what time interval is too long under Rule 803(1). . . . [A]dmissibility of statements under hearsay exceptions depends upon the facts of the particular case." *United States v. Blakey*, 607 F.2d 779, 785 (7th Cir. 1979). Here, Karen's statement was made in close proximity to the event—a reasonable inference would be the length of time it took to drive from Willow Springs to her mother's house in Raleigh. Under the particular facts of this case, Karen's statement to her mother was made sufficiently close to the event to be admissible as present sense impressions under Rule 803(1).

The second conversation occurred on 14 November 1985. On this occasion, Karen told her mother that she had taken out a child support warrant against the defendant and had sought advice from an attorney regarding obtaining custody of the children. We hold that these hearsay statements are admissible as statements of then existing mental or emotional conditions. N.C.G.S. § 8C-1, Rule 803(3) (1988). As in the first two instances above, Karen's state of mind on the date she disappeared is highly relevant to show the status of her relationship with defendant and the unlikelihood of the event that she would run off and leave her children with defendant.

VII.

[8] Defendant contends that the trial court incorrectly charged the jury on two matters: (1) premeditation and deliberation and (2) impeachment and corroboration by prior statement. First, with respect to the premeditation and deliberation instruction, it should be noted that defendant never raised a proper objection at trial. A party to a trial may not assign as error any portion of the jury charge unless objected to at trial prior to the jury retiring to deliberate. North Carolina Rules of Appellate Procedure, Rule 10(b)(2) (1988). In such cases defendant is entitled to relief only if he can show that the instructions complained of constitute "plain error" as that term is defined in *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). For the reasons stated below, no such error exists in the present case.

Judge Farmer instructed the jury as follows:

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

Defendant contends that there was no evidence of a "lack of provocation by the victim," "use of grossly excessive force," or "infliction of lethal wounds after the victim is felled" and, thus, the jury was allowed to infer premeditation and deliberation from elements unsupported by the evidence. We disagree. The above-cited instruction was delivered straight from the North Carolina Pattern Jury Instructions. N.C.P.I.—Crim. 206.10. The elements listed are merely examples of circumstances which, if found, the jury could use to infer premeditation and deliberation. It is not required that each of the listed elements be proven beyond a reasonable doubt before the jury may infer premeditation and deliberation. *See generally State v. Watson*, 222 N.C. 672, 24 S.E.2d 540 (1943). However, from our review of the record in this case, it appears that there is evidence to support each of the objectionable elements. The physical evidence obtained at the house and from the body disclosed no sign of a fight, argument or other

provocation at or near the time of the killing. The condition of the body supports an inference that excessive force was used and that the fatal gunshot wound was inflicted while the victim was already incapacitated by the previous gunshot wound to her arm.

This Court has held that:

> [A] trial judge should never give instructions to a jury which are not based upon a state of facts presented by some reasonable view of the evidence. When such instructions are prejudicial to the accused he would be entitled to a new trial.

State v. Buchanan, 287 N.C. 408, 421, 215 S.E.2d 80, 88 (1975) (quoting *State v. Lampkins*, 283 N.C. 520, 523, 196 S.E.2d 697, 699 (1973)). That is not the case here. This argument is without merit.

[9] Defendant next asserts that the trial court erroneously refused to charge the jury on impeachment and corroboration by prior statement. However, our review of the record indicates that this charge was given almost verbatim from the pattern jury instructions. *See* N.C.P.I.—Crim. 105.20. Therefore, this assignment is baseless.

VIII.

[10] Defendant's next contention is that the trial court erroneously refused to submit second degree murder as a possible verdict. "It is unquestioned that the trial judge must instruct the jury as to a lesser-included offense of the crime charged, when there is evidence from which the jury could find that the defendant committed the lesser offense." *State v. Redfern*, 291 N.C. 319, 321, 230 S.E.2d 152, 153 (1976). The factual element distinguishing murder in the first degree from second degree murder is premeditation and deliberation. Therefore, the issue presented by this assignment of error is whether the evidence of defendant's premeditation and deliberation was such as to require the submission of second-degree murder. We find that there was not and that the trial court correctly refused to charge on the unsupported lesser degree.

This Court set forth the procedure to be followed in making this determination as follows:

> We emphasize again that although it is for the jury to determine, from the evidence, whether a killing was done with premeditation and deliberation, the *mere possibility of a negative finding* does not, in every case, assume that defendant

> could be guilty of a lesser offense. Where the evidence belies anything other than a premeditated and deliberate killing, a jury's failure to find all the elements to support a verdict of guilty of first degree murder must inevitably lead to the conclusion that the jury disbelieved the State's evidence and that defendant is not guilty. The determinative factor is what the State's evidence tends to prove. If the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree, including premeditation and deliberation, and there is *no* evidence to negate these elements other than defendant's denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of second degree murder.

State v. Strickland, 307 N.C. 274, 293, 298 S.E.2d 645, 657-58 (1983) (emphasis added). The direct and credible circumstantial evidence showed that Karen Puryear went to defendant's secluded, isolated home in Hoke County on the premise of a possible reconciliation. Once there, as Karen removed her clothing in anticipation of sexual intercourse, defendant shot her in the arm and, as he held her immobile by twisting her wounded arm behind her, shot her again in the base of the skull. The second shot was the cause of death. There were no bruises, cuts or scrapes on the body characteristic of a fight. The interior of the house was similarly devoid of any evidence of a struggle. Defendant's actions in the disposal of the body indicate defendant's prior careful thought and planning to hide the killing. These facts indicate a coldly calculated killing planned well in advance and not a killing occurring on the "spur of the moment" in response to some unanticipated provocation.

The state adequately established all the elements of first degree murder, including premeditation and deliberation, and defendant produced no evidence sufficient to negate these elements. The mere possibility that the jury could return with a negative finding does not, without more, require the submission of the lesser included offense—murder in the second degree.

IX.

[11] Defendant asserts that the trial court erroneously allowed SBI agent Troy Hamlin, witness for the state, to compare physical evidence to other evidence which had been misplaced from the SBI lab where it was sent for testing and storage pending trial. The evidence at issue was the plastic bags and sheets in which

the bodies were wrapped when discovered. The odor of these materials was so intense that they were moved several times inside the SBI lab following complaints. Finally, they were placed in an outside shed. It is from this location that the plastic bags and sheets disappeared. Since the evidence was lost, the defendant contends he was denied the opportunity to have his own experts test the material, to argue the dissimilarity of the items and to refute Agent Hamlin's assertions that the articles were similar. As a result, defendant alleges his constitutional rights of confrontation and due process were violated. We find no merit in this assignment of error.

Agent Hamlin, a forensic chemist, observed the plastic bag and sheets on the day they were photographed (date the bodies were discovered), and at the various times when they were moved prior to disappearing from the storage shed. At trial, Agent Hamlin identified the photographs and explained the disappearance of the materials to the jury. He then noted the similarity of the missing items to the ones on hand found in Karen Puryear's car when he was asked the following questions on direct examination:

> Q. Can you describe the sheets and pillow cases that you saw in the trunk of the vehicle, sir?
>
> A. Yes, sir, I can. There were three pillow cases, a fitted flowered sheet; and a pink fitted sheet.
>
> Q. Now, Mr. Hamlin, did you make any observations about the flowered sheet that you saw there and the flowered sheet which you saw from the wrappings of the body of Karen Puryear?
>
> MR. PARISH: Objection to this comparison since the evidence has been lost, your honor.
>
> COURT: Overruled.
>
> A. They were somewhat similar in design. That is, they were both flowered sheets, had the same type of color.
>
> MR. PARISH: Motion to strike.
>
> COURT: Denied.
>
> . . . .

Q. Now, using State's exhibit number forty-four, can you explain what you meant about how that bag is unusual, sir, and as it compared to the bag which you have observed in the wrappings from Karen Puryear's body?

A. Yes sir, I can.

MR. PARISH: Objection to the comparison of the bag that's been lost, your honor.

COURT: Overruled.

Q. Would you please do so, sir?

A. The bag that I noted earlier during the day at the gymnasium floor was a very large, clear plastic bag. It was a bag as opposed to plastic sheeting, in that I could see a flap and seams around the edges of the bag. (witness held up bag.)

Agent Hamlin testified at trial as a nonexpert witness. N.C.G.S. § 8C-1, Rule 701 provides:

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

His testimony was obviously based upon firsthand knowledge and observation and was clearly helpful to the jury. The credibility of Agent Hamlin's comparison testimony was for the jury to determine. The trial court did not err and defendant was not prejudiced in regard to the ruling to allow the comparison testimony.

X.

[12] Defendant next complains that the trial court erred by allowing the state to introduce into evidence two photographs, over objection, arguing that they were overly gruesome, inflammatory and prejudicial. The photographs at issue were introduced during the testimony of Dr. Page Hudson, Chief Medical Examiner of the State of North Carolina, who acknowledged that the photographs were taken at the time he performed the autopsy and were necessary for illustrative purposes. The first photograph depicted the face of Karen Puryear and the other showed the wound to her stomach. This Court has recently determined that whether the use of photographic evidence is more prejudicial than probative is a deci-

sion within the discretion of the court. *State v. Hennis*, 323 N.C. 279, 372 S.E.2d 523 (1988). In exercising that discretion, we, in *Hennis*, set forth certain factors which should be weighed by the trial court:

> The trial court's task is . . . to examine both the content and the manner in which photographic evidence is used and to scrutinize the totality of circumstances composing that presentation. What a photograph depicts, its level of detail and scale, whether it is color or black and white, a slide or a print, where and how it is projected or presented, the scope and clarity of the testimony it accompanies—these are all factors the trial court must examine in determining the illustrative value of photographic evidence and in weighing its use by the state against its tendency to prejudice the jury.

Id. at 285, 372 S.E.2d at 527. Here, considering the totality of the circumstances, both photographs pass the balancing test. Both photographs were introduced for purposes other than to arouse the passions of the jury—the full face shot was relevant to negate the occurrence of a struggle and the photograph of the stomach was relevant to illustrate Dr. Hudson's description of the wound. Furthermore, each of the photographs was the only one submitted of those particular body parts so there was no unnecessary repetition. There were no complaints of the manner in which the photographs were presented. Therefore, while gruesome, the photographs are relevant, illustrative of Dr. Hudson's testimony and helpful to the jury in understanding his explanation of the cause of death. Defendant has failed to show abuse of discretion by the trial court.

XI.

[13] Defendant's next assignment of error alleges that the trial court erroneously admitted evidence seized from defendant's residence and automobiles in violation of the fourth amendment in that the search warrants were not based upon probable cause. However, defendant cites no authority for this contention and requests this Court to review the applications for the search warrants and, if error is found in their issuance, hold that the fruits of the illegal searches were improperly admitted. Rule 28(b)(5), North Carolina Rules of Appellate Procedure, states, in pertinent part, that: "[a]ssignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or author-

ity cited, will be taken as abandoned." Abandoned exceptions require no response.

However, in reviewing death sentence appeals, this Court has traditionally examined all possible assignments of error. There is nothing in the record to suggest that the fruits of the searches in this case were improperly admitted. 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, 319 S.E.2d 254 (1984); *see also Illinois v. Gates*, 462 U.S. 213, 76 L. Ed. 2d 527 (1983) (citations omitted). "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." *State v. Greene*, 324 N.C. 1, 8, 376 S.E.2d 430, 435-36 (1989), *death sentence vacated on other grounds, Greene v. North Carolina*, --- U.S. ---, --- L. Ed. 2d --- (U.S. March 19, 1990) (No. 88-7306). "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. Greene*, 324 N.C. at 9, 376 S.E.2d at 436. Under the totality of the circumstances and upon giving due deference to the magistrate's determination, we conclude that all three search warrants were supported by extensive and complete affidavits that established unarguable probable cause. We find no prejudicial error in the guilt phase of defendant's trial.

PENALTY PHASE

[14] Defendant asserts as error the trial court's failure to submit in writing to the jury certain mitigating circumstances timely requested by defendant during the penalty phase. At the beginning of the sentencing hearing, defendant requested in writing that the following mitigating circumstances be submitted to the jury:

1. The defendant has no significant prior criminal record.

2. The defendant has no significant history of prior criminal activity.

3. The defendant, prior to this homicide, had no significant history of violent conduct.

4. The defendant has a history of being gainfully employed.

5. The defendant has been a conscientious and good worker.

6. The defendant has been a loving father to his children.

7. The defendant has a reputation with his employers as being trustworthy.

8. There was an extenuating relationship between the defendant and the victim, in that it was a domestic relationship and possible child custody dispute.

In preparing the issues and recommendation form, the trial court in its discretion placed in writing two statutory mitigating circumstances: "lack of significant prior criminal activity" and "any other circumstance or circumstances arising from the evidence which [the jury deems] to have mitigating value." The trial court verbally listed some of the remaining requested circumstances during his charge as he explained what the jury could consider under the second or "catchall" mitigating circumstance. Defendant contends that the failure to list the requested circumstances on the written form was prejudicial error. We agree and remand the case for a new sentencing hearing.

The verdict of guilty was returned on 4 May 1987. On 5 May 1987, the defendant filed the written motion requesting the court to instruct on the mitigating circumstances set forth above. This written motion does not request that the mitigating circumstances be listed in writing on the issues and recommendation form.

However, during the charge conference as to the punishment phase, which was recorded and transcribed, defendant's counsel moved that peremptory instructions be given as to some of the mitigating circumstances. He then stated to the court:

> And for the jury to see in print what the State's contentions are and then they have to go looking for some themselves and then weigh against what is already before them in type we feel is prejudicial to our clients and would object to the format of the issues and recommendation as to punishment sheet.
>
> If not peremptorily given to them as existing, and instructing them to weigh them, that if nothing else they should be at least on equal footing that evidence has been presented as to these matters.

> I think they can find that if they do exist, but they ought to be able to read them and not try to catch them in, I think you said, a lengthy and much more complicated instruction from you tomorrow morning, and then go back and have this in front of them and try to remember exactly what you said and weigh all of that.

Although not artfully stated, we conclude that defendant's counsel was requesting that the mitigating circumstances be placed in writing on the form.

In charging the jury, the only reference made by the court concerning the mitigating circumstances requested by the defendant was:

> Number two, you may consider any other circumstance or circumstances arising from the evidence which you deem to have mitigating value including, but not limited to, consideration as to whether the defendant has a good character, or whether the defendant was gainfully employed prior to this murder, and was a good worker, trustworthy, and conscientious, or whether the defendant is considerate and loving to his children.

In so doing, the trial court only mentioned four of the seven remaining circumstances requested by defendant. Before the jury commenced its deliberations, the court, in the absence of the jury, inquired if counsel had any corrections to the jury charge or "additional matters." Defendant's counsel responded by repeating the motion for a peremptory instruction as to certain mitigating circumstances. The court denied this motion, and defendant then stated:

> Your Honor, we would then ask for, without the peremptory instruction, that they be included and listed so that the jury will not have to go looking for them, and they are there for their consideration. In that it was not directed, they ought to at least be able to see it on equal footing with the State's aggravating circumstances before them.

The court responded:

> All right, sir. Motion denied since I've charged them on it.

When defendant's written motion and the requests by defendant at the charge conference, as well as his request at the court's invitation, are considered together it is manifest that defendant

requested that the proposed mitigating circumstances be placed in writing on the form. N.C.G.S. § 15A-1231(b) requires that the charge conference be recorded. We hold that defendant properly requested that the proposed nonstatutory mitigating circumstances be listed in writing on the issues and recommendation form, and that the denial of this request was error. *See State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308 (1983); *State v. Johnson*, 298 N.C. 47, 257 S.E.2d 597 (1979).

To avoid any possible question concerning the requirements of *McDougall* and *Johnson* as to this issue, we now hold that where a defendant makes a timely *written* request for a listing *in writing* on the form of possible nonstatutory mitigating circumstances that are supported by the evidence and which the jury could reasonably deem to have mitigating value, the trial court must put such circumstances in writing on the form. Absent such a request, the failure of the trial court to list in writing such mitigating circumstances on the form is not error. *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308. This rule shall only be applied prospectively to all capital cases tried after the certification date of this opinion.

The finding of error does not end our discussion of this issue because the error is subject to a harmless error analysis. *See State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988). Because failure to submit a nonstatutory mitigating circumstance is subject to a harmless error analysis, *a fortiori*, failure to include such circumstances in writing on the form is also subject to the harmless error rationale. In this instance, however, it is questionable whether the violation is one of federal constitutional dimension. We hold that it is not necessary for us to decide whether the error involves constitutional questions under *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973 (1978); the defendant has demonstrated prejudicial error under N.C.G.S. § 15A-1443(a).

The evidence supported each of the requested mitigating circumstances and a rational jury could deem that each had mitigating value. The extent of that mitigating value was a matter for the jury to determine. This Court stated in *Johnson*, 298 N.C. at 74, 257 S.E.2d at 616-17:

> A death penalty sentencing statute, however, which by its terms or the manner in which it is applied, puts some mitigating circumstances in writing and leaves others to the jury's recollection might be constitutionally impermissible. . . . For if the

sentencing authority cannot be precluded from considering any relevant mitigating circumstances supported by the evidence neither should such circumstances be submitted to it in a manner which makes some seemingly less worthy of consideration than others.

Thus we are satisfied that our legislature intended that all mitigating circumstances, both those expressly mentioned in the statute and others which might be submitted under G.S. 15A-2000(f)(9), be on equal footing before the jury. If those which are expressly mentioned are submitted in writing, as we believe they should be, then any other relevant circumstance proffered by the defendant as having mitigating value which is supported by the evidence and which the jury may reasonably deem to have mitigating value must, upon defendant's timely request, also be submitted in writing.

Where, as here, only two mitigating circumstances are in writing on the issues and recommendation form, and the nonstatutory mitigating circumstances are only named orally by the trial court to the jury, the mitigating circumstances are not susceptible of equal consideration by the jury. Because the circumstances were not presented on an equal footing, the jury could easily believe that the unwritten circumstances were not as worthy as those in writing. Further, common sense teaches us that jurors, as well as all people, are apt to treat written documents more seriously than items verbally related to them. Had the circumstances been written on the form, the trial judge and the jury would have been required to directly address each of them. The evidence on each of the circumstances was predominantly supportive of them. We hold that defendant has shown that there was a reasonable possibility that had the error not occurred, a different result would have been reached at the sentencing hearing. The case must be remanded for a new sentencing hearing.

Other errors assigned in the sentencing hearing are not likely to reoccur; therefore, we refrain from discussing them.

We find no prejudicial error in the guilt phase of defendant's trial. For error in the sentencing phase of defendant's trial, the cause is remanded to Superior Court, Hoke County, for a new sentencing hearing.

Guilt Phase—no error.

Sentencing Phase—remanded for new sentencing hearing.

Justice WEBB dissenting.

I dissent from that part of the majority opinion which holds that the testimony of Celia Mansary was admissible. Ms. Mansary was allowed to testify that Karen Puryear had told her that defendant had beaten her on several occasions and threatened to kill her if she tried to take the children from him.

The majority reasons that this testimony of Ms. Mansary was admissible under N.C.G.S. § 8C-1, Rule 803(3) which provides that a statement of the declarant's then existing state of mind may be admitted as an exception to the hearsay rule. The majority says these statements "related directly to Karen's existing state of mind and emotional condition."

It is true that if these things had happened to Karen Puryear she would probably have been emotional and upset about them. If this makes the testimony admissible it seems to me we have opened the door to any hearsay testimony the subject of which can be shown to have been upsetting to the declarant. This is a wide door indeed. I would limit this exception to testimony as to statements of the declarant which say what is his or her mental or emotional state. I believe this is all that was intended by the Legislature.

HAZEL MARIE CRIST v. ROBERT C. MOFFATT, M.D.

No. 69PA89

(Filed 1 March 1990)

1. **Appeal and Error § 6.2 (NCI3d)— malpractice—contact with nonparty treating physicians—remedial order—appealable**

Although defendant's appeal was interlocutory, the Supreme Court elected to hear the matter on the merits under the authority of North Carolina Constitution, article IV, § 12(1), because of the importance of the question presented.

Am Jur 2d, Appeal and Error §§ 50, 53, 55, 62.

2. Evidence § 14 (NCI3d)— malpractice action—ex parte interview with nonparty treating physician

Assuming that the plaintiff in a medical malpractice action impliedly waived her physician-patient privilege by her pretrial conduct, the trial court correctly found that defense counsel acted improperly by privately contacting and discussing plaintiff's medical care and treatment with plaintiff's nonparty treating physicians. Considerations of patient privacy, the adequacy of formal discovery devices, and the untenable position in which *ex parte* contact places the nonparty physician supersede defendant's interest in a less expensive and more convenient method of discovery. Defense counsel may not interview plaintiff's nonparty treating physicians privately without plaintiff's express consent; defendant must instead utilize the statutorily recognized methods of discovery enumerated in N.C.G.S. § 1A-1, Rule 26.

Am Jur 2d, Depositions and Discovery §§ 29, 70, 132; Witnesses § 233.

3. Trial § 9 (NCI3d); Rules of Civil Procedure § 26 (NCI3d)— medical malpractice action—ex parte interview with nonparty treating physician—remedial order—within the authority of the court

The trial court did not err in a medical malpractice action by requiring defense counsel to fully disclose the substance of all private conversations between defense counsel and plaintiff's nonparty treating physicians even though defendant contended that this forced him to reveal his work product. The order was remedial in purpose and effect and within the broad, inherent, discretionary power of the trial court to control the course of a trial so as to prevent injustice to a party.

Am Jur 2d, Depositions and Discovery §§ 29, 70, 132; Witnesses § 233.

ON discretionary review of a decision of the Court of Appeals, reported at 92 N.C. App. 520, 374 S.E.2d 487 (1988), dismissing defendant's appeal from an order entered by *Hyatt, J.*, on 10 February 1988 in Superior Court, BUNCOMBE County. Heard in the Supreme Court 14 November 1989.

DeVere C. Lentz, Jr., P.A., by Shirley H. Brown, and Tharrington, Smith & Hargrove, by Elizabeth F. Kuniholm, for plaintiff-appellee.

Roberts Stevens & Cogburn, P.A., by Isaac N. Northup, Jr., for defendant-appellant.

Tharrington, Smith & Hargrove, by Elizabeth F. Kuniholm, for North Carolina Academy of Trial Lawyers, amicus curiae.

Poyner & Spruill, by John R. Jolly, Jr., Mary Beth Johnston, and Robert O. Crawford III, for North Carolina Association of Defense Attorneys, amicus curiae.

Tuggle Duggins Meschan & Elrod, P.A., by Joseph E. Elrod III, Sally A. Lawing, and J. Reed Johnston, Jr., for North Carolina Society of Obstetricians and Gynecologists, amicus curiae.

WHICHARD, Justice.

Plaintiff filed this medical malpractice action on 4 December 1986, alleging in her complaint that defendant performed surgery on her and rendered post-operative treatment to her in a negligent manner, causing injury, pain and suffering, and damages. After answering, defendant served plaintiff with interrogatories and requests for all medical bills incurred by plaintiff as a result of defendant's allegedly negligent acts. Plaintiff complied, producing among others the records of her treatment by Dr. James W. Tyson and Dr. F. Alan Thompson. In her supplemental answer to defendant's interrogatories she identified Dr. F. Alan Thompson and Dr. James W. Tyson as physicians who "will testify as to facts and circumstances" of their treatment of plaintiff prior to surgery.

Defendant deposed plaintiff on 6 July 1987 and questioned her about the treatment rendered by nonparty treating physicians, including Drs. Thompson and Tyson. On or about 23 November 1987 defendant's attorney, Isaac N. Northup, Jr., met privately with Dr. Tyson to discuss his treatment of plaintiff. Dr. Tyson later told plaintiff's attorney that Mr. Northup had assured him that plaintiff had waived her physician-patient privilege. *See* N.C.G.S. § 8-53 (1986). Upon being questioned by plaintiff's attorney, Mr. Northup advised that he also had met with Dr. Thompson, on or about 19 November 1987. A letter from Dr. Thompson to plaintiff's attorney stated: "It was also my understanding at the time the discussion took place that the physician-patient privilege had

been waived under the new law." At oral argument Mr. Northup confirmed that he had advised both physicians that plaintiff had waived the privilege.

Plaintiff filed a motion to compel disclosure of defendant's attorney's private conversations with plaintiff's nonparty treating physicians. In addition, plaintiff requested that the court prohibit the use at trial of any information obtained during the private conversations and prohibit any further *ex parte* contact with nonparty treating physicians. The trial court entered an order containing the following pertinent findings, conclusions, and orders:

> 11. The plaintiff has not expressly waived and did not expressly waive prior to November 19, 1987, and November 23, 1987, the physician/patient privilege conferred by N.C.G.S. 8-53.
>
> 12. No resident or presiding judge, either at trial, this matter not having been called for trial, nor prior to trial during the course of discovery, has entered an order compelling disclosure pursuant to N.C.G.S. 8-53.
>
> 13. No resident or presiding judge has entered an order finding that plaintiff has waived any physician/patient privilege by providing, in response to formal requests for discovery, copies of her medical records, by testifying concerning her medical treatment at her deposition, by identifying Dr. F. Alan Thompson and Dr. James Tyson as witnesses who would testify concerning their medical treatment of plaintiff, and by not objecting to the deposition of any non-party treating physician.
>
> Based upon the foregoing findings of fact the court concludes as a matter of law that the conduct of Isaac N. Northup, Jr. in privately contacting and discussing plaintiff's medical care and treatment with Dr. James Tyson and Dr. F. Alan Thompson, non-party treating physicians, without the plaintiff's knowledge and consent, although in good faith, was not proper.
>
> Now, therefore, it is ordered, adjudged and decreed as follows:
>
> 1. The defendant's attorneys shall fully disclose within fifteen (15) days of the date of this order, in written form, the substance of all private conversations between the defendant's attorneys and non-party treating physicians;

2. Defendant's attorneys shall not contact non-party treating physicians without the knowledge and consent of plaintiff's attorney or, alternatively, without an order of the court;

3. The presiding trial judge shall rule upon the use at trial of any information and/or opinions obtained as a result of private conversations between the defendant's attorneys and non-party treating physicians[.]

* * *

Defendant appealed from this order, conceding that his appeal was interlocutory, but arguing that the order affects a substantial right. The Court of Appeals dismissed the appeal, stating: "We do not perceive that Judge Hyatt's order deprived defendant of any right, substantial or otherwise." *Crist v. Moffatt*, 92 N.C. App. 520, 523, 374 S.E.2d 487, 488 (1988). We allowed discretionary review on 8 June 1989.

[1] While an appeal may not be taken from an interlocutory order unless the order affects a substantial right—N.C.G.S. § 1-277(a) (1983); N.C.G.S. § 7A-27(d) (1989)—because of the importance of the question presented, we elect to vacate the Court of Appeals opinion dismissing the appeal and to consider the case on the merits. We do so pursuant to the Constitution of North Carolina, article IV, section 12(1), which gives this Court jurisdiction "to review upon appeal any decision of the courts below, upon any matter of law or legal inference" and gives it "general supervision and control over the proceedings of the other courts." *See Lea Company v. N.C. Bd. of Transportation*, 317 N.C. 254, 263, 345 S.E.2d 355, 360 (1986) (general supervisory powers provided by article IV, section 12(1) rarely used but may be invoked "to promote the expeditious administration of justice").

[2] Defendant assigns error to the trial court's failure to find that plaintiff waived the physician-patient privilege conferred by N.C.G.S. § 8-53.[1] He argues that plaintiff waived the privilege by

1. N.C.G.S. § 8-53 provides:

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

providing copies of her medical records to opposing counsel, testifying at her deposition concerning her treatment by other doctors, and identifying Drs. Thompson and Tyson as witnesses.

A patient may impliedly waive the physician-patient privilege by his or her conduct. *Cates v. Wilson*, 321 N.C. 1, 14, 361 S.E.2d 734, 742 (1987). The facts and circumstances of a particular case determine whether a patient's conduct constitutes an implied waiver. *Id.*; *Capps v. Lynch*, 253 N.C. 18, 23, 116 S.E.2d 137, 141 (1960). Both *Cates* and *Capps* applied this ad hoc test in the context of a trial and held that each plaintiff's public disclosure of his or her medical condition at trial waived the privilege.

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

Capps, 253 N.C. at 23, 116 S.E.2d at 141 (quoted in *Cates*, 321 N.C. at 14, 361 S.E.2d at 742). Defendant asks us similarly to find an implied waiver by virtue of plaintiff's conduct during discovery, asserting that no meaningful distinction exists between disclosures occurring at trial and disclosures made during discovery.

Defendant also assigns error to the trial court's finding that defense counsel acted improperly by privately contacting and discussing plaintiff's medical care and treatment with plaintiff's nonparty treating physicians, and to the trial court's order requiring defense counsel to obtain plaintiff's consent or a court order before further contacting plaintiff's nonparty treating physicians. Assuming, without deciding, that plaintiff impliedly waived her physician-patient privilege by her pretrial conduct, we overrule this assignment of error and uphold the finding and order entered by the trial court on grounds distinct from that of physician-patient privilege. We hold that the trial court did not abuse its broad discretionary power

---

shall be furnished only on the authorization of the patient, or if deceased, the executor, administrator, or, in the case of unadministered estates, the next of kin. Any resident or presiding judge in the district, either at the trial or prior thereto, or the Industrial Commission pursuant to law may, subject to G.S. 8-53.6, compel disclosure if in his opinion disclosure is necessary to a proper administration of justice. If the case is in district court the judge shall be a district court judge, and if the case is in superior court the judge shall be a superior court judge.

to ensure justice in entering the order. *Miller v. Greenwood*, 218 N.C. 146, 150, 10 S.E.2d 708, 711 (1940) (within trial court's discretion to take any action within the law "to see to it that each side has a fair and impartial trial"); *see also State v. Britt*, 285 N.C. 256, 271-72, 204 S.E.2d 817, 828 (1974) ("paramount duty" of trial court to control course of trial so as to prevent injustice to any party; trial court possesses broad discretionary powers in exercise of this duty). We affirm the order on this basis and on the basis of public policy grounds discussed below.

Courts in numerous other jurisdictions have considered whether opposing counsel may conduct *ex parte* interviews of the injured party's treating physicians following waiver of the physician-patient privilege. Annot. "Discovery: right to ex parte interview with injured party's treating physician," 50 A.L.R.4th 714 (1986). The emerging consensus adheres to the position that defense counsel is limited to the formal methods of discovery enumerated by the jurisdiction's rules of civil procedure, absent the patient's express consent to counsel's *ex parte* contact with her treating physician. *See, e.g., Petrillo v. Syntex Laboratories, Inc.*, 148 Ill. App. 3d 581, 499 N.E.2d 952 (1986), *appeal denied*, 113 Ill. 2d 584, 505 N.E.2d 361, *cert. denied*, 483 U.S. 1007, 97 L. Ed. 2d 738 (1987). This rule has been adopted in jurisdictions where waiver of the physician-patient privilege is mandated by statute upon the filing of a suit which places the plaintiff's medical condition at issue, *see, e.g., Wenninger v. Muesing*, 307 Minn. 405, 240 N.W.2d 333 (1976), and where waiver is deemed by judicial decision to occur upon the filing of a lawsuit, *see, e.g., Anker v. Brodnitz*, 98 Misc. 2d 148, 413 N.Y.S.2d 582 (1979). *See also Smith v. Ashby*, 106 N.M. 358, 743 P.2d 114 (1987) (privilege abolished by statute, but *ex parte* interviews prohibited on public policy grounds, absent plaintiff's consent). A related line of cases prohibits trial courts from ordering physicians to submit to *ex parte* interviews because private interviews are not statutorily prescribed methods of discovery: *Jaap v. District Court of Eighth Judicial Dist.*, 191 Mont. 319, 623 P.2d 1389 (1981); *Johnson v. District Court of Oklahoma County*, 738 P.2d 151 (Okla. 1987); *State ex rel. Klieger v. Alby*, 125 Wis. 2d 468, 373 N.W.2d 57 (Wis. App. 1985).

The statutory physician-patient privilege is distinct from the rule prohibiting unauthorized *ex parte* contacts in several respects. First, the privilege is purely statutory; at common law communications from patients to physicians were not privileged. *Sims v. In-*

surance Co., 257 N.C. 32, 36, 125 S.E.2d 326, 329 (1962). In contrast, the prohibition against *ex parte* contacts "is derived from neither statute nor established common law; rather, it is an emerging court-created effort to preserve the treating physician's fiduciary responsibilities during the litigation process." *Manion v. N.P.W. Medical Center of N.E. Pa., Inc.*, 676 F. Supp. 585, 593 (M.D. Pa. 1987).

Both the privilege and the rule are rooted in public policy. However, the policies underlying the privilege are more narrow than those underlying the prohibition against *ex parte* contacts. The purposes of North Carolina's statutory physician-patient privilege are to encourage the patient to fully disclose pertinent information to a physician so that proper treatment may be prescribed, to protect the patient against public disclosure of socially stigmatized diseases, and to shield the patient from self-incrimination. *Cates v. Wilson*, 321 N.C. at 14-15, 361 S.E.2d at 742; *Sims v. Insurance Co.*, 257 N.C. at 36, 125 S.E.2d at 329. The rationales underlying the rule prohibiting *ex parte* contacts with nonparty treating physicians encompass and extend beyond those purposes enumerated in *Cates* to embrace other grounds as well.

The privilege and the rule prohibiting *ex parte* contacts differ in function as well as purpose. "The statutory privilege determines whether certain information may be disclosed. In contrast, the prohibition against unauthorized *ex parte* contacts regulates only how defense counsel may obtain information from a plaintiff's treating physician, *i.e.*, it affects defense counsel's methods, not the substance of what is discoverable." *Manion v. N.P.W. Medical Center of N.E. Pa., Inc.*, 676 F. Supp. at 593.

The primary policy reason against allowing *ex parte* interviews involves the unique and confidential nature of the physician-patient relationship. *Duquette v. Superior Court of Arizona*, 161 Ariz. 269, 275, 778 P.2d 634, 640 (Ariz. App. 1989). Patients expect that physicians will comply with the Hippocratic oath, which states in part: "Whatever, in connection with my professional practice or not in connection with it, I see or hear, in the life of men, which ought not to be spoken abroad, I will not divulge, as reckoning that all such should be kept secret." *Petrillo v. Syntex Laboratories, Inc.*, 148 Ill. App. 3d at 589, 499 N.E.2d at 957-58. Both The American Medical Association's (AMA) Principles of Medical Ethics and The Current Opinions of the Judicial Council of the AMA affirm the physician's duty to protect the patient's confidences. *Id.* at 590,

499 N.E.2d at 957-58. As stated by the Court of Appeals of Arizona: "We believe the public has a widespread belief that information given to a physician in confidence will not be disclosed to third parties absent legal compulsion, and we further believe that the public has a right to have this expectation realized." *Duquette v. Superior Court of Arizona*, 161 Ariz. at 275, 778 P.2d at 640. This expectation of confidentiality exists separate and distinct from the matter of statutory privilege. As stated by the Supreme Court of Iowa: "[W]e cannot accept defendant's contention that the plaintiff's suit totally waives the confidential nature of the physician-patient relationship. It only waives the application of the privilege, which is confined by the statute to a testimonial setting, and does not speak to ex parte communications in a nontestimonial setting." *Roosevelt Hotel Ltd. Partnership v. Sweeney*, 394 N.W.2d 353, 356 (Iowa 1986) (interpreting Iowa statutory privilege). Unlike the Iowa statute, N.C.G.S. § 8-53 is not confined by its plain language to a testimonial setting, but instead protects physicians generally from being "required to disclose" confidential information. We nevertheless agree with the Iowa Supreme Court's conclusion that, once the statutory privilege has been waived, the confidential nature of the physician-patient relationship remains, even though medical information is then subject to discovery.

Assuming the privilege has been waived, the question remains by what procedures and subject to what controls the exchange of information shall proceed. Private interviews with nonparty treating physicians are neither authorized nor prohibited by our discovery rules.[2] Other courts have concluded that formal discovery procedures enable defendants to reach all relevant information while simultaneously protecting the patient's privacy by ensuring supervision over the discovery process, via presence of counsel or judicial intervention, if warranted. *See Petrillo v. Syntex Laboratories, Inc.*, 148 Ill. App. 3d at 597, 499 N.E.2d at 963; *Roosevelt Hotel Ltd. Partnership v. Sweeney*, 394 N.W.2d at 356; *Anker v. Brodnitz*, 98 Misc. 2d at 153-54, 413 N.Y.S.2d at 585-86. Defendant complains that depositions are expensive and time consuming. "Oral depositions are not the only means available to obtain the opinion

2. "Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission." N.C.G.S. § 1A-1, Rule 26(a) (1983).

of the treating physician. A deposition upon written questions is less costly and copies of all relevant medical records are easily obtainable pursuant to the rules." *Jordan v. Sinai Hosp. of Detroit, Inc.*, 171 Mich. App. 328, 343-44, 429 N.W.2d 891, 898 (1988).

> Moreover, while *ex parte* interviews may be less expensive and time-consuming than formal discovery and may provide a party some means of equalizing tactical advantage, these interests are insignificant when compared with the patient-plaintiff's interest in maintaining the confidentiality of personal and possibly embarrassing information, irrelevant to the determination of the case being tried.

Nelson v. Lewis, 130 N.H. 106, 111, 534 A.2d 720, 723 (1987).

Another compelling policy argument against *ex parte* contacts concerns the liability of the nonparty physicians. Although physicians, like other witnesses, may refuse to meet informally with defense counsel, all may not be conversant with their right to refuse. "A physician may lack an understanding of the legal distinction between an informal method of discovery such as an *ex parte* interview, and formal methods of discovery such as deposition and interrogatories, and may therefore feel compelled to participate in the *ex parte* interview." *Duquette v. Superior Court of Arizona*, 161 Ariz. at 276, 778 P.2d at 641. Breaches of patient confidentiality, whether the result of inadvertence or pressure by the interviewer, may expose the doctor to charges of professional misconduct or tort liability.[3] Regarding the potential for improper pressure, one court has stated:

> An unauthorized *ex parte* interview could disintegrate into a discussion of the impact of a jury's award upon a physician's professional reputation, the rising cost of malpractice insurance premiums, the notion that the treating physician might be the next person to be sued, and other topics which might influence the treating physician's views. The potential for impropriety grows even larger when defense counsel represents the treating physician's own insurance carrier and when the

---

3. We note that the North Carolina Court of Appeals has followed other jurisdictions in allowing a plaintiff to recover from a health care provider for unauthorized disclosure of confidential information in a medical malpractice action. *Watts v. Cumberland County Hosp. System*, 75 N.C. App. 1, 9-12, 330 S.E.2d 242, 248-50, *disc. rev. denied as to additional issues*, 314 N.C. 548, 335 S.E.2d 27 (1985), *reversed in part on other grounds*, 317 N.C. 321, 345 S.E.2d 201 (1986).

> doctor, who typically is not represented by his personal counsel at the meeting, is unaware that he may become subject to suit by revealing the plaintiff/patient's confidences which are not pertinent to the pending litigation.

Manion, 676 F. Supp. at 594-95. The Iowa Supreme Court has expressed its concern

> with the difficulty of determining whether a particular piece of information is relevant to the claim being litigated. Placing the burden of determining relevancy on an attorney, who does not know the nature of the confidential disclosure about to be elicited, is risky. Asking the physician, untrained in the law, to assume this burden is a greater gamble and is unfair to the physician. We believe this determination is better made in a setting in which counsel for each party is present and the court is available to settle disputes.

Roosevelt Hotel Ltd. Partnership v. Sweeney, 394 N.W.2d at 357.

In summary, the gravamen of the issue is not whether evidence of plaintiff's medical condition is subject to discovery, but by what methods the evidence may be discovered. We conclude that considerations of patient privacy, the confidential relationship between doctor and patient, the adequacy of formal discovery devices, and the untenable position in which *ex parte* contacts place the nonparty treating physician supersede defendant's interest in a less expensive and more convenient method of discovery. We thus hold that defense counsel may not interview plaintiff's nonparty treating physicians privately without plaintiff's express consent. Defendant instead must utilize the statutorily recognized methods of discovery enumerated in N.C.G.S. § 1A-1, Rule 26. For additional authorities reaching the same result on similar policy grounds, *see Alston v. Greater Southeast Community Hosp.*, 107 F.R.D. 35 (D.D.C. 1985); *Weaver v. Mann*, 90 F.R.D. 443 (D. N.D. 1981); *Garner v. Ford Motor Co.*, 61 F.R.D. 22 (D. Alaska 1973); *Fields v. McNamara*, 189 Colo. 284, 540 P.2d 327 (1975); *State ex rel. Woytus v. Ryan*, 776 S.W.2d 389 (Mo. 1989); *Loudon v. Mhyre*, 110 Wash. 2d 675, 756 P.2d 138 (1988).

We do not intend by this holding to discourage consensual informal discovery. *See Wenninger v. Muesing*, 307 Minn. at 412, 240 N.W.2d at 337; *Smith v. Ashby*, 106 N.M. at 360, 743 P.2d at 116.

[3] Defendant next assigns error to the trial court's order to defense counsel to fully disclose the substance of all private conversations between defense counsel and plaintiff's nonparty treating physicians. He argues that this order forces him to reveal his work product, which is protected under N.C.G.S. § 1A-1, Rule 26(b)(3). He also argues that plaintiff may obtain the same information by deposing the physicians herself.

The order was remedial in purpose and effect, designed to enable plaintiff to prepare for evidence that might be offered at trial as a result of the *ex parte* discovery. As such, its entry was within the broad, inherent, discretionary power of the trial court to control the course of a trial so as to prevent injustice to a party. *Miller v. Greenwood*, 218 N.C. at 150, 10 S.E.2d at 711 (within trial court's discretion to take any action within the law "to see to it that each side has a fair and impartial trial"); *see also State v. Britt*, 285 N.C. at 271-72, 204 S.E.2d at 828 ("paramount duty" of trial court to control course of trial so as to prevent injustice to any party; trial court possesses broad discretionary powers in exercise of this duty). While the court could have required plaintiff to secure the information by deposing the physicians herself, it was not required to do so. This assignment of error is overruled.

In his next assignment of error, defendant asserts that the trial court erred in reserving ruling on the admissibility of information or opinions obtained during the private interviews with plaintiff's treating physicians. Defendant admits this assignment is premature, but states he brought it forward to preserve it and to urge this Court to vacate the trial court's order *in toto*. Because we hold that the order was proper, we overrule this assignment of error.

Finally, defendant argues that if plaintiff did not waive the physician-patient privilege, plaintiff should seek any possible remedy for disclosure of privileged information against Drs. Tyson and Thompson, rather than against defense counsel. We have held that the trial court acted within its broad discretionary powers in ordering disclosure by defense counsel. This assignment of error is overruled.

For the reasons stated, the opinion of the Court of Appeals dismissing the appeal is vacated. The order entered on 10 February 1988 in the Superior Court, Buncombe County, is affirmed. The

case is remanded to the Court of Appeals for further remand to the Superior Court, Buncombe County, for further proceedings not inconsistent with this opinion.

Court of Appeals opinion vacated; superior court order affirmed; case remanded.

ROBERT J. BATTEN v. N.C. DEPARTMENT OF CORRECTION

No. 76PA89

(Filed 1 March 1990)

1. **Appeal and Error § 6.3 (NCI3d)— absence of subject matter jurisdiction—ruling appealable**

An order issued by a trial court holding that an adminstrative agency does not have subject matter jurisdiction over the issues on appeal is immediately appealable under N.C.G.S. § 1-277(a) because it determines or discontinues the action.

Am Jur 2d, Administrative Law § 646; Appeal and Error § 87.

2. **State § 12 (NCI3d)— state employee grievance—jurisdiction of State Personnel Commission and Office of Administrative Hearings—applicable statute**

Among all of the provisions of Article 8 of the State Personnel Act, only section 126-37 confers upon the State Personnel Commission or upon the Office of Administrative Hearings the jurisdiction, or power, to deal with a state employee grievance based on a reduction in position prompted by managerial reallocation of personnel. Insofar as *Poret v. State Personnel Comm.*, 74 N.C. App. 536 (1985) and *N.C. Dept. of Justice v. Eaker*, 90 N.C. App. 30 (1988) hold otherwise, they are overruled.

Am Jur 2d, Administrative Law § 203; Civil Service §§ 72, 74.

3. State § 12 (NCI3d)— grievance of Department of Correction employee—no exemption under Administrative Procedure Act

The exemption of the Department of Correction from the Administrative Procedure Act, G.S. Ch. 150B, does not apply to a Department of Correction employee whose job classification is not one of those exempted from grievance review and appeal under the State Personnel Act, G.S. Ch. 126. Therefore, petitioner, a permanent employee in a non-policymaking, non-academic position in the Department of Correction, was not barred from the appeal procedures of the Administrative Procedure Act by that Act's general exclusion of his department from its provisions.

Am Jur 2d, Administrative Law § 203; Civil Service §§ 72, 74.

4. State § 12 (NCI3d)— state employee—demotion without sufficient cause—contested case—appeal conducted by Office of Administrative Hearings

An allegation that a permanent state employee was "demoted in rank without sufficient cause" stated grounds for his department's action to be deemed "disciplinary" within the meaning of N.C.G.S. § 126-35, even though his reduction in position was prompted by managerial reallocation of personnel rather than by employee misconduct, and presented a "contested case" within the meaning of N.C.G.S. § 126-37(a). Therefore, plaintiff's grievance invoked first the jurisdiction of the State Personnel Commission and, on appeal, that of the Office of Administrative Hearings.

Am Jur 2d, Administrative Law § 203; Civil Service §§ 72, 74.

ON discretionary review of an unpublished opinion of the Court of Appeals, 92 N.C. App. 595, 376 S.E.2d 53 (1988), dismissing as interlocutory an appeal from an order entered by *Stephens, J.*, at the 4 January 1988 Civil Session of Superior Court, WAKE County. Heard in the Supreme Court 9 October 1989.

Kirk, Gay, Kirk, Gwynn & Howell, by Philip G. Kirk and Katherine M. McCraw, for petitioner-appellant.

Lacy H. Thornburg, Attorney General, by Sylvia Thibaut, Assistant Attorney General, for respondent-appellee.

WHICHARD, Justice.

This case concerns the grievance of an employee of the Department of Correction (DOC) who was "reallocated"[1] pursuant to a managerial reorganization of correctional facility personnel. Grievance procedures available to the employee are set forth in the State Personnel Act, N.C.G.S. §§ 126-1 through 126-88, and in the administrative code regulations authorized thereunder. Because reallocation in this employee's case entailed a reduction in position, the action was "disciplinary" within the meaning of the Act. Such actions entitle "permanent state employees"[2] subject to the Act to review of the action in accordance with the procedures set forth in the Administrative Procedure Act, N.C.G.S. §§ 150B-1 through 150B-64.

When the Harnett Correctional Center was converted from a youth prison to an adult facility, petitioner was reallocated from his position as a correctional lieutenant, at pay grade level sixty-six, to that of a correctional officer, at pay grade level sixty-two. Petitioner has not alleged that his reallocation was the result of either discrimination or disciplinary action. The reallocation did not affect petitioner's pay or benefits; he contends, however, that because the pay scale at grade level sixty-two peaks at a lower figure than the pay scale for grade level sixty-six, the reallocation eventually will affect the maximum amount of compensation he could earn.

---

1. The North Carolina Administrative Code defines "reallocation" as "the assignment of a position to a different classification." 25 NCAC 1D .0601. Reallocation to a lower grade may be effected as a disciplinary measure, in which case it is treated as a "demotion," 25 NCAC 1D .0603(b)(2), or it may result from "management needs not associated with the employee's . . . performance." 25 NCAC 1D .0603(b)(1).

2. "Permanent State employee" is defined in the State Personnel Act as a person

(1) in a grade 60 or lower position who has been continuously employed by the State of North Carolina for the immediate 12 preceding months;

(2) in a grade 61 to grade 65 position who has been continuously employed by the State of North Carolina for the immediate 36 preceding months;

(3) in a grade 66 to grade 70 position who has been continuously employed by the State of North Carolina for the immediate 48 preceding months; or

(4) in a grade 71 or higher position who has been continuously employed by the State of North Carolina for the immediate 60 preceding months at the time of the act, grievance, or employment practice complained of.

N.C.G.S. § 126-39 (1989).

Petitioner was informed by the DOC personnel director that nondisciplinary reallocations were reviewed by the Personnel Office and that its recommendation would be forwarded to the Secretary of Correction. Upon review of petitioner's case, the Secretary decided to let prior actions of the department stand, and petitioner was informed that there were no further means of appeal within the department. He was simultaneously informed that if he wished to pursue his grievance, he must contact the Director of Employee Relations at the Office of State Personnel.

Petitioner accordingly requested information from the Office of State Personnel about the nonhearing, complaint resolution procedure of the State Personnel Commission. Petitioner's letter attempting to perfect his grievance with the State Personnel Commission was answered by a memorandum from the Office of State Personnel enclosing a "Hearing Request Information Form" for a contested case hearing under the aegis of the Office of Administrative Hearings (OAH) pursuant to N.C.G.S. § 150B-23(a).

Petitioner pursued this avenue of relief, but the DOC filed a motion to dismiss for lack of subject matter jurisdiction. The OAH denied the motion, found that jurisdiction did lie with it pursuant to N.C.G.S. § 126-37, and denied the DOC's motion for reconsideration, its petition for writ of certiorari, and its motion to stay OAH proceedings. A motion to stay and a petition for writ of supersedeas were granted subsequently, however, by the Superior Court, Wake County.

The superior court held that the OAH did not have jurisdiction "to determine nondisciplinary matters, which do not involve allegations of discrimination, and which concern business judgments of agencies of the State, such as, in this case, a reallocation." The court ordered the matter remanded to the Office of State Personnel, directing that it review petitioner's grievance through its nonhearing, complaint resolution procedure.

The Court of Appeals dismissed petitioner's appeal without prejudice to his right to pursue the procedure dictated by the trial court, holding that the order entered by the trial court was interlocutory and did not affect a substantial right. On 5 April 1989 we allowed discretionary review. We now reverse.

[1] An order issued by a trial court holding that an administrative agency does not have subject matter jurisdiction over the issues

on appeal is immediately appealable under N.C.G.S. § 1-277(a) because it determines or discontinues the action. *See Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 327, 293 S.E.2d 182, 184 (1982) (order granting a motion to dismiss for lack of subject matter jurisdiction immediately appealable); Whichard, *Appealability in North Carolina: Common Law Definition of the Statutory Substantial Right Doctrine*, 47 Law & Contemp. Probs. 123, 127-28 n. 33 (1984). The Court of Appeals thus erred in dismissing the appeal as interlocutory and not affecting a substantial right. Because of inconsistent interpretation of the statutes authorizing the resolution of state employee grievances, we elect to determine the issues presented rather than remand to the Court of Appeals for such determination.

The issues involve statutory provisions governing the State Personnel System, codified at N.C.G.S. §§ 126-1 through 126-88. Article 8 of that Act, dealing with "Employee Appeals of Grievances and Disciplinary Action," N.C.G.S. §§ 126-34 through -41, read together with provisions for administrative hearings of "contested cases" under Article 3 of the Administrative Procedure Act, N.C.G.S. §§ 150B-22 through 150B-37, entitles certain state employees "aggrieved" by agency or departmental decisions affecting their employment to administrative and judicial review of those decisions. *See* N.C.G.S. § 150B-43 (1987). The question whether the trial court erred in determining that the OAH did not have subject matter jurisdiction to review petitioner's appeal and whether petitioner is otherwise entitled to the review procedures outlined in Chapter 150B turns upon three subsidiary questions: first, what is the source of OAH jurisdiction over such appeals; second, whether petitioner is barred by the general exemption of the DOC from the provisions of Chapter 150B; and third, whether an appeal of a reduction in position prompted by managerial reallocation of personnel rather than by allegations of employee misconduct is a "contested case" arising under the State Personnel Act, the appeal of which must be conducted in the OAH in accordance with the provisions of Chapter 150B. *See* N.C.G.S. § 126-37(a) (1989).

I.

The jurisdiction of the OAH over the appeals of state employee grievances derives not from Chapter 150B, but from Chapter 126. The administrative hearing provisions of Article 3, Chapter 150B, do not establish the right of a person "aggrieved" by agency action to OAH review of that action, but only describe the procedures

for such review. *See* N.C.G.S. § 150B-23(a) (1987). The purpose of that Chapter is narrowly defined: "to establish as nearly as possible a uniform system of administrative rule making and adjudicatory procedures for State agencies." N.C.G.S. § 150B-1(b) (1987).

[2] OAH jurisdiction over appeals of state employee grievances is granted in the State Personnel Act: "Appeals involving a disciplinary action, alleged discrimination, and any other contested case arising under this Chapter shall be conducted in the Office of Administrative Hearings as provided in Article 3 of Chapter 150B." N.C.G.S. § 126-37(a) (1989). Such appeals do not reach the OAH unless the grievance meets a number of statutory conditions precedent. First, it must be an appeal "involving a disciplinary action, alleged discrimination, and any other contested case arising under [the State Personnel Act]." *Id.* Second, employees whose grievances arise out of their employment, other than those who allege discrimination, must have complied with N.C.G.S. § 126-34, which requires all permanent state employees having such a grievance arising out of or due to their employment first to discuss their problem or grievance with their supervisor, then to follow the grievance procedure established by their department or agency. N.C.G.S. § 126-34 (1989); N.C.G.S. § 126-37(a) (1989). Third, unless the provision describing his dispute permits direct appeal to the Personnel Commission, *see, e.g.*, N.C.G.S. §§ 126-5(h), -36, -36.1, -36.2 (1989), an employee who has met the prerequisites of section 126-34 and who remains dissatisfied with the final decision of the head of his department or agency may appeal to the Personnel Commission for investigation of that action. N.C.G.S. § 126-37(a) (1989). Among all the provisions of Article 8, only section 126-37 confers upon the State Personnel Commission or upon the OAH the jurisdiction, or power, to deal with the action in question. *See* W. Shuford, *N.C. Civil Practice and Procedure* § 12-6 (1988). Insofar as *Poret v. State Personnel Comm.*, 74 N.C. App. 536, 539, 328 S.E.2d 880, 883, *disc. rev. denied*, 314 N.C. 117, 332 S.E.2d 491 (1985) and *N.C. Dept. of Justice v. Eaker*, 90 N.C. App. 30, 39, 367 S.E.2d 392, 398, *disc. rev. denied*, 322 N.C. 836, 371 S.E.2d 279 (1988), hold otherwise, they are overruled.

II.

[3] The DOC is one of several departments exempted from the provisions of the Administrative Procedure Act. *See* N.C.G.S. § 150B-1(d) (1987). This broad exemption, however, appears to be

contradicted by provisions of the State Personnel Act that detail a system of investigation, review, and appeal for certain personnel decisions affecting state employees and that specifically refer to the role of the OAH and the procedures of Chapter 150B as part of that process. The State Personnel Act empowers the State Personnel Commission to establish policies and rules governing personnel administration, including investigating complaints and taking "other appropriate action concerning employment, promotion, demotion, transfer, discharge, and reinstatement." N.C.G.S. § 126-4(9) (1989). The Act specifies that its provisions apply to "[a]ll State employees not herein exempt." N.C.G.S. § 126-5(a)(1) (1989). "Teaching and related educational classes of employees of the Department of Correction" are specifically exempted from certain provisions of the Act, N.C.G.S. § 126-5(c3) (1989), as are any policymaking positions in that department that the Governor may designate. N.C.G.S. § 126-5(d)(1) (1989). However, permanent, non-academic, non-policymaking employees of the DOC are notably not among the exempted state employees enumerated, despite the length and detail of the list. *See* N.C.G.S. §§ 126-5(c)(1)-(4), 126-5(c1)(1)-(14), 126-5(c2)(1), (2), 126-5(c4), and 126-5(d)(1) (1989).

When two statutes deal with common subject matter, one in "general and comprehensive terms" and the other "in a more minute and definite way," they should be read together and harmonized, if possible, to effectuate consistent legislative policy. *Food Stores v. Board of Alcoholic Control*, 268 N.C. 624, 628-29, 151 S.E.2d 582, 586 (1966) (quoting 82 C.J.S. *Statutes* § 369 (1953)). "[B]ut, to the extent of any necessary repugnancy between them, the special statute, or the one dealing with the common subject matter in a minute way, will prevail over the general statute . . . unless it appears that the legislature intended to make the general act controlling." *Id.* Thus, the detailed provisions of Chapter 126, which govern the appeal of personnel actions affecting state employees, prevail with respect to DOC employees over the general departmental exclusion stated in the Administrative Procedure Act. The fact that Chapter 150B merely provides procedural guidelines to be followed in order to satisfy substantive rights established under Chapter 126 lends additional weight to our recognition that the exemption of the DOC from Chapter 150B does not apply to a DOC employee whose job classification is not one of those exempted from grievance review and appeal under Chapter 126. Moreover, the exclusion of a particular circumstance from a statute's general

operation is evidence of legislative intent not to exempt other particular circumstances not expressly excluded. *See Barnhardt v. Cab Co.*, 266 N.C. 419, 428, 146 S.E.2d 479, 485 (1966). Thus, the particularized exclusion of certain DOC employees from the provisions of Chapter 126 plainly indicates the General Assembly's intent that the Act's provisions for appeals of employment grievances apply to those not so excluded. Petitioner, a permanent employee in a non-policymaking, non-academic position in the DOC, thus was not barred from the appeal procedures of the Administrative Procedure Act by that Act's general exclusion of his department from its provisions.

III.

[4] The question whether petitioner's appeal was a "contested case" arising under the State Personnel Act turns upon whether he has stated grounds recognized in that Act as meriting administrative review and appeal. Although several sections in the Act describe employment-related grounds for such review,[3] only section 126-35 states as grounds the particular adverse departmental action of which petitioner complained in this case. The first sentence of the section provides that "[n]o permanent state employee subject to the State Personnel Act shall be discharged, suspended, or reduced in pay or position, except for just cause." N.C.G.S. § 126-35 (1989). Although this provision proceeds to refer to such adverse action as "disciplinary," it is apparent that the focus of the review is justification of the adverse departmental action, without regard to whether it is taken in response to employee conduct or in response to the vicissitudes of a department's personnel needs.

A "contested case" is not defined in the State Personnel Act. It is defined, however, in Chapter 150B, as "an administrative proceeding pursuant to this Chapter to resolve a dispute between an agency and another person that involves the person's rights, duties, or privileges." N.C.G.S. § 150B-2(2) (1987). This definition

---

3. *E.g.*, N.C.G.S. § 126-5(h) (dispute between employer and employee as to whether latter non-exempt); N.C.G.S. §§ 126-14(c), -14.1(c) ("disciplinary actions": false accusation of coercion of political help from fellow employee); N.C.G.S. § 126-25 (employee objection to inaccurate or misleading material in personnel file); N.C.G.S. §§ 126-27, -28 (prohibiting unauthorized examination of personnel files); N.C.G.S. § 126-35 (disciplinary actions); N.C.G.S. §§ 126-16, -36 (alleged discrimination on unlawful bases); N.C.G.S. § 126-36.2 (denial of promotion because of employer's failure to post job vacancy or to give employee priority consideration); N.C.G.S. § 126-82(d) (employer failure to give qualified veteran preference).

is narrowed subsequently to a procedural status, referring to a complaint that has satisfied the prerequisite of informal review:

> It is the policy of this State that any dispute between an agency and another person that involves the person's rights, duties, or privileges, . . . should be settled through informal procedures. . . . Notwithstanding any other provision of law, if the agency and the other person do not agree to a resolution of the dispute through 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).

"Unless the contrary appears, it is presumed that the Legislature intended the words of the statute to be given the meaning which they had in ordinary speech at the time the statute was enacted. . . . However, the context of the statute must also be considered." *Transportation Service v. County of Robeson*, 283 N.C. 494, 500, 196 S.E.2d 770, 774 (1973) (citations omitted). Read in the context of N.C.G.S. § 126-37(a), which provides that "[a]ppeals involving a disciplinary action, alleged discrimination, and any other contested case arising under this Chapter shall be conducted in the Office of Administrative Hearings as provided in Article 3 of Chapter 150B," "contested case" clearly derives its meaning from the latter, procedural statute.

The right of permanent state employees subject to the State Personnel Act not to "be discharged, suspended, or reduced in pay or position, except for just cause," is clearly stated among the provisions of that Act. The abrogation of this right comprises grounds for employee grievances, their investigation, and appeal under the provisions of Article 8, N.C.G.S. §§ 126-34 through 126-41, "Employee Appeals of Grievances and Disciplinary Action." A permanent state employee who alleges he has been "reduced in . . . position [without] just cause" is entitled to the review and appeal provisions outlined in Article 8, whether the motive for his demotion was illegally discriminatory or retaliatory, N.C.G.S. § 126-36 (1987), or apparently or actually disciplinary, N.C.G.S. § 126-35. Because this section deems such departmental or agency action "disciplinary," we hold that an allegation that an employee has been "demoted in rank without sufficient cause" invokes first the jurisdiction of the State Personnel Commission, then, on appeal,

that of the OAH, even when there has been no documented misconduct by the employee. *See* N.C.G.S. § 126-35 (1989).

Petitioner's allegation that he had been "demoted in rank without sufficient cause" stated grounds under the Act for his department's action to be deemed "disciplinary" within the meaning and intent of N.C.G.S. § 126-35 and for his case to be considered "contested" within the meaning and intent of N.C.G.S. § 126-37(a). Because he had properly pursued all informal procedures mandated by the State Personnel Act and by the North Carolina Administrative Code for the resolution of his grievance,[4] petitioner's appeal also fit the procedural profile of a "contested case" for purposes of its review by the OAH under Chapter 150B. We accordingly hold that, contrary to the conclusion of the trial court, the OAH did have jurisdiction to determine petitioner's appeal, and we reverse the dismissal by the Court of Appeals and remand to that court for subsequent remand to that agency in order for petitioner's appeal to be heard.

Court of Appeals opinion reversed; superior court order reversed; case remanded.

---

4. The section of the North Carolina Administrative Code governing "Employee Grievances" outlines "a procedure representative of the minimum provisions" for a grievance review by the State Personnel Commission. 25 NCAC 1J .503(1)-(3). In addition, the Personnel Manual of the North Carolina Office of State Personnel permits a nonhearing, complaint resolution procedure before the Employee Relations Division of the Office of State Personnel, "designed to provide an informal, nonadversarial method of reviewing employee complaints." *Manual*, § 9, p. 18. This procedure does not displace an employee's statutory entitlement to a contested case hearing under the provisions of Chapter 150B, and the Manual notes that these are available to either the employee or his department or agency if the nonhearing, complaint resolution procedure fails to resolve their dispute.

STATE OF NORTH CAROLINA v. MILDRED WATKINS VANDIVER

No. 101PA89

(Filed 1 March 1990)

1. **Criminal Law § 1123 (NCI4th)— second degree murder—resentencing—non-statutory aggravating factor—premeditation and deliberation**

The trial court did not err when resentencing defendant for second degree murder by finding the non-statutory aggravating factor of premeditation and deliberation as a basis for a sentence greater than the presumptive term where there was an initial charge and subsequent conviction of second degree murder, so that there was no jury determination of whether the murder was committed with premeditation and deliberation. Where a defendant is convicted on an indictment charging only second degree murder, a determination by the preponderance of the evidence that defendant premeditated and deliberated the killing is reasonably related to the purposes of sentencing and a sentencing judge is not barred from using premeditation and deliberation as an aggravating factor.

Am Jur 2d, Criminal Law §§ 598, 599.

2. **Criminal Law § 1123 (NCI4th)— second degree murder—resentencing—aggravating factor—premeditation and deliberation**

The Court of Appeals erred by concluding that it was unlikely that the trial judge at a resentencing hearing for second degree murder had been able to give the pertinent portions of the trial transcript adequate review before finding premeditation and deliberation as an aggravating factor where, although the record supported only a fifteen minute recess to review the case law and make findings, the trial court appeared to be familiar with the transcript; it was apparent that the judge had devoted a substantial amount of time to the case prior to the fifteen minute recess; and the evidence was sufficient to support the sentencing judge's finding by a preponderance of the evidence.

Am Jur 2d, Criminal Law §§ 598, 599.

3. Criminal Law § 1079 (NCI4th)— resentencing—consideration of other aggravating factors—de novo proceeding

Although the question of whether the Court of Appeals could prohibit a judge from making other findings in aggravation at a resentencing hearing did not have to be reached, it was noted that ordinarily a resentencing hearing is a *de novo* proceeding at which the trial judge may find aggravating and mitigating factors without regard to the findings made at the prior hearing.

Am Jur 2d, Criminal Law §§ 580, 583.

ON discretionary review upon petitions filed by both the State and defendant pursuant to N.C.G.S. § 7A-31 from a decision of the Court of Appeals, 92 N.C. App. 695, 376 S.E.2d 17 (1989), which remanded for resentencing a judgment entered by *Herring, J.*, on 25 February 1988 in Superior Court, CUMBERLAND County. Heard in the Supreme Court 15 November 1989.

Lacy H. Thornburg, Attorney General, by Charles M. Hensey, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Staples Hughes, Assistant Appellate Defender, for defendant.

FRYE, Justice.

This case raises questions concerning the role of the sentencing judge as it relates to the finding of a non-statutory aggravating factor at a resentencing hearing. Defendant was charged in a proper bill of indictment with second degree murder. She was convicted of second degree murder and sentenced to life imprisonment, a sentence in excess of the presumptive term. On appeal, defendant's conviction was upheld by this Court, but the Court remanded for a new sentencing hearing because a non-statutory aggravating factor that defendant's testimony was perjured was erroneously used. *State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). At the resentencing hearing, the trial court found the non-statutory aggravating factor of premeditation and deliberation, found two mitigating factors, and sentenced defendant to thirty years imprisonment, a sentence also in excess of the presumptive term.

On appeal to the Court of Appeals, defendant contended: 1) the evidence was insufficient as a matter of law to support the

sentencing court's finding that the crime was committed with premeditation and deliberation; and 2) the State should be estopped from asserting premeditation and deliberation as an aggravating factor in sentencing on a conviction of second degree murder based on an indictment alleging only second degree murder. The Court of Appeals rejected defendant's second contention but nevertheless concluded that the disputed factor in aggravation—premeditation and deliberation—was not supported by a preponderance of the evidence. Concluding that "fundamental fairness and due process considerations require that this defendant not be required to again meet the risk of other findings in aggravation," the Court of Appeals remanded the case for resentencing "for imposition of a sentence not to exceed the presumptive sentence." *State v. Vandiver*, 92 N.C. App. 695, 701, 376 S.E.2d 17, 20 (1989). The State and defendant filed petitions for discretionary review of the Court of Appeals' decision. This Court allowed both petitions on 5 May 1989.

The State's petition for discretionary review presents two questions:

1. May the appellate court substitute its discretion or judgment for the judgment of the sentencing judge in determining the existence of aggravating factors?

2. May the appellate court *ex mero motu* prohibit the resentencing court from conducting a resentencing hearing *de novo*?

Defendant's petition for discretionary review presents the question of whether a sentencing judge is barred from using premeditation and deliberation as an aggravating factor in sentencing upon a verdict of second degree murder based on an indictment alleging only second degree murder.

[1] We first consider the question raised by defendant's petition. We begin with this Court's decision in *State v. Melton*, 307 N.C. 370, 298 S.E.2d 673 (1983). Although the indictment in *Melton* would have supported a conviction of murder in the first degree as well as murder in the second degree, the State agreed not to try defendant for murder in the first degree in exchange for defendant's plea to guilty of murder in the second degree. *Id.* at 372-73, 298 S.E.2d at 676. At the sentencing hearing, the judge found one aggravating factor, that "the killing occurred after defendant premeditated and deliberated the killing." *Id.* at 372, 298 S.E.2d

at 675. On appeal defendant argued that "fundamental fairness requires that facts underlying charges which have been dismissed pursuant to a plea bargain cannot be used during sentencing for the admitted charge." *Id.* at 376, 298 S.E.2d at 678. Noting that the mere fact that a guilty plea has been accepted pursuant to a plea bargain does not preclude a sentencing court from reviewing all of the circumstances surrounding the admitted offense in determining the presence of aggravating or mitigating factors, this Court held that "[a]s long as they are not elements essential to the establishment of the offense to which the defendant pled guilty, all circumstances which are transactionally related to the admitted offense and which are reasonably related to the purposes of sentencing must be considered during sentencing." *Id.* at 378, 298 S.E.2d at 679 (citations omitted). The Court went on to hold that although the State agreed not to prosecute defendant for murder in the first degree, the fact that he premeditated and deliberated the killing was transactionally related to the second degree murder conviction and was therefore properly considered by the jury during sentencing. *Id.*

Our decision in *Melton* was followed by this Court in *State v. Brewer*, 321 N.C. 284, 362 S.E.2d 261 (1987). In *Brewer*, defendant was charged with murder in the first degree and entered a plea of guilty to murder in the second degree. Upon being sentenced to life imprisonment, defendant appealed to this Court assigning as error the trial judge's finding of premeditation and deliberation as a non-statutory aggravating factor. We held that the fact that defendant premeditated and deliberated the killing was transactionally related to the second degree murder conviction and was therefore properly considered by the sentencing judge. *Id.* at 286, 362 S.E.2d at 262. Both *Melton* and *Brewer* hold that a determination by the preponderance of the evidence that defendant premeditated and deliberated the killing is reasonably related to the purposes of sentencing. *Melton*, 307 N.C. at 378, 298 S.E.2d at 679; *Brewer*, 321 N.C. at 286, 362 S.E.2d at 262. Therefore, a sentencing judge is not precluded from finding premeditation and deliberation as an aggravating factor even though the State has accepted a defendant's plea of guilty to second degree murder.

In both *Melton* and *Brewer*, we noted that a *plea* of guilty to second degree murder is fundamentally different from a *conviction* of second degree murder when the defendant has been *tried on a charge of first degree murder. Id.*

In *State v. Marley*, 321 N.C. 415, 364 S.E.2d 133 (1988), the defendant was tried before a jury on a charge of murder in the first degree and convicted of murder in the second degree. On appeal to this Court, defendant contended that the sentencing judge was precluded by considerations of due process from finding as an aggravating factor that defendant acted with premeditation and deliberation. This Court agreed, reasoning as follows:

> To allow the trial court to use at sentencing an essential element of a greater offense as an aggravating factor, when the presumption of innocence was not, at trial, overcome as to this element, is fundamentally inconsistent with the presumption of innocence itself.
>
> We conclude that due process and fundamental fairness precluded the trial court from aggravating defendant's second degree murder sentence with the single element—premeditation and deliberation—which, in this case, distinguished first degree murder after the jury had acquitted defendant of first degree murder.

Id. at 425, 364 S.E.2d at 139.

In the instant case, defendant contends that whether premeditation and deliberation may be used as an aggravating factor in sentencing a defendant charged with second degree murder and convicted of second degree murder is controlled by *Marley*. She contends that since it is unfair to find an aggravating factor of premeditation and deliberation when the jury has acquitted the defendant of first degree murder based on premeditation and deliberation then it is equally unfair to find that same aggravating factor when the defendant is originally indicted and charged only with second degree murder. We conclude that an initial charge and subsequent conviction of murder in the second degree is controlled by *Melton* and *Brewer* rather than *Marley*.

In *Marley*, the jury found defendant not guilty of first degree murder based on premeditation and deliberation. The sentencing judge was then precluded from using that element to enhance defendant's sentence because the conviction of the lesser included offense of second degree murder acquitted defendant of the greater offense of first degree murder. *Id.* at 424, 364 S.E.2d at 138. However, unlike *Marley*, in the instant case there is no jury determination

as to whether the murder was committed with premeditation and deliberation.

The instant case is more like *Melton* and *Brewer* where the prosecutors accepted pleas of guilty to second degree murder although the indictments permitted prosecution for first degree murder based on premeditation and deliberation. In both cases we held that acceptance of the plea of guilty to the lesser included offense of second degree murder did not prevent the sentencing judge from finding premeditation and deliberation as a non-statutory aggravating factor and using that factor as a basis for a sentence greater than the presumptive term. *Brewer*, 321 N.C. at 286, 362 S.E.2d at 262.

We hold that where a defendant is convicted on an indictment charging only second degree murder, a determination by the preponderance of the evidence that defendant premeditated and deliberated the killing is reasonably related to the purposes of sentencing. Therefore, a sentencing judge is not barred from using premeditation and deliberation as an aggravating factor in such a case.

[2] We next consider questions raised by the State's petition. The State contends essentially that the Court of Appeals substituted its judgment for that of the sentencing judge in determining whether aggravating factors existed so as to permit a sentence in excess of the presumptive term. Defendant was before the sentencing judge for resentencing pursuant to the remand from this Court. This Court had awarded a new sentencing hearing because the initial sentencing judge incorrectly found as a non-statutory aggravating factor that defendant perjured herself at trial, and used that factor as a basis for sentencing defendant to life imprisonment, a sentence in excess of the presumptive term for second degree murder. At the resentencing hearing the judge found the non-statutory aggravating factor of premeditation and deliberation and upon a determination that this aggravating factor outweighed the mitigating factors sentenced defendant to thirty years imprisonment, a sentence also in excess of the presumptive term. The Court of Appeals concluded that it was unlikely that in fifteen minutes the sentencing judge was able to give the pertinent portions of the entire trial transcript adequate review so as to allow him to find premeditation and deliberation by a preponderance of the evidence. *Vandiver*, 92 N.C. App. at 700, 376 S.E.2d at 20. The

court reached this conclusion after reviewing the preponderance of the evidence standard which gives to the trial judge "wide latitude in arriving at the truth as to the existence of aggravating and mitigating [factors] . . . ." *Id.* (quoting *State v. Ahearn*, 307 N.C. 584, 300 S.E.2d 689 (1983)). "This standard," the court said, "must be applied even more stringently where the sentencing judge is not the trial judge, and more particularly to such a subjective element as premeditation and deliberation." *Vandiver*, 92 N.C. App. at 700, 376 S.E.2d at 20.

The specific question before the Court of Appeals was whether the disputed factor in aggravation—premeditation and deliberation—was supported by a preponderance of the evidence. The assistant district attorney announced that the evidence at the resentencing hearing "would be by way of directing the court's attention to the trial transcript and portions there, testimony given under oath by certain witnesses and arguments. We will have no formal presentation." The State then presented the trial transcript to the court, calling the court's attention to specific pages "to support our argument for aggravating factors, the first one being premeditation and deliberation." *Id.* at 698, 376 S.E.2d at 19. Defense counsel objected to this procedure, essentially contending that the sentencing judge could not find an aggravating factor by a preponderance of the evidence by reading portions of the trial transcript. The resentencing hearing continued with the defendant presenting such evidence as he desired to rebut the aggravating factors and support mitigating factors. The judge then announced that he would take about fifteen minutes to "review the case decision, as well as the *State v. Brewer* . . . before making findings." *Id.* at 699, 376 S.E.2d at 19-20. Following the fifteen minute recess, the trial judge made the following pertinent remarks:

> COURT: [T]aking into consideration the evidence presented both by the State and the Defendant and the argument of counsel, the Court finds . . . by a preponderance of the evidence that the crime was committed with premeditation and with deliberation . . . .

Id. at 699, 376 S.E.2d at 20.

We are unable to say that the judge's finding of the aggravating factor of premeditation and deliberation was not supported by the

preponderance of the evidence. We first note that the judge appeared to be familiar with the transcript. For example, when the prosecutor referred to the testimony of a specific witness, the sentencing judge supplied the name of that witness. Secondly, while the record only supports a fifteen minute recess to review the case law and make findings, it is apparent that the judge had devoted a substantial amount of time to the case prior to the fifteen minute recess. Finally, the only testifying eyewitness to the murder, other than defendant, testified that defendant came out of her apartment armed with a knife and stabbed the victim who was standing with his hands in his pockets, after defendant's boyfriend urged her to "[g]o ahead and do it if you're going to." Defendant testified that she did not kill the victim, that her boyfriend was the perpetrator. The question for the sentencing judge was one of credibility. In making this determination, the judge was aided by the jury's finding that defendant murdered the victim, a finding of at least some credibility on the part of the eyewitness to the crime. This same witness gave testimony detailing circumstances leading up to the actual stabbing tending to show that defendant in fact premeditated and deliberated the killing. This evidence was sufficient to support the sentencing judge's finding by a preponderance of the evidence that the crime was committed with premeditation and deliberation. The Court of Appeals erred in finding to the contrary. *See generally State v. Ahearn*, 307 N.C. 584, 300 S.E.2d 689.

[3] The State's second question concerns whether the Court of Appeals could prohibit the judge at the sentencing hearing from making other findings in aggravation. Although that question does not have to be reached since there will not be another resentencing hearing in this case, we note that ordinarily a resentencing hearing is a *de novo* proceeding at which the trial judge may find aggravating and mitigating factors without regard to the findings made at the prior sentencing hearing. *State v. Jones*, 314 N.C. 644, 336 S.E.2d 385 (1985).

In summary, we agree with the Court of Appeals that the State is not estopped from asserting premeditation and deliberation as an aggravating factor in this case. We reject the Court of Appeals' conclusion that the disputed factor in aggravation—premeditation and deliberation—is not supported by a preponderance of the evidence. The decision of the Court of Appeals remanding

this case for resentencing is reversed and the judgment of the trial court is reinstated.

Reversed.

ANNIE BROWN v. BURLINGTON INDUSTRIES, INC.

No. 206PA89

(Filed 1 March 1990)

ON defendant's petition for discretionary review of the decision of the Court of Appeals, 93 N.C. App. 431, 378 S.E.2d 232 (1989), which found no error in the judgment of *Morgan, J.*, at the 18 December 1987 Session of Superior Court, ROCKINGHAM County. Heard in the Supreme Court 12 February 1990.

Kennedy, Kennedy, Kennedy and Kennedy, by Harvey L. Kennedy, Harold L. Kennedy, III, and Annie Brown Kennedy, for plaintiff-appellee.

Smith Helms Mullis & Moore, by McNeill Smith, Michael A. Gilles, and Julie C. Theall, for defendant-appellant.

Lonnie B. Williams, Immediate Past President; and Young, Moore, Henderson & Alvis, P.A., by Walter E. Brock, Jr., and E. Knox Proctor, for amicus curiae, North Carolina Association of Defense Attorneys.

Anne M. Fishburne for amicus curiae NC Equity.

Smith, Patterson, Follin, Curtis, James, Harkavy & Lawrence, by Martha A. Greer and Heidi G. Chapman, for North Carolina Association of Women Attorneys; J. Wilson Parker, Wake Forest University School of Law, and Tharrington, Smith & Hargrove, by Wade M. Smith and Burton Craige, for North Carolina Academy of Trial Lawyers, amici curiae.

PER CURIAM.

Discretionary review improvidently allowed.

IN RE FORECLOSURE OF FIRST RESORT PROPERTIES

[326 N.C. 357 (1990)]

IN THE MATTER OF: THE FORECLOSURE OF THE DEED OF TRUST EXECUTED BY FIRST RESORT PROPERTIES OF N.C., INC. TO SAMUEL H. POOLE, TRUSTEE, AND CHARLES BILLINGS AND WIFE, JANICE BILLINGS, BENEFICIARIES, RECORDED IN BOOK 362, PAGE 546, MOORE COUNTY REGISTRY

No. 283A89

(Filed 1 March 1990)

APPEAL by petitioners Charles and Janice Billings pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 94 N.C. App. 99, 380 S.E.2d 124 (1989), and upon discretionary review as to additional issues allowed by this Court on 31 July 1989. The Court of Appeals affirmed the order of *Helms (William H.), J.*, entered 6 June 1988 in Superior Court, MOORE County, dismissing the underlying foreclosure action and vacating an order allowing foreclosure entered by the Clerk of Superior Court, Moore County. Heard in the Supreme Court 12 February 1990.

Jack E. Carter and McCoy, Weaver, Wiggins, Cleveland & Raper, by Richard M. Wiggins, for petitioner-appellants Charles and Janice Billings.

Parham, Helms and Kellam, by Raymond L. Lancaster and William H. Trotter, Jr., for respondent-appellee Berkeley Federal Savings and Loan Association.

PER CURIAM.

Affirmed.

IN RE FORECLOSURE OF FIRST RESORT PROPERTIES

[326 N.C. 358 (1990)]

IN THE MATTER OF: THE FORECLOSURE OF THE DEED OF TRUST EXECUTED BY FIRST RESORT PROPERTIES OF N.C., INC. TO SAMUEL H. POOLE, TRUSTEE, AND CHARLES BILLINGS AND WIFE, JANICE BILLINGS, BENEFICIARIES, RECORDED IN BOOK 362, PAGE 544, MOORE COUNTY REGISTRY

No. 284A89

(Filed 1 March 1990)

APPEAL by petitioners Charles and Janice Billings pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 94 N.C. App. 219, 380 S.E.2d 128 (1989), and upon discretionary review as to additional issues allowed by this Court on 31 July 1989. The Court of Appeals affirmed the order of *Helms (William H.), J.*, entered 6 June 1988 in Superior Court, MOORE County, dismissing the underlying foreclosure action and vacating an order of foreclosure by the Clerk of Superior Court, Moore County. Heard in the Supreme Court 12 February 1990.

Jack E. Carter and McCoy, Weaver, Wiggins, Cleveland & Raper, by Richard M. Wiggins, for petitioner-appellants Charles and Janice Billings.

Parham, Helms and Kellam, by Raymond L. Lancaster and William H. Trotter, Jr., for respondent-appellee Berkeley Federal Savings and Loan Association.

PER CURIAM.

Affirmed.

IN THE MATTER OF THE ESTATE OF SHIRLEY ALLRED TUCCI

No. 294A89

(Filed 1 March 1990)

APPEAL by dissenting spouse pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 94 N.C. App. 428, 380 S.E.2d 782 (1989), reversing an order entered 2 May 1988 by *Rousseau, J.*, in Superior Court, FORSYTH County, allowing the surviving spouse of Shirley Allred Tucci to dissent from her will under N.C.G.S. § 30-1. Heard in the Supreme Court 14 February 1990.

Harrison, North, Cooke & Landreth, by A. Wayland Cooke and Michael C. Landreth, for dissenter-appellant spouse, James Tucci.

Womble Carlyle Sandridge & Rice, by Michael E. Ray, Kurt C. Stakeman, and Lori P. Hinnant, for estate-appellee.

PER CURIAM.

Affirmed.

CITY OF RALEIGH v. COLLEGE CAMPUS APARTMENTS, INC.

No. 298A89

(Filed 1 March 1990)

Appeal by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 94 N.C. App. 280, 380 S.E.2d 163 (1989), which affirmed summary judgment for the defendant by *Brannon, J.*, at the 14 March 1988 session of Superior Court, WAKE County. Heard in the Supreme Court 14 February 1990.

Elizabeth C. Murphy, Associate City Attorney, for the plaintiff-appellant.

Warren & Perry, by Sue E. Anthony, for the defendant-appellee.

PER CURIAM.

Affirmed.

HOOKS v. MAYO

[326 N.C. 361 (1990)]

NONA MAYO HOOKS AND HUSBAND, CURTIS W. HOOKS, ETHEL MAYO SHIREY AND HUSBAND, LYNWOOD SHIREY, LEONARD MAYO AND WIFE, JULIA R. MAYO, ORA MAE FOWLER (WIDOW), FRED B. MAYO AND WIFE, LOUISE D. MAYO, JANET MAYO PEARSALL (WIDOW) AND MARJORIE MAYO CARROLL AND HUSBAND, WOODROW W. CARROLL, SR. v. DAVID WHITLEY MAYO (SINGLE), GEORGE E. MAYO, III AND WIFE, REBECCA COLE MAYO, AND GRETCHEN MAYO JORDAN AND HUSBAND, BEN JORDAN

No. 330A89

(Filed 1 March 1990)

APPEAL by defendants pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 94 N.C. App. 657, 381 S.E.2d 197 (1989), reversing an order of summary judgment for defendants entered by *Phillips, J.*, on 7 November 1988 in Superior Court, WAYNE County. Heard in the Supreme Court on 13 February 1990.

Dees, Smith, Powell, Jarrett, Dees & Jones, by Tommy W. Jarrett, for plaintiff-appellees.

Warren, Kerr, Walston & Hollowell, by John H. Kerr, III and John R. Rose, for defendant-appellants.

PER CURIAM.

Affirmed.

IN THE MATTER OF: CONCHITA P. SMITH, PETITIONER-APPELLANT v. KINDER CARE LEARNING CENTERS, INC. AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, RESPONDENT-APPELLEES

No. 350A89

(Filed 1 March 1990)

ON appeal as of right pursuant to N.C.G.S. § 7A-30(a) of a decision of the Court of Appeals, 94 N.C. App. 663, 381 S.E.2d 193 (1989), affirming a decision by *Allen (J.B., Jr.), J.*, at the 11 July 1988 Civil Session of Superior Court, WAKE County. *Eagles, J.*, dissented. Heard in the Supreme Court 12 February 1990.

East Central Community Legal Services, by William D. Rowe, for petitioner-appellant.

Maupin, Taylor, Ellis and Adams, P.A., by Margie T. Case, for respondent-appellee Kinder Care Learning Centers, Inc.

T. S. Whitaker, Chief Counsel, and Guy C. Evans, Jr., for respondent-appellee Employment Security Commission of North Carolina.

PER CURIAM.

Reversed for the reasons stated in the dissenting opinion in the Court of Appeals.

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

ADAMS v. BASS

No. 572P89

Case below: 88 N.C.App. 599

Petition by defendant for a writ of certiorari to the North Carolina Court of Appeals denied 1 March 1990. Motion by plaintiff for sanctions denied 1 March 1990.

BARBER v. WOODMEN OF THE WORLD LIFE INS. SOCIETY

No. 481P89

Case below: 95 N.C.App. 340

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues denied 1 March 1990.

BOLICK v. SUNBIRD AIRLINES, INC.

No. 11A90

Case below: 96 N.C.App. 443

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 1 March 1990.

CITY OF RALEIGH v. HOLLINGSWORTH

No. 552P89

Case below: 96 N.C.App. 260

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 1 March 1990.

COLBORN v. COLBORN

No. 19P90

Case below: 96 N.C.App. 512

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 1 March 1990.

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

IN RE APPEAL OF COASTAL RESOURCES COMMISSION DECISION

No. 21P90

Case below: 96 N.C.App. 468

Petition by North Topsail Water and Sewer pursuant to G.S. 7A-31 denied 1 March 1990.

JOHNSON HOSIERY MILLS v. CAMERLENGO

No. 8P90

Case below: 96 N.C.App. 512

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 1 March 1990.

KING v. CRANFORD, WHITAKER & DICKENS

No. 536P89

Case below: 96 N.C.App. 245

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 1 March 1990.

McDANIEL v. DIVISION OF MOTOR VEHICLES

No. 31P90

Case below: 96 N.C.App. 495

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 1 March 1990.

MATHEWS v. BD. OF TRUSTEES OF ASHEVILLE POLICEMEN'S FUND

No. 549P89

Case below: 96 N.C.App. 186

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 1 March 1990.

MORROW v. MORROW

No. 40P90

Case below: 94 N.C.App. 187

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 1 March 1990.

SMITH v. NATIONWIDE MUTUAL FIRE INS. CO.

No. 550P89

Case below: 96 N.C.App. 215

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 1 March 1990.

STATE v. CARTER

No. 33P90

Case below: 96 N.C.App. 611

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 1 March 1990.

STATE v. DAVIS

No. 14P90

Case below: 96 N.C.App. 513

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 1 March 1990. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 1 March 1990.

STATE v. FOLAND

No. 62PA90

Case below: 97 N.C.App. 309

Petition by the Attorney General for writ of supersedeas and temporary stay allowed 1 March 1990. Petition by the Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 1 March 1990.

STATE v. GARDNER

No. 10P90

Case below: 96 N.C.App. 514

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 1 March 1990.

STATE v. JONES

No. 43P90

Case below: 96 N.C.App. 389

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 1 March 1990. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 1 March 1990.

STEVENSON v. PARSONS

No. 524P89

Case below: 96 N.C.App. 93

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 1 March 1990.

TOMPKINS v. LOG SYSTEMS, INC.

No. 557P89

Case below: 96 N.C.App. 333

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 1 March 1990.

TOWN OF SPARTA v. HAMM

No. 66P90

Case below: 97 N.C.App. 1

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 1 March 1990.

WILLIS v. MANN

No. 29P90

Case below: 96 N.C.App. 450

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 1 March 1990.

WILLS v. WAKE MEDICAL CENTER

No. 16P90

Case below: 96 N.C.App. 515

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 1 March 1990.

STATE OF NORTH CAROLINA v. LAWRENCE GRAHAM LEROUX

No. 93A88

(Filed 5 April 1990)

1. **Homicide § 21.6 (NCI3d)— first degree murder—lying in wait—sufficiency of evidence**

The prosecution presented substantial evidence of every element of murder by lying in wait where defendant, by his own admission, was sneaking around a dark golf course and, with a suddenness which deprived the victim of all opportunity to defend himself, fired upon and killed the victim. It was not necessary to show that defendant had an announced purpose or intent to kill the victim when he shot him under those circumstances; furthermore, a specific intent to kill is not an element of the crime and evidence of intoxication is irrelevant as a defense.

Am Jur 2d, Homicide §§ 44, 47, 49.

2. **Homicide § 30.1 (NCI3d)— first degree murder—lying in wait—refusal to instruct on second degree murder**

The trial court acted correctly both in instructing the jury on first degree murder perpetrated by lying in wait and in refusing to instruct on second degree murder where nothing in the evidence supports a finding that the murder was committed other than by lying in wait. When the evidence supports a finding that the murder was perpetrated by means of lying in wait and there is no conflict in the evidence, the trial court is not required to instruct the jury on second degree murder, and the trial court may not give an instruction on second degree murder when the State's evidence supports a jury finding of each element of lying in wait and when there is no conflict with respect to such evidence.

Am Jur 2d, Homicide § 534.

3. **Homicide § 8.1 (NCI3d)— murder by lying in wait—defense of intoxication—testimony of prior offenses with same defense**

In a prosecution for first degree murder by lying in wait in which defendant attempted to establish that he lacked the capacity to know what he was doing on the night in question because of an alcoholic blackout, the trial court did not err

by allowing testimony on rebuttal regarding a breaking or entering committed two years prior to this offense in which defendant claimed an allegedly similar alcoholic blackout. Although evidence tending to indicate that defendant was cognizant of what he was doing is prejudicial to defendant's specific example of his blackout theory, this evidence is highly probative as well and does not have an undue tendency to suggest decision on an improper basis; the probative value of the evidence is thus not substantially outweighed by the degree of unfair prejudice. N.C.G.S. § 8C-1, Rule 401.

Am Jur 2d, Homicide §§ 127, 310.

4. **Criminal Law § 86.5 (NCI3d)— first degree murder by lying in wait—defense of intoxication—cross-examination concerning prior acts**

There was no plain error in a prosecution for first degree murder by lying in wait by allowing the prosecutor's cross-examination of defendant regarding numerous prior acts where the State sought to demonstrate that defendant's assertions of lack of intent due to alcoholism were untruthful. The inquiries into prior instances of misconduct were a proper attempt to explore, explain, or rebut defendant's principal evidence; they constituted proper impeachment in that they detailed matters testified to on direct examination and specifically bore upon defendant's propensity for truthfulness.

Am Jur 2d, Homicide §§ 127, 328, 540.

5. **Jury § 6.1 (NCI3d)— first degree murder by lying in wait—defense of intoxication—voir dire questions concerning alcohol—not allowed**

The trial court did not abuse its discretion during jury selection in a prosecution for first degree murder by lying in wait in which defendant alleged lack of intent due to alcoholism by barring defense counsel's questioning of prospective jurors regarding their opinions about alcohol consumption and its effects on mental processes. Counsel is not permitted to fish for legal conclusions or argue its case during voir dire; moreover, defendant obtained the information he sought through voir dire inquiries which were initially permitted and, by doing so, obtained adequate assurances that potential jurors could be fair.

Am Jur 2d, Jury §§ 202, 204.

6. Homicide § 15 (NCI3d)— first degree murder by lying in wait— defense of intoxication—defendant's questions concerning condition of officer

The trial court did not err in a prosecution for murder by lying in wait in which defendant alleged lack of intent due to alcoholism by permitting the prosecutor to elicit testimony that defendant had not been told that a police officer had been shot prior to defendant's questions about the officer's condition. The testimony was not hearsay because it was adduced for the purpose of showing that defendant was not told that anyone had been shot and the truth of the assertion depended only on the credibility of the testifying witness; the testimony was relevant to show defendant's firsthand knowledge of the fact that an officer had been shot and was admissible to impeach defendant's credibility; and the information was subsequently admitted without objection through the testimony of another officer.

Am Jur 2d, Homicide §§ 127, 328.

7. Criminal Law § 1226 (NCI4th)— murder—alcoholism—mitigating factor not found

The trial court did not err in a prosecution for first degree murder by lying in wait by failing to find the statutory mitigating factor that defendant was suffering from a physical condition which was insufficient to constitute a defense but which significantly reduced his culpability. Defendant did not request this factor and did not object to the court's failure to find the factor, and the evidence of defendant's intoxication at the time of the offenses was controverted and failed to meet the required standard. N.C.G.S. § 15A-1340.4(a)(2)d (1983).

Am Jur 2d, Criminal Law §§ 527, 598, 599, 628.

DEFENDANT appeals as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment in a capital proceeding imposing a sentence of life imprisonment entered by *Burroughs, J.*, at the 2 November 1987 Criminal Session of Superior Court, MECKLENBURG County, upon a jury verdict of guilty of first-degree murder perpetrated by lying in wait. Defendant was additionally found guilty of five counts of discharging a firearm into an occupied dwelling in violation of N.C.G.S. § 14-34.1, for which he was sentenced to five consecutive ten-year sentences, and two counts of assault on a law

enforcement officer with a deadly weapon, a felony under N.C.G.S. § 14-34.2, for which he was sentenced to two consecutive five-year sentences. Defendant's motion to bypass the Court of Appeals on these convictions was allowed 12 July 1989. Heard in the Supreme Court 12 December 1989.

Lacy H. Thornburg, Attorney General, by David F. Hoke, Associate Attorney General, for the State.

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

MEYER, Justice.

Defendant assigns error to five aspects of the guilt-innocence phase of his trial and to one aspect of the sentencing proceeding. We have performed a careful and thorough review of the record, the briefs, and oral arguments of counsel, and we conclude that defendant received a fair trial free of prejudicial error.

The State's evidence tended to show that defendant engaged in a shooting spree in the early morning hours of 15 January 1987 in his Charlotte neighborhood. With his .22 rifle, he shot into the windows of several residences over a time period from approximately 12:00 midnight on 14 January to 2:00 a.m. on 15 January. Several residents testified that they heard rapid gunfire, as much as thirty or forty gunshots, on as many as five or six occasions that night. One of the residents called the Charlotte Police Department around 1:15 a.m., and Officers R.J. Hammett and R.L. Smith arrived on the scene a few minutes later. The resident related the circumstances of the shooting to them, and the officers then proceeded to walk across the fairway of the adjacent golf course in search of the perpetrator. There was a full moon that night, but a meteorologist testified as an expert witness for the defense that during the time period in question, clouds created a "total opague [sic] sky cover." This condition meant that the "cloud cover was so totally covering the sky and was of such thickness that there would be no discernable light from the moon."

Officer Hammett testified that he and Officer Smith proceeded to walk across the fairway, which was approximately two hundred feet wide, with Smith leading the way. Smith used his flashlight; Hammett did not. When they reached the tree line on the far side of the fairway, they turned to the right to walk down the

fairway toward the green. The officers had walked about forty or fifty feet when Smith exclaimed, "What's that? Look at that. Hit the deck." Shots then rang out from the darkness ahead of them. Hammett dropped to the ground and called for Smith, but received no response. After he sent a radio message to the police station for assistance, he spotted a man who was dressed in dark clothes in front of him. The man got up from a crouched position and began running along the tree line of the fairway into the woods. Hammett shot at the man and took cover behind a tree. He could hear the man running on the dead leaves through the woods. It sounded as if the man was running in a semicircle around toward him. Hammett moved around the tree in an attempt to protect himself. Officers S.P. Maxfield and Jerry Williams arrived a few minutes later. As they approached his side of the fairway, Hammett heard several shots and heard the suspect yell. He called for him to drop the gun, but the suspect continued to run. The suspect yelled again, and another volley of shots was fired. The chase continued for several minutes. Hammett then heard a shotgun blast and heard Williams yell, "he's down." Hammett walked to where Williams was standing and observed a man on the ground with a rifle beside him. He identified that man as the defendant.

Officer Williams testified that when he arrived, he armed himself with a shotgun and proceeded toward Officer Smith's body. After ascertaining that Smith was dead, he assisted his fellow officers in attempting to apprehend the suspect. He testified that after some time, he saw the suspect come out from behind a condominium. Williams aimed his shotgun at the suspect and ordered him to drop his gun. When the suspect instead raised his weapon, Williams shot him in the upper arm. Williams then approached the suspect, who said, "Well, you guys win." Williams testified that the suspect seemed to be very much in control of his mental and physical faculties and that he never saw any sign of faulty steps or staggering. The suspect was taken to the hospital for medical attention. The officer who rode in the ambulance with the suspect testified that he did not detect any odor of alcohol on the suspect and that he spoke normally. The operating physician testified, however, that he smelled alcohol on the suspect, tested him, and discovered that he had a blood alcohol content of .166.

Sergeant Rick Sanders of the homicide investigation unit of the Charlotte Police Department interviewed the suspect in the emergency room. The interview was tape recorded. The suspect

stated that he had been drinking in several nightclubs that night. He did not remember arriving home. He recalled hearing a "lot of yelling and screaming, and whatever, on the golf course. . . . And I saw some flashlights and I heard some noises. The last thing I remember is a big bang—that's all I can remember." He then stated that everything got "real still and real quiet. So I went downstairs and I got the rifle and I went outside anyway and snuck around. . . . And I guess I really shouldn't have gone down there, but I did. . . . I can't deny that I wasn't sneaking around, and I was. I was going between trees and going between shrubs and stuff, and sneaking around[,] . . . weaving in and out, staying low to the ground." He recalled that he had the rifle with him and "[i]t was loaded and cocked too. And . . . I got up to the next apartment complex down there, . . . and I started going up over the hill, and the next thing I know it was just a big crash and my hands were burning, and I just fell down." The suspect did not recall shooting his gun that night and did not recall seeing a police officer until he himself had been shot.

Officer T. L. Athey of the Charlotte Police Department testified that he rode with defendant in the ambulance en route to the hospital. Defendant inquired, "Did I shoot anybody[?]" Athey answered affirmatively. At the hospital, defendant asked if any policemen were shot. Athey informed him that one had been shot, and defendant asked how he was.

During the taped interview with Officer Sanders, defendant remembered talking to Athey earlier and asking him how the policeman was who had been shot. Sanders stated that when defendant had inquired earlier as to the condition of the policeman who was shot, nobody had informed him that anybody had in fact been shot.

An owner of a nearby pawn shop testified that defendant pawned the rifle in question, a .22 semiautomatic, on 10 January 1987 and reclaimed it on 14 January, the day before the shootings. After the incident, police detectives combed the area for residual shells and bullets. A ballistics expert testified that, in his opinion, the two projectiles found in Officer Smith's body—one in his neck and one in his right thigh—were fired from defendant's rifle. Two additional bullets were imbedded in Officer Smith's protective vest. The other bullets found in and around the condominiums fired into that night were consistent with the projectiles fired from defendant's rifle.

Defendant testified in his own behalf. He relied on an intoxication defense, basing his case on the theory that he was incapable of forming the intent to shoot Officer Smith that night and therefore was not guilty of first-degree murder. He testified that his drinking had caused problems during his service in the Navy and that as a result he had received in-patient treatment for twenty-eight days for his alcohol problem. He testified that he had experienced alcoholic blackouts on numerous occasions and that he had once been charged with breaking and entering the mobile home next to the one in which he lived because, in his intoxicated state, he thought that the mobile home was his own. That charge was dismissed because of defendant's alcohol problem, and his attorney recommended that he seek treatment.

Dr. John Ewing, a psychiatrist specializing in alcoholism, testified that defendant suffered from "chronic alcoholism" and that, in his opinion, it was likely that he had a blood alcohol content of at least .20 at the time of the shootings. He explained that when a person has a blood alcohol content above .12 or .14, it begins to interfere with his protein synthesis, and his memory cannot be transferred from short-term to long-term. He explained, however, that such a blackout does not preclude a person from taking routine actions and that defendant could have fired his rifle despite being in the midst of an alcoholic blackout. He opined that defendant would not have been able, however, to formulate a goal and then act on it and thus could not have been able either to exercise judgment or to form the intent to harm anyone.

[1] Defendant first assigns error to the trial court's charge to the jury. The court submitted a charge of first-degree murder solely under the theory of lying in wait. The jury was instructed that it was to find defendant either guilty of first-degree murder or not guilty. Defendant initially asserts that the State's evidence was insufficient to prove beyond a reasonable doubt defendant's guilt as to each element of the offense. He alternatively contends that the evidence supporting this theory was inconclusive and therefore supported an instruction on second-degree murder.

Defendant asserts that the trial court erred in denying his motion to dismiss the charge of first-degree murder because the State's evidence was insufficient to convince a rational trier of fact beyond a reasonable doubt that defendant killed Officer Smith "by placing himself in a position along the golf course fairway

in order to make a secret ambush" on him. Defendant argues that this case lacks the common thread found among the lying-in-wait cases in the past: that the defendant stationed himself in a position of attack knowing the specific victim would pass and waiting for the victim with the intent to kill him. Defendant contends the assailant's purpose must be evident or announced before the killing in order to show the offense of lying in wait, relying on *State v. Brown*, 320 N.C. 179, 358 S.E.2d 1, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987), for this contention. Defendant contends that, not only did he fail to manifest an intention to kill Smith, but also he did not station himself in a position of ambush because he never concealed his presence and because the victim, Officer Smith, knew defendant was armed and in the area.

The State counters that the record indicates that the prosecution presented substantial evidence concerning every element of the crime charged. We agree. Upon defendant's motion to dismiss, all of the evidence must be considered in the light most favorable to the State, and the State is entitled to every inference of fact which may be reasonably deduced from the evidence. *State v. Witherspoon*, 293 N.C. 321, 237 S.E.2d 822 (1977). The trial court must determine whether there is sufficient evidence that the offense was committed in a fashion consistent with the prosecution's theory of the case. *State v. Chapman*, 293 N.C. 585, 238 S.E.2d 784 (1977). We conclude from our review of the evidence that lying in wait can certainly be inferred from the facts of this case.

A murder perpetrated by means of lying in wait is murder in the first degree. *Brown*, 320 N.C. 179, 358 S.E.2d 1. Premeditation and deliberation are not elements of the crime of first-degree murder perpetrated by means of lying in wait, nor is a specific intent to kill. The presence or absence of these elements is irrelevant. *State v. Evangelista*, 319 N.C. 152, 353 S.E.2d 375 (1987). Murder perpetrated by lying in wait "refers to a killing where the assassin has stationed himself or is lying in ambush for a private attack upon his victim." *State v. Allison*, 298 N.C. 135, 147, 257 S.E.2d 417, 425 (1979). The assassin need not be concealed, nor need the victim be unaware of his presence. "If one places himself in a position to make a private attack upon his victim and assails him at a time when the victim does not know of the assassin's presence or, if he does know, is not aware of his purpose to kill him, the killing would constitute a murder perpetrated by lying in wait." *Id.* at 148, 257 S.E.2d at 425.

The State need not prove that the killer stationed himself and waited at the site of the killing for some period of time before it may proceed on a theory of lying in wait. "Even a moment's deliberate pause before killing one unaware of the impending assault and consequently 'without opportunity to defend himself' satisfies the definition of murder perpetrated by lying in wait." *Brown*, 320 N.C. at 190, 358 S.E.2d at 10 (quoting *State v. Wiseman*, 178 N.C. 784, 790, 101 S.E. 629, 631 (1919)) (citation omitted). In *State v. Bridges*, 178 N.C. 733, 101 S.E. 29 (1919), police officers went to the defendants' home for the purpose of arresting them. They did not know whether anyone was in the house, but upon turning a corner inside the house, an officer was suddenly fired upon by the defendants. The victim "had no time even to raise his pistol in defense of himself. The defendants were waiting in the dark for him, as much concealed as if they had been hidden in ambush, prepared to slay without a moment's warning to their victim." *Id.* at 738, 101 S.E. at 32.

In the case *sub judice*, Officer Hammett was on the fairway of the dark golf course when Officer Smith said, "What's that? Look at that. Hit the deck. Hit the ground." A volley of shots immediately rang out. Hammett signaled for help on his hand radio. He then observed "a figure start to get up, like from a crouch, and . . . running parallel to me but into the woods." It sounded as though the runner, who was dressed in dark clothing, "was coming in a semicircle around towards me." As the other two officers arrived to assist in the assailant's capture, another volley of shots, which seemed to be coming "from further up the fairway and on the other side of the fairway," rang out. Defendant himself admitted to "sneaking around" on the golf course, "going between trees and going between shrubs," and "staying low to the ground" with his loaded and cocked rifle. This Court has defined the concept of lying in wait as follows:

> "If [the assailant] placed himself in a position so as to make a private attack upon his victim, so as to assail him, under circumstances when the person assailed did not know of his presence, or of his purpose, and in the darkness of the night, or when the ordinary darkness was obscured by clouds and mist, and under such circumstances when he makes a secret assault upon the person assailed and shoots and kills him, and flees without a disclosure of his identity—a killing under

these circumstances would constitute a waylaying within the meaning of the statute."

State v. Wiseman, 178 N.C. 784, 789-90, 101 S.E. 629, 631 (quoting trial judge's charge and approving it as being in accord with existing authority).

The circumstances of this case fall within the above definition. Defendant, by his own admission, was sneaking around the dark golf course and, with a suddenness which deprived Officer Smith of all opportunity to defend himself, fired upon and killed the officer. It was not necessary for the State to show that defendant had an announced purpose or intent to kill Officer Smith when he shot him under those circumstances. As this Court has established, "a specific intent to kill is . . . irrelevant when the homicide is perpetrated by means of poison, lying in wait, imprisonment, starving, or torture." *State v. Johnson*, 317 N.C. 193, 203, 344 S.E.2d 775, 781; *see also State v. Evangelista*, 319 N.C. 152, 158, 353 S.E.2d 375, 380. When we take the evidence in the light most favorable to the State and draw from it every reasonable inference which can be drawn, the evidence was sufficient to convince a rational jury beyond a reasonable doubt that defendant was guilty of this crime. We therefore conclude that the trial court was correct in denying defendant's motion to dismiss.

Next, defendant contends that the trial court erred in failing to instruct the jury of the need to find that defendant acted with a specific intent to kill Officer Smith. He asserts that although this Court has reasoned that specific intent to kill is not an element of first-degree murder when the perpetrator kills his victim by administering poison, *State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775, this rule does not control a case where the State proceeds on a theory of lying in wait. Defendant asserts, first, that unlike killing with poison, killing by lying in wait does not necessarily raise a compelling inference of an intent to kill anyone. Second, defendant asserts that he offered substantial evidence regarding his alcoholic condition to negate any intent to kill. The defendant urges us to recognize, as an evidentiary conflict, his evidence that he was in a highly intoxicated state and was therefore incapable of forming the intent to kill. However, this Court has established that a specific intent to kill is not an element of the crime of first-degree murder by lying in wait and that evidence of intoxica-

tion is therefore irrelevant as a defense. *State v. Brown*, 320 N.C. 179, 358 S.E.2d 1. We conclude that this argument has no merit.

[2] Defendant further contends that the evidence of lying in wait was in conflict and that the evidence supported submitting to the jury the charge of murder in the second degree. This Court has held that when the evidence allows more than one inference with respect to lying in wait, it is error for the trial court to fail to charge the jury that a verdict of murder in the second degree may be returned. *State v. Gause*, 227 N.C. 26, 40 S.E.2d 463 (1946). In that case, the defendant offered evidence of a confrontation with the victim earlier that day in which the victim shot and beat him. Defendant went home, retrieved his shotgun, and returned to the victim's home for the purpose of shooting him. Upon arriving, defendant looked through the window, spotted the victim, shot him, and ran away. The Court held that the evidence was inconclusive on the theory of lying in wait and that an instruction on second-degree murder should therefore have been given. Defendant here contends that had the jury been instructed on and rejected the element of specific intent to kill, it could have returned a verdict of murder in the second degree.

Defendant's assertion that when the evidence permits more than one inference with respect to lying in wait, the trial court must instruct the jury on second-degree murder is a correct statement of the law. This Court recently held in *State v. Thomas*, 325 N.C. 583, 386 S.E.2d 555 (1989), that in a felony-murder prosecution under an indictment in the form prescribed by N.C.G.S. § 15-144, evidence that the defendant did not commit the underlying felony requires an instruction upon whatever lesser included homicides the indictment and the evidence support, including second-degree murder. The indictment in this case was in the form prescribed by N.C.G.S. § 15-144. An indictment in such form will support a verdict finding the defendant guilty of first-degree murder upon any of the theories set forth in N.C.G.S. § 14-17 or guilty of any lesser offense included within any of those theories. *State v. Talbert*, 282 N.C. 718, 721, 194 S.E.2d 822, 825 (1973). The test in every case involving the propriety of an instruction on a lesser grade of an offense is not whether the jury could convict defendant of the lesser crime, but whether the State's evidence is positive as to each element of the crime charged and whether there is any conflicting evidence relating to any of these elements. *State v. Peacock*, 313 N.C. 554, 330 S.E.2d 190 (1985); *State v. Strickland*,

307 N.C. 274, 298 S.E.2d 645 (1983), *holding modified by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775.

Unlike *State v. Thomas*, 325 N.C. 583, 386 S.E.2d 555, here we perceive no such conflict in the evidence as to the crime charged. Nothing in the evidence suggests that defendant committed the crime other than by lying in wait. The State's evidence unequivocally demonstrates that the defendant, under cover of darkness, made a secret assault when he shot and killed Officer Smith, who had no opportunity to defend himself against the unexpected attack. Defendant merely asserts that he does not remember the circumstances surrounding the shooting. When the evidence supports a finding that the murder was perpetrated by means of lying in wait and there is no conflict in the evidence, the trial court is not required to instruct the jury on second-degree murder. *State v. Strickland*, 307 N.C. 274, 298 S.E.2d 645. The trial court may not give an instruction on second-degree murder when the State's evidence supports a jury finding of each element of lying in wait and when there is no conflict with respect to such evidence. Nor may a trial court premise a second-degree murder instruction on the possibility that the jury will accept some of the State's evidence while rejecting other portions of the State's case. *State v. Hicks*, 241 N.C. 156, 84 S.E.2d 545 (1954). Here, there was no evidence to negate the elements of murder perpetrated by lying in wait. Defendant does not deny that he was present on the golf course that night, "sneaking around," "going between trees and going between shrubs," and "staying low to the ground" with his loaded and cocked rifle.

In *State v. Brown*, 320 N.C. 179, 358 S.E.2d 1, this Court addressed the identical contention that because the evidence of lying in wait was in conflict and because the defendant was intoxicated, a charge of second-degree murder should have been submitted to the jury. This Court first established that neither a specific intent to kill nor premeditation and deliberation constitute elements of the crime of first-degree murder by lying in wait; thus, intoxication is irrelevant. It then concluded that "[j]ust as '[a]ny murder committed by means of poison is automatically first-degree murder[,]' so any murder committed by means of lying in wait is automatically first degree murder." *Id.* at 193, 358 S.E.2d at 12 (quoting *State v. Johnson*, 317 N.C. 193, 204, 344 S.E.2d 775, 782) (citation omitted). We therefore conclude that the trial court acted correctly both

in instructing the jury on first-degree murder perpetrated by lying in wait and in refusing to instruct on murder in the second degree.

[3] Defendant next assigns error to the trial court's decision to allow testimony on rebuttal regarding a breaking or entering offense committed by defendant two years prior to this incident. Defendant contends that this evidence was irrelevant and its admission unfairly prejudicial.

Defendant's trial strategy consisted of attempting to establish that because of an alcoholic blackout, he lacked the mental capacity to know what he was doing while on the golf course on the night in question. Through the testimony of three witnesses, defendant produced evidence of a prior breaking or entering charge stemming from an allegedly similar alcoholic blackout.

First, William Holtz, a defense attorney, testified that he was appointed to represent defendant on the first-degree burglary case arising from the incident and that defendant told him that he "did not remember much of what occurred" and that "he had been drinking heavily." Holtz contacted the district attorney's office, and as a result of that contact, arrangements were made to dismiss the charge. Holtz recommended to defendant that he obtain treatment for his drinking problem.

Second, defendant testified in his own behalf regarding the incident. His only recollections were of drinking that night and of being arrested.

Third, Dr. John Ewing, a psychiatrist, testified that in his expert opinion defendant, due to his chronic alcoholism, suffered from memory loss on the night at issue and was in an alcoholic blackout. He illustrated this theory by recounting prior occasions on which defendant had ostensibly experienced blackout episodes, including the breaking or entering incident. He theorized that defendant "was sufficiently intoxicated that he could not identify his own trailer" and "presumably was trying to get into his own home."

On rebuttal, the State called the victim of the breaking or entering incident to testify as to her perception of what transpired. She identified defendant as the perpetrator, described how she and her husband armed themselves with knives to pursue him, and described defendant's arrest. She stated that during the incident, defendant "went down on his hands and knees and started

telling me that his wife was pregnant and she had left him and he needed money." This was his stated rationale for breaking into her mobile home.

Defendant asserts that the trial court's only reason for admitting the evidence was for the purpose of showing defendant's intent to commit the present crimes. Defendant contends that the evidence was not probative, however, of defendant's intent or plan because it had no logical tendency to show the specific intent at issue here. He had previously testified that this charge had been dismissed. The testimony therefore bore no relevance to any material issue in this case.

The State contends that the evidence at issue was relevant to rebut defendant's intoxication defense. The trial court's limiting instruction confined the State's evidence, not only to show a similar plan or scheme, but also for the purpose of rebuttal:

> This evidence was received solely for the purpose of showing that there existed in the mind of the defendant a plan, scheme, system, or design involving the crimes charged in these present cases, or it was received for the purpose of rebutting earlier testimony presented on behalf of the defendant. If you believe [the victim's] testimony, you may consider it but only for the limited purposes for which it was received.

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 (1983). The State's purpose was to appropriately challenge defendant's blackout defense:

> Discrediting a witness by proving, through other evidence, that the facts were otherwise than as he testified, is an obvious and customary process that needs little comment. If the challenged fact is material, the contradicting evidence is just as much substantive evidence as the testimony under attack, and no special rules are required.

1 Brandis on North Carolina Evidence § 47 (3d ed. 1988). Certainly, defendant's explanation to the victim regarding his reasons for attempting to break into her mobile home would tend to challenge his theory that he did not know what he was doing at the time.

Although evidence tending to indicate that defendant was cognizant of what he was doing is prejudicial to defendant's specific example of his blackout theory, this evidence is highly probative as well and does not have an undue tendency to suggest decision on an improper basis. We thus conclude that the probative value of this evidence is not substantially outweighed by the danger of unfair prejudice. We reject this assignment of error.

[4] Defendant's third assignment of error relates to the prosecution's cross-examination of him concerning numerous prior acts. During this questioning, the prosecutor asked defendant questions covering subjects ranging from defendant's military duty during a period when he was absent from his station without authorization and an occasion when he refused to obey the command of a superior officer, to defendant's various traffic infractions. The prosecutor also questioned defendant regarding his possession of marijuana on three occasions, although defendant was not criminally charged with this possession. Defendant contends that because none of this conduct either resulted in a criminal conviction or was probative of truthfulness or veracity, it was impermissible subject matter for cross-examination. Rule 608(b) of the North Carolina Rules of Evidence strictly limits impeachment by specific instances of conduct. The prior conduct must be probative of veracity, and its probative value must be shown to outweigh the prejudicial effect of the evidence. Here, defendant contends, the questions were irrelevant and were prejudicial because they represented a deliberate, belabored attempt to impugn defendant's character in the eyes of the jury.

The State counters that defendant only objected to one specific question during its line of questioning, an inquiry regarding defendant's absence from his duty station on one occasion. Defendant therefore waived his right to appeal on this ground under N.C.R. App. P. 10(b)(2), and we must discover "plain error" in order to afford defendant relief. *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). Upon our review of the entire record, we cannot say that the claimed error had a probable impact on the jury's finding of guilt of a nature which would mandate the award of a new trial. *Id.* The inquiries into prior instances of defendant's conduct were a proper attempt to explore, explain, or rebut defendant's proffered evidence. *State v. Brown*, 310 N.C. 563, 313 S.E.2d 585 (1984). They constituted proper impeachment in that they detailed matters testified to on direct examination and specifically bore

upon defendant's propensity for truthfulness. Impeachment by cross-examination may be employed to test a witness' credibility in a number of ways, and the examiner is permitted wide latitude in this endeavor. 1 Brandis on North Carolina Evidence § 42 (3d ed. 1988).

> [T]he law wisely permits evidence not otherwise admissible to be offered to explain or rebut evidence elicited by the defendant himself. Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially.

State v. Albert, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981).

The State sought to demonstrate through its line of questioning that defendant's assertions of lack of intent due to alcoholism were untruthful. For example, defendant testified on direct examination that he was honorably discharged from the Navy, but admitted on cross-examination that he falsified his enlistment contract. He testified that he underwent in-patient treatment for alcoholism while in the Navy, but admitted that his hospitalization was at least partially precipitated by the fact that he struck a police officer. The State's questioning tests the plausibility of the defense theory that while in the Navy, defendant developed a drinking problem which, over the years, became a chronic disease rendering him nonculpable on the night in question. The State sought to show that defendant's Navy service was in fact replete with instances of bad conduct. We conclude that there was no plain error in the trial court's decision to allow this cross-examination.

[5] Defendant next contends that the trial court erred in barring his counsel's questioning of prospective jurors regarding their opinions about alcohol consumption and its effects on mental processes. Counsel asked such questions as, "Would your theories about the overindulgence of alcohol tend to color your thinking about [defendant] if you find that he is an alcoholic from the evidence?" and "Do you have such strong feelings about the use of alcohol that you couldn't be fair to someone that you believe to be an alcoholic?" The trial court sustained the prosecutor's objections to this line of questioning. Defendant now asserts that the preclusion of this line of inquiry contravened basic principles of jury selection because the restrictions placed upon him during his *voir dire* examination

precluded him from meaningfully and intelligently exercising his peremptory challenges. We do not agree.

The purposes of *voir dire* are to eliminate extremes of partiality and to assure the parties that the resulting jury will make its decision solely from the evidence presented. *State v. Honeycutt*, 285 N.C. 174, 203 S.E.2d 844 (1974), *judgment vacated on other grounds*, 428 U.S. 903, 49 L. Ed. 2d 1207 (1976). However, counsel is not permitted to "fish" for legal conclusions or argue its case during *voir dire*, and for that reason the trial court properly ended the line of inquiry. *State v. Phillips*, 300 N.C. 678, 268 S.E.2d 452 (1980). While counsel may inquire into a potential juror's fitness to serve, the extent and manner of that inquiry rests within the sound discretion of the trial court. *State v. Parks*, 324 N.C. 94, 376 S.E.2d 4 (1989). Defendant has failed to show that the trial court's action was an abuse of discretion. Nor has he demonstrated prejudice. He obtained the information he sought through the *voir dire* inquiries which were initially permitted and, by doing so, obtained adequate assurances that the potential jurors could be fair. We therefore find no error in this assignment.

[6] Defendant's next assignment of error regards the trial court's decision to permit the prosecutor to elicit from investigating police officer Rick Sanders testimony that defendant had not been told a police officer had been shot prior to defendant's questions about the slain officer's condition. Sanders initially testified for the defendant regarding statements defendant made during his interview in the hospital emergency room. Sanders testified that defendant told him he did not remember shooting into any windows or shooting any person. Defendant further stated that he did not remember seeing any police officers until he himself was shot. On cross-examination, the State asked Sanders if defendant had been asked during the interview whether he remembered asking T. L. Athey, the officer traveling in the ambulance with defendant to the hospital, whether a policeman had been shot and, when told that one had been, asking about his condition. Defendant answered that he did remember asking Athey those questions. Sanders then testified, over objection, that up to the point when defendant asked Officer Athey about whether a policeman had been shot, nobody who had contact with defendant had said anything to him about anybody having been shot. Defendant now contends that Sanders' testimony to the effect that no one who had contact with defendant had said anything to him about anybody having been shot constituted

hearsay not falling within any exception because it was offered to prove that defendant was not told about Officer Smith's injury.

The State asserts, and we agree, that Sanders' testimony was not hearsay. Testimony to the effect that nobody in defendant's presence had said anything to him about anybody having been shot does not fall within the definition of hearsay contained in Rule 801 of the North Carolina Rules of Evidence. This testimony was adduced for the purpose of showing that defendant was not told that anyone had been shot. The truth of this assertion depended only on the credibility of Officer Sanders, the testifying witness. Thus, it was not hearsay. The testimony was relevant to show defendant's firsthand knowledge of the fact that an officer had been shot and thus was admissible to impeach defendant's credibility. Defendant's contention was that he had blacked out and did not remember anything until he himself had been shot. This evidence constitutes an inconsistency admissible for the jury's consideration in determining defendant's credibility and, as such, is proper impeachment. *State v. Cope*, 240 N.C. 244, 81 S.E.2d 773 (1954).

We further note that this information was subsequently admitted without objection through the testimony of Officer T. L. Athey. Athey testified that he rode in the ambulance with defendant, that defendant asked, "[D]id I shoot anybody?" and that, upon arrival at the hospital, defendant asked if any policemen were shot. Athey also testified, as did Sanders, that nobody had said anything to defendant about anybody being shot at that point. When evidence is admitted over objection and the same evidence is later admitted without objection, the benefit of the objection is lost. *State v. Searles*, 304 N.C. 149, 282 S.E.2d 430 (1981). We conclude that defendant has failed to show error by this assignment.

[7] Finally, defendant contends that the trial court erred during the sentencing phase in failing to find the statutory mitigating factor that defendant was suffering from a physical condition which was insufficient to constitute a defense, but which significantly reduced his culpability for the offense. N.C.G.S. § 15A-1340.4(a)(2)(d) (1983). Defendant concedes that he did not request this factor, nor did he object to the trial court's failure to find the factor. He contends, however, that if there is evidence of a statutory mitigating factor's existence that is both uncontradicted and manifestly credible, a trial court errs in failing to find that factor, even if not

requested by defendant. Defendant contends that he offered plenary evidence of a physical condition which was insufficient to constitute a defense in the eyes of the jury, but which nevertheless reduced his culpability for the assaultive conduct. He testified that he drank as many as nineteen beers before the shooting. He stated that he had become dependent on alcohol while in the Navy and that he had received treatment for it. The examining physician testified that defendant's blood alcohol content was .166 at the time that defendant arrived at the hospital after the shooting. Defendant's expert witness, Dr. Ewing, testified that defendant's blood alcohol level at the time of the shooting would probably have exceeded .20 and that, in his opinion, defendant suffered from chronic alcoholism. Various witnesses chronicled defendant's history of alcohol abuse.

The burden is on the defendant to prove the existence of a mitigating factor by a preponderance of the evidence, and a court is required to find a statutory mitigating factor only if the evidence supporting it is uncontradicted and manifestly credible as a matter of law. *State v. Jones*, 309 N.C. 214, 306 S.E.2d 451 (1983). It is evident from our review of the entire record in this case that the evidence of defendant's intoxication at the time of the offense is indeed controverted and therefore fails to meet the required standard. "Only if the evidence offered at the sentencing hearing 'so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn' is the court compelled to find that the mitigating factor exists." *State v. Clark*, 314 N.C. 638, 642, 336 S.E.2d 83, 85 (1985) (quoting *State v. Jones*, 309 N.C. 214, 220, 306 S.E.2d 451, 455). The proffered evidence of diminished capacity due to intoxication in this case does not compel this finding because it fails to demonstrate that defendant's alcohol consumption reduced his mental or physical capacity, and thus his culpability, to commit the offense.

Several witnesses presented manifestly credible evidence that defendant appeared to be in total control of his mental and physical faculties on the night in question. Officer Williams testified that from his observations of defendant both before and after defendant was ultimately forced to surrender, defendant appeared to be very much in control of his mental and physical faculties and that he never observed any indication of faulty steps or staggering. The officer who performed the gunpowder residue test on defendant at the emergency room of the hospital testified that defendant

was "very cooperative," with no odor of alcohol about him. Officer Sanders testified that he interviewed defendant before his surgery and that defendant was "clear and lucid," even "correcting me on a couple of statements and questions I had asked him." A woman working at one of the bars defendant visited late in the evening before returning home testified that defendant did not in any way appear to be intoxicated to her. While the doctor who performed surgery on defendant testified that he smelled alcohol on the defendant and tested his blood alcohol level at .166, he also stated that defendant was in control of his faculties, that he was alert, intelligently discussed the upcoming surgery, and signed a consent form to undergo anesthesia. Evidence that the condition of intoxication exists, without more, does not mandate its consideration as a mitigating factor. *State v. Bush*, 78 N.C. App. 686, 338 S.E.2d 590 (1986). We find no error in this assignment.

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

No error.

DOYLE BROWN AND COLEEN B. BROWN v. LUMBERMENS MUTUAL CASUALTY COMPANY AND GENERAL MOTORS CORPORATION

No. 337PA88

(Filed 5 April 1990)

1. **Insurance § 100 (NCI3d)— insurer's duty to defend**

There is no statutory requirement that an insurance company provide its insured with a defense, but a company may provide by contract that it will defend its insured.

Am Jur 2d, Automobile Insurance §§ 389, 390.

2. **Insurance § 100 (NCI3d)— insurer's duty to defend**

An insurer's duty to defend suits against its insured is determined by the language in the insurance contract and is broader than its obligation to pay damages under a particular policy.

Am Jur 2d, Automobile Insurance §§ 389, 390.

3. Insurance § 6 (NCI3d)— insurance policy as contract

An insurance policy is a contract and, unless overridden by statute, its provisions govern the rights and duties of the parties thereto.

Am Jur 2d, Automobile Insurance § 1.

4. Insurance § 6.2 (NCI3d)— ambiguous policy language— construction in favor of insured

Any ambiguity in the policy language must be resolved against the insurance company and in favor of the insured, and a difference of judicial opinion regarding proper construction of policy language is some evidence calling for application of this rule.

Am Jur 2d, Automobile Insurance § 3.

5. Insurance § 100 (NCI3d)— automobile liability insurance— payment of policy limits to injured claimant—duty to defend

Where a duty to defend provision in an automobile liability policy requires the insurer to "settle or defend" covered claims against the insured, requires the insurer to bear defense costs in addition to paying liability limits, and provides that the insurer's duty to settle or defend ends when its limit of liability for this coverage has been exhausted, the duty to defend provision is ambiguous as to the manner by which the coverage must be exhausted before the duty to defend terminates and must be interpreted favorably to the insured. So interpreted, it means that the insurer's duty to defend continues until its coverage limits have been exhausted in the settlement of a claim or claims against the insured or until judgment against the insured is reached. Therefore, an insurer's duty to defend did not end when it paid its policy limit to the injured claimant pursuant to N.C.G.S. § 1-540.3.

Am Jur 2d, Automobile Insurance §§ 389, 390.

Justice WHICHARD dissenting.

Justices MEYER and WEBB join in this dissenting opinion.

ON discretionary review of a decision of the Court of Appeals, reported at 90 N.C. App. 464, 369 S.E.2d 367 (1988), affirming in part and reversing in part judgments entered by *DeRamus, J.*,

at the 5 March 1987 session of Superior Court, DAVIE County. Heard in the Supreme Court 11 April 1989.

Franklin Smith for plaintiff-appellee.

Parker, Poe, Thompson, Bernstein, Gage & Preston, by Irvin W. Hankins III, for defendant-appellant Lumbermens Mutual Casualty Company.

EXUM, Chief Justice.

This is an action seeking in part damages against Lumbermens Mutual Casualty Company (Lumbermens) for an alleged breach of a "duty to defend" provision in an automobile liability policy issued by Lumbermens. The trial court entered summary judgment for Lumbermens on the ground that it had discharged its duty to defend when it paid its entire coverage limits to one of the claimants allegedly injured by the negligence of its insureds, the plaintiffs.[1] The Court of Appeals reversed and remanded. We affirm the decision of the Court of Appeals.

On 20 June 1983 plaintiff Doyle Brown purchased a general liability automobile insurance policy from Lumbermens. The policy period was 20 June to 20 December 1983. Coverage under the policy was limited to $25,000 per person and $50,000 per accident. Both plaintiffs were insured as operators of Mr. Brown's 1979 Cadillac. The policy contained this provision:

> We will pay damages for bodily injury or property damage for which any **covered person** becomes legally responsible because of an auto accident. We will settle or defend, as we consider appropriate, any claim or suit asking for these damages. In addition to our limit of liability, we will pay all defense costs we incur. Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted.

On 14 October 1983 plaintiff Coleen Brown was driving the Cadillac when it collided with a car driven by Joan Hinson. Hinson and Nora Shore, a passenger in Hinson's car, were injured. On

---

1. The Browns' action also seeks damages against General Motors, the maker of plaintiffs' automobile involved, for various acts of alleged wrongdoing. The trial court granted General Motors' motion to dismiss the claims against it. The Court of Appeals affirmed in part and reversed in part this ruling. This aspect of the case is not before us.

28 March 1984 Hinson filed suit against the Browns for her injuries.[2]

Pursuant to the insurance contract, Lumbermens employed counsel to defend Hinson's suit against the Browns. On 1 June 1984 counsel filed answer on behalf of the Browns. In a 3 December 1986 affidavit, counsel gave his opinion that the Browns probably would be found liable and he predicted a jury verdict between $50,000 and $75,000. On 19 August 1984 Lumbermens filed an offer of judgment in the amount of its $25,000 coverage limit. Hinson rejected the offer, saying she would accept $43,000 to settle the claim. Lumbermens then determined to pay its policy limit of $25,000 to Hinson in partial satisfaction of Hinson's claim, and on 4 January 1985 it informed the Browns of its decision. The Browns objected and refused to contribute to the settlement of Hinson's claim. On 7 January 1985 Lumbermens paid $25,000 to Hinson pursuant to N.C.G.S. § 1-540.3 and an "Advance Payment Agreement" in which Hinson released Lumbermens from all claims arising out of the automobile collision and reserved her right to pursue her claim against the Browns.[3]

After paying its policy limit to Hinson, Lumbermens stopped defending the Browns and discharged counsel which it had employed for this purpose. The trial court granted counsel's motion to withdraw on 14 January 1985. The Browns did not then employ new counsel.

Hinson's claim against the then unrepresented Browns came on for trial in April 1985. On 1 May 1985 Hinson obtained a verdict against the Browns in the amount of $45,000. The trial court entered judgment on the verdict but credited the judgment with the $25,000 Lumbermens had paid Hinson. The Browns then obtained counsel and appealed. The Court of Appeals found no error. *Hinson v. Brown*, 80 N.C. App. 661, 343 S.E.2d 284 (1986), *disc. rev. denied*, 318 N.C. 282, 348 S.E.2d 138 (1986).

---

2. Shore also filed an action against plaintiffs for the injuries she sustained in the accident. The Browns brought Lumbermens into that suit as a third-party defendant. In *Shore v. Brown*, 324 N.C. 427, 378 S.E.2d 778 (1989), we held that the third-party claim there abated because of the pendency of this action.

3. N.C.G.S. § 1-540.3 governs the treatment of "advance or partial" payment(s) to claimants in personal injury or wrongful death claims vis-a-vis admissions of liability on the part of the payor, release of the payor from further liability, and the crediting of the advance payment on any judgment later rendered against the payor.

The Browns, thereafter, filed this action, alleging that Lumbermens breached its insurance contract by failing properly to defend them and that it negligently failed to investigate the design, construction and assembly of the brake system on the 1979 Cadillac.[4] At the hearing on Lumbermens' motion for summary judgment Lumbermens contended that by paying its entire coverage to Hinson it had discharged its duty to defend the Browns under the duty to defend provision of its insurance contract. The trial court agreed with this contention and entered summary judgment for Lumbermens.

The Court of Appeals disagreed, reversed the ruling and remanded the case. The Court of Appeals concluded that the duty to defend provision in Lumbermens' policy was ambiguous in that it failed to specify in what manner Lumbermens' coverage limits would have to be "exhausted" before its duty to defend was discharged. The Court of Appeals concluded the substantive portion of its opinion on this issue by saying, "[G]iven the unnecessarily ambiguous use of the word 'exhaust' in this . . . policy, we adopt plaintiffs' interpretation which requires [Lumbermens] to continue defending the Browns until a settlement or judgment is reached despite having paid its policy limits under Section 1-540.3." *Brown v. Lumbermens Mut. Casualty Co.*, 90 N.C. App. at 475-76, 369 S.E.2d at 374.

We allowed Lumbermens' petition for discretionary review, limited to the question of whether the Court of Appeals erred in concluding that the company had not discharged its duty to defend and in reversing summary judgment in its favor. Concluding that the Court of Appeals did not err, we affirm.

[1, 2] There is no statutory requirement that an insurance company provide its insured with a defense. *See* N.C.G.S. § 20-279.21 (1983 & Cum. Supp. 1988) (stating requirements of a "motor vehicle liability policy"). However, a company may provide by contract that it will defend its insured. *Carrousel Concessions v. Florida Ins. Guar.*, 483 So. 2d 513, 516 (Fla. Dist. Ct. App. 1986); *Schiebout v. Citizens Insur. Co. of America*, 140 Mich. App. 804, 813, 366

4. As we understand the briefs and record, the Browns contended in Hinson's claim against them that the Cadillac's brake system was defective and this defect rather than any negligence on the part of Ms. Brown caused the collision. Apparently, too, this allegation forms part of the basis of the Browns' claim against General Motors.

N.W.2d 45, 49 (1985); *see also Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 691, 340 S.E.2d 374, 377, *reh'g denied*, 316 N.C. 386, 346 S.E.2d 134 (1986) (extent of duty to defend requires resolution of scope of policy provisions). An insurer's duty to defend suits against its insured is determined by the language in the insurance contract, *Liberty Mutual Insurance Co. v. Mead Corporation*, 219 Ga. 6, 8, 131 S.E.2d 534, 535 (1963); *Gross v. Lloyd's of London Ins. Co.*, 121 Wis. 2d 78, 87, 358 N.W.2d 266, 270 (1984), and is broader than its obligation to pay damages under a particular policy. *Waste Management of Carolinas, Inc.*, 315 N.C. at 691, 340 S.E.2d at 377.

[3] An insurance policy is a contract and, unless overridden by statute, its provisions govern the rights and duties of the parties thereto. *Fidelity Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 380, 348 S.E.2d 794, 796 (1986). "As with all contracts, the goal of construction is to arrive at the intent of the parties when the policy was issued." *Woods v. Insurance Co.*, 295 N.C. 500, 505, 246 S.E.2d 773, 777 (1978). In construing an insurance policy, "nontechnical words, not defined in the policy, are to be given the same meaning they usually receive in ordinary speech, unless the context requires otherwise." *Grant v. Insurance Co.*, 295 N.C. 39, 42, 243 S.E.2d 894, 897 (1978); *see also Davis v. Maryland Casualty Co.*, 76 N.C. App. 102, 104, 331 S.E.2d 744, 746 (1985).

[4] Any ambiguity in the policy language must be resolved against the insurance company and in favor of the insured. *Woods*, 295 N.C. at 506, 246 S.E.2d at 777. A difference of judicial opinion regarding proper construction of policy language is some evidence calling for application of this rule. *See Maddox v. Insurance Co.*, 303 N.C. 648, 654, 280 S.E.2d 907, 910 (1981); *Electric Co. v. Insurance Co.*, 229 N.C. 518, 521, 50 S.E.2d 295, 297 (1948); Annot., "Insurance—Ambiguity—Split Court Opinions," 4 A.L.R. 4th 1253, 1255 (1981). While "[t]he fact that a dispute has arisen as to the parties' interpretation of the contract is some indication that the language of the contract is at best, ambiguous," *St. Paul Fire & Marine Ins. Co. v. Freeman-White Assoc., Inc.*, 322 N.C. 77, 83, 366 S.E.2d 480, 484 (1988); *accord Mazza v. Medical Mut. Ins. Co.*, 311 N.C. 621, 630, 319 S.E.2d 217, 223 (1984), "ambiguity . . . is not established by the mere fact that the plaintiff makes a claim based upon a construction of its language which the company asserts is not its meaning." *Trust Co. v. Insurance Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970).

"All parts of a contract are to be given effect if possible. It is presumed that each part of the contract means something." *Bolton Corp. v. T.A. Loving Co.*, 317 N.C. 623, 628, 347 S.E.2d 369, 372 (1986). *See also Williams v. Insurance Co.*, 269 N.C. 235, 240, 152 S.E.2d 102, 107 (1967) ("each clause and word must be . . . given effect if possible by any reasonable construction"); *Robbins v. Trading Post*, 253 N.C. 474, 477, 117 S.E.2d 438, 440-41 (1960).

> The terms of a contract must, if possible, be construed to mean something, rather than nothing at all, and where it is possible to do so by a construction in accordance with the fair intendment of a contract, the tendency of the courts is to give it life, virility, and effect, rather than to nullify or destroy it.

17 Am. Jur. 2d *Contracts* § 254, at 648-49 (1964).

[5] With these principles in mind we conclude that there is ambiguity in the Lumbermens policy's duty to defend provision and this ambiguity must be construed favorably to the insured and that the Court of Appeals correctly reversed the trial court. The relevant policy provision states in part:

> We will pay damages for bodily injury or property damage for which any **covered person** becomes legally responsible because of an auto accident. *We will settle or defend, as we consider appropriate, any claim or suit asking for these damages. In addition to our limit of liability, we will pay all defense costs we incur. Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted.*

(Emphasis added.) To "exhaust" means "to use up the whole supply or store of." Webster's Third New International Dictionary 796 (1971). Lumbermens would have us concentrate on the word "exhaust" and conclude that its payment of liability limits to Hinson terminated its obligation to defend under the policy because the limits were "used up." However, we cannot divorce the last sentence in the provision from its context. We must consider the entire provision dealing with the insurer's duty to defend and base our decision on the whole. "The various terms of the policy are to be harmoniously construed, and if possible, every word . . . is to be given effect." *Woods*, 295 N.C. at 506, 246 S.E.2d at 777. The second sentence in the provision requires the insurer to "settle

or defend" covered claims against its insured. The third sentence requires the insurer to bear defense costs in addition to paying liability limits, indicating that the duties to pay claims and to defend are separate and independent.

When the final sentence regarding exhaustion of coverage limits and termination of the duty to settle or defend is read together with the prior sentences, the entire provision's ambiguity becomes apparent. As the plaintiffs argue and the Court of Appeals correctly recognized, the insurer could "exhaust" its coverage limits in any number of ways. It could pay them into court and interplead conflicting claimants in a declaratory judgment action. It could pay them to one of several claimants in return for a complete settlement of that claim against its insured. It could pay them in full or partial satisfaction of a judgment against its insured. It could advance the sum to its insured in lieu of investigating whatever defenses might be available. It could, as was done here, pay them to the injured party, in return for a release only of the insurer and not the insured. Other methods of exhausting coverage limits are possible.

The ambiguity in the questioned provision thus lies not in the meaning of the word "exhausted." It lies in the manner by which the coverage must be exhausted before the duty to defend terminates. The insurer under this provision first assumes a duty to "settle or defend" any covered claim. This duty ends only when its coverage limits are exhausted. The question is whether, considering both propositions, exhaustion of the coverage limits must be by way of settlement or judgment before the duty to defend ends, or whether simply exhausting the limits in *any* manner terminates the duty. Both interpretations are possible. Plaintiff argues for the first; defendant, for the second.

Given the ambiguity, the provision relating to the insurer's duty to defend must be interpreted favorably to the insured. So interpreted, it means that the insurer's duty to defend continues until its coverage limits have been exhausted in the settlement of a claim or claims against the insured or until judgment against the insured is reached.

Our interpretation of the duty to defend provision is supported by cases from other jurisdictions which have considered insurance

contracts with language essentially identical to the language here.[5] *Stanley v. Cobb*, 624 F. Supp. 536, 537 (E.D. Tenn. 1986) ("this Court is of the opinion that the limit of liability may not be exhausted in a manner other than that specified by the policy, *i.e.*, to either settle or defend"); *Samply v. Integrity Ins. Co.*, 476 So. 2d 79, 83 (Ala. 1985) ("we hold that the better rule of law is that an insurer, when it obligates itself to defend, . . . cannot avoid its duty to defend against an insured's contingent liability by tendering the amount of its policy limits into court without effectuating a settlement or obtaining the consent of the insured"); *Anderson v. U.S. Fidelity & Guar. Co.*, 177 Ga. App. 520, 521, 339 S.E.2d 660, 661 (1986) ("[w]e do not agree . . . that the term 'exhaust' encompasses the paying into court of the policy limits, but interpret that term to mean the payment either of a settlement or of a judgment wholly depleting the policy amount"). *Anderson* reaches its result after concluding the provision is not ambiguous but clearly requires exhaustion of limits in the payment of a settlement or judgment. *Id. Stanley* finds ambiguity which it resolves favorably to the insured. *Stanley*, 624 F. Supp. at 538. *Samply* fails to mention the ambiguity issue but nevertheless construes the provision in favor of the insured. *Samply*, 476 So. 2d at 83-84.

It is true that in each of the above cases the insurer tendered its policy limits into court and awaited determination of liability, *Stanley*, 624 F. Supp. at 537; *Samply*, 476 So. 2d at 81; *Anderson*, 177 Ga. App. at 520, 339 S.E.2d at 660, while here defendant paid its policy limit directly to the claimant in return for a release of the insurer. This, we believe, is a distinction without material difference. The result under both procedures, vis-a-vis the insured,

---

5. The Court of Appeals correctly recognized that over the years the insurance industry "has moved towards contractually limiting its duty to defend its insureds." *Brown v. Lumbermens Mut. Casualty Co.*, 90 N.C. App. at 477, 369 S.E.2d at 374. Before 1966 standard liability policies did not include provisions terminating the insurer's obligation to defend upon "exhaustion" of coverage limits. *Pareti v. Sentry Indem. Co.*, 536 So. 2d 417 (La. 1988); Zulkey & Pollard, *The Duty to Defend After Exhaustion of Policy Limits*, For The Defense, 21, 22 (June 1985). Since 1966 standard liability policies have included this provision: "[T]he company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements." Van Vugt, *Termination of the Insurer's Duty to Defend By Exhaustion of Policy Limits*, 44 Ins. Couns. J. 254, 257 (1977). More recently standard liability policies have contained the language now before us; and only a few cases have interpreted this language. Those we have found are discussed in the text.

is the same. The claim against the insured remains outstanding, because there has been neither a judgment nor settlement disposing of that claim.

Pareti v. Sentry Indem. Co., 536 So. 2d 417 (La. 1988), also supports our decision. In *Pareti* the policy limits were paid to effect a formal settlement of one among several claims, which resulted in a complete release of both the insured and the insurer by that claimant and which was agreed to by the insured. *Pareti*, 536 So. 2d at 419. Under these circumstances the court held the insurer had no duty to defend the other claims. *Id.* at 424. It also held that the language as applied to these circumstances was not ambiguous. *Id.* at 420-21. It said,

> [r]ead as a whole, the only reasonable interpretation of this section is that the insurer will defend any claim, *but* the defense obligation will terminate if and when the insurer's policy limits are exhausted. These provisions are not subject to more than one reasonable interpretation. The policy in this regard is not ambiguous.

Id. at 421. Importantly, the *Pareti* Court distinguished from the circumstances before it,

> the numerous cases which hold that the insurer cannot discharge its defense duties by unilaterally tendering its policy limits to the court, the claimant, or the insured. When an insurer merely tenders its limits without obtaining a settlement of any claim for its insured, a strong argument can be made that it has neither "exhausted" its policy limits nor fulfilled its fiduciary duty to discharge its policy obligations to the insured in good faith.

Id. at 422-23 (footnote omitted). The *Pareti* Court also recognized,

> [i]f an effort were made to construe the policy clause at issue here to cover the situation where there is a tender of policy limits, arguably it would be ambiguous in that context . . . . [U]nilateral tenders by the insurer have generally been viewed as insufficient to terminate the duty to defend.

Id. at 421, n.3. We agree with the result and the reasoning in *Pareti*.

Finally, as one court has noted: "[A] most significant protection afforded by the policy—that of defense—is rendered a near nullity" if the duty to defend terminates upon unilateral tender of the

policy limits. *Simmonds v. Jeffords*, 260 F. Supp. 641, 642 (E.D. Pa. 1966).

We conclude, for the reasons given, that under the terms of the policy in question Lumbermens' unilateral tender to, and Hinson's acceptance of, the policy limit without effecting settlement of Hinson's claim against the Browns did not relieve Lumbermens of its duty to defend against this claim. The decision of the Court of Appeals is, therefore,

Affirmed.

Justice WHICHARD dissenting.

I agree that there is no ambiguity in the meaning of the word "exhausted," but I do not agree that a latent ambiguity lurks in the "manner by which the coverage must be exhausted before the duty to defend terminates." The more reasonable reading of this policy language is a contextual one, such as that given an identical provision by the Supreme Court of Louisiana:

> Read as a whole, the only reasonable interpretation of this section is that the insurer will defend any claim, *but* the defense obligation will terminate if and when the insurer's policy limits are exhausted. These provisions are not subject to more than one reasonable interpretation. The policy in this regard is not ambiguous.
>
> . . . .
>
> This standard policy provision ["In addition to our limit of liability, we will pay all defense costs we incur"] simply means that defense costs will be paid separately by the insurer and will not be applied against its policy limits. . . . This language cannot be taken to mean that the company will *continue* to pay defense costs once its policy limits have been exhausted, and in fact the very next sentence of the policy expressly states that this will not be the case. Once again, these sentences must be construed together, and when they are so construed there is no ambiguity.

Pareti v. Sentry Indem. Co., 536 So. 2d 417, 421 (La. 1988). *See also Stanley v. Cobb*, 624 F. Supp. 536, 538 (E.D. Tenn. 1986) (absent provision that insurer may pay the insured the policy limits *or* defend to judgment, policy language identical to that here must

be interpreted by its plain meaning and any ambiguity must be resolved against the contract's drafter); *Anderson v. U.S. Fidelity & Guar. Co.*, 339 S.E.2d 660, 661 (Ga. App. 1986).

I would hold that defendant's unilateral tender of the policy limit to Hinson, and Hinson's acceptance, sufficed to exhaust defendant's "limit of liability" and thus to end its duty to defend plaintiff. I would do so because, in the context presented, neither the word "exhausted" nor the manner of "exhausting" the policy limits is ambiguous: the only reasonable interpretation is that by paying its full policy limits to the party injured by its insured, defendant "exhausted" its limit of liability and ended its duty to settle or defend.

The double meaning that the majority perceives in the policy language—that the duty to defend or settle ends only after judgment or settlement or that it ends when the policy limits are exhausted in any other manner—and its interpretation that the former, which favors the insured, controls, in effect reinserts policy language into the contract that was standard in post-1966 insurance contracts, but is omitted from the policy here:

> [T]he company shall not be obligated to pay any claim or judgment or to defend any suit or prosecute or maintain any appeal after the applicable limits of the Company's liability have been exhausted *by payment of any judgments or settlements.*

E.g., *Conway v. Country Cas. Ins. Co.*, 92 Ill. 2d 388, 393, 442 N.E.2d 245, 247 (1982) (emphasis added).

In *Conway*, the company, after making several advance payments to the plaintiff for her medical expenses, entered into an agreement, with the approval of its insured, to pay the remainder of the $10,000 limit. *Conway*, 92 Ill. 2d at 391-92, 442 N.E.2d at 246. The agreement, however, did not release the insured, against whom the plaintiff continued her action. *Id.* at 392, 442 N.E.2d at 246. The Illinois Supreme Court held that the company was not discharged of its duty to defend. It stated:

> Our holding that an insurer cannot discharge its duty to its insured simply by making payments to the claimant to the extent of its policy's limits is clearly supported by the language of the policy here. As we have noted above, the policy provided that the insurer could terminate its obligation to defend and pay by payments to the policy's limits of "any judgments or

> settlements." The insurer here, of course, made no payment pursuant to a judgment or a settlement agreement.

Id. at 395-96, 442 N.E.2d at 248. Thus, in *Conway* the inclusion of the language that exhaustion of the policy limit must be by payment of "judgments or settlements" was crucial to the court's determination that the company's payments to the claimant did not discharge its duty to defend.

Policy language in *Gross v. Lloyd's of London Ins. Co.*, 121 Wis. 2d 78, 83, 358 N.W.2d 266, 269 (1984), was identical to that in *Conway*, with the appended phrase that exhaustion of policy limits could be either by payment of judgments or settlements "or after such limit of the Company's liability has been tendered for settlement." The trial court allowed the company to pay its policy limit into court and thereby be relieved of its duty to defend its insured. *Id.* at 83, 358 N.W.2d at 269. The court of appeals affirmed, but the Wisconsin Supreme Court reversed, stating that the "tendered for settlement" language contemplated payment prior to judgment or settlement, that the addition of that language was evidence of a "substantial change" in the insurer's obligation to defend, and that the insurer improperly failed to highlight the new language in the policy so as to give notice to the insureds of a change in the insurer's duty to defend. *Id.* at 86, 89, 358 N.W.2d at 270, 271.

The language specifying means of exhaustion of policy limits is patently absent in the contract at issue here. Although an insurer's duty to defend suits against its insured must be determined on the basis of the language in the insurance contract, *Liberty Mutual Insurance Co. v. Mean Corporation*, 219 Ga. 6, 8, 131 S.E.2d 534, 535 (1963), the majority reads more into the contract than is there: the contract neither states nor implies a provision limiting "exhaustion" of policy liability limits to settlement or judgment, or even to a tender "for settlement." *See Gross v. Lloyd's of London Ins. Co.*, 121 Wis. 2d at 83, 358 N.W.2d at 269. Indeed, the absence of such limiting language, which underlay the courts' holdings in *Conway* and *Gross*, suggests that defendant's drafters may well have avoided it for the reasons therein expressed.

It is well established that "[a]ll parts of a contract are to be given effect if possible. It is presumed that each part of the contract means something." *Bolton Corp. v. T.A. Loving Co.*, 317 N.C. 623, 628, 347 S.E.2d 369, 372 (1986). *See also Williams v.*

Insurance Co., 269 N.C. 235, 240, 152 S.E.2d 102, 107 (1967) ("each clause and word must be . . . given effect if possible by any reasonable construction"); *Robbins v. Trading Post*, 253 N.C. 474, 477, 117 S.E.2d 438, 440-41 (1960).

> The terms of a contract must, if possible, be construed to mean something, rather than nothing at all, and where it is possible to do so by a construction in accordance with the fair intendment of a contract, the tendency of the courts is to give it life, virility, and effect, rather than to nullify or destroy it.

17 Am. Jur. 2d *Contracts* § 254 at 648-49 (1964). The majority would interpret the provision in question to mean "that the insurer's duty to defend continues until its coverage limits have been exhausted in the settlement of a claim or claims against the insured or until judgment against the insured is reached." Where a settlement or judgment has been reached in the factual context presented here, no claim against the insured remains. The duty of the insurer to defend thus terminates inevitably, and contractual provision therefor is unnecessary. To interpret the provision as the majority does thus renders it meaningless surplusage, without purposeful effect. Under the interpretation here—that unilateral payment of the policy limit to the injured party presettlement or prejudgment effects an exhaustion of the insured's liability limits and a termination of the insurer's duty to settle or defend—the provision "mean[s] something, rather than nothing at all"; it has "effect, rather than [being] nullif[ied] or destroy[ed]." *Id.*

The majority briefly surveys the handful of cases—*Stanley v. Cobb*, 624 F. Supp. 536; *Samply v. Integrity Ins. Co.*, 476 So. 2d 79 (Ala. 1985); *Anderson v. U.S. Fidelity & Guar. Co.*, 177 Ga. App. 520, 339 S.E.2d 660 (1986); and *Pareti v. Sentry Indem. Co.*, 536 So. 2d 417—in which state and federal courts have construed policy language identical to that before us. In each of these cases the insurer's assertion that tender of the policy limits terminated its duty to defend the insured was rejected. The majority acknowledges that these cases are factually distinguishable, but denies the materiality of the difference. I disagree.

In *Stanley*, *Samply* and *Anderson*, the insurance companies tendered the policy limits into court, then awaited determination of liability. *Pareti* involved a compromise and release agreement between the claimants, the insured, and the insured's insurance

company. The agreement released the insured and the insurance company from further liability. In return, the insurance company tendered $50,000 in settlement. The claimants' underinsured carrier argued that the insurance company did not exhaust its duty to defend. The court held that because the insurer had exhausted its policy limits through a good faith settlement, it no longer had a duty to defend. The court only suggested in a footnote that a "unilateral tender" of the policy limits might not exhaust the duty to defend, citing *Samply* and cases on point cited therein, which are factually distinguishable from this case because they involve tender of policy limit amounts into a court and/or because they involve different language.[1]

Here the company paid its policy limit directly to the claimant. The injured claimant thus benefitted—immediately and maximally—from the payment. When an insurer merely tenders its policy limits into court, the insured may or may not be found liable for the claimant's injuries. If the insured is found not liable, the insurer recovers the entire sum tendered. Given that possibility, the insurer may not have "exhausted" its "limit of liability" when it merely tenders its limits into court. By contrast, when an insurer has paid to the claimant all it can be required to pay, and it cannot recover any part of that sum, by any reasonable construction its "limit of liability . . . has been exhausted."

---

1. *Pareti* cites *Keene Corp. v. Insurance Co. of N. America*, 597 F. Supp. 946 (D.D.C.), *vacated on other grounds*, 631 F. Supp. 34 (D.D.C. 1985); *Simmonds v. Jeffords*, 260 F. Supp. 641 (E.D. Pa. 1966); *National Casualty Co. v. Insurance Co. of N. America*, 230 F. Supp. 617 (N.D. Ohio 1964); *Samply v. Integrity Ins. Co.*, 476 So. 2d 79 (Ala. 1985); *Conway v. County Cas. Ins. Co.*, 92 Ill. 2d 388, 442 N.E.2d 245 (1982); *Sutton Mutual Ins. Co. v. Rolph*, 109 N.H. 142, 244 A.2d 186 (1968); *Delaney v. Vardine Paratransit, Inc.*, 132 Misc. 2d 397, 504 N.Y.S.2d 70 (N.Y. Sup.Ct. 1986), and *Batdorf v. Transamerica Title Ins. Co.*, 41 Wash. App. 254, 702 P.2d 1211 (1985).

Keene, *Simmonds*, and *Sutton Mutual* involved pre-1966 policy language. *National Casualty* involved a pre-1966 policy; the specific policy language was not before the court. The policy in *Conway* stated that the liability limits must be "exhausted by payment of judgments or settlements." The policy in *Delaney* contained the following language on which the court based its decision: "our payment of LIABILITY INSURANCE limit ends our duty to settle or defend." In *Simmonds*, *National Casualty*, *Samply*, and *Sutton Mutual*, the insurance companies tendered or offered to tender their policy limits into court. In *Batdorf*, the court held that the insurer's payment of the policy in full to the insured terminated the insurer's duty to defend. The court's decision rested on policy language stating that the insurance company had the option of paying the policy in full, thus terminating the insured's liability.

Finally, the interpretation here is in accord with the public policy of North Carolina implicit in N.C.G.S. § 1-540.3(a), which provides for advance payments by an insurance company to a person making a claim for bodily injury against the company's insured. This statute states:

> *Advance Payments.*
>
> (a) In any claim, potential civil action or action in which any person claims to have sustained bodily injuries, advance or partial payment or payments to any such person claiming to have sustained bodily injuries . . . may be made to such person . . . by the person or party against whom such claim is made or by the insurance carrier for the person . . . [who] is or may be liable for such injuries or death. Such advance or partial payment or payments shall not constitute an admission of liability on the part of the person . . . on whose behalf the payment or payments are made or by the insurance carrier making the payments . . . . The receipt of the advance or partial payment or payments shall not in and of itself act as a bar, release, accord and satisfaction, or a discharge of any claims of the person or representative receiving the advance or partial payment or payments, unless by the terms of a properly executed settlement agreement it is specifically stated that the acceptance of said payment or payments constitutes full settlement of all claims . . . .

N.C.G.S. § 1-540.3(a) (1983). Part of the General Assembly's purpose in enacting this statute was to encourage insurance companies to make advance partial payments to a claimant prior to a final settlement. *Thornburg v. Lancaster*, 303 N.C. 89, 94, 277 S.E.2d 423, 427 (1981), *overruled on other grounds, Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 360 S.E.2d 772 (1987).

> As a result of this statute, seriously injured persons who require long-term medical treatment can now accept piecemeal payments from an insurer before any determination of liability, and those payments represent neither an admission of liability on the part of the insurer nor full satisfaction of the injured party's claims. Under the present law, acceptance of partial or advance payments, absent a properly executed *full* settlement agreement, does not bar the party receiving the payments from suing on the underlying claim.

Id. The majority's holding, in effect, that an insurer cannot exhaust its policy limit by making advance payment(s) to a claimant of the maximum sum payable under the policy, and thereby terminate its duty to defend, will discourage payments to claimants prior to a judgment or full settlement, and is thus counter to the public policy implicit in N.C.G.S. § 1-540.3(a).

I thus would hold that, under the facts and the language of the insurance contract here, defendant did not breach its duty to defend its insured.[2] The decision of the Court of Appeals reversing the summary judgment for defendant on the claim that defendant breached its contractual duty to defend thus should be reversed and the cause should be remanded to the Court of Appeals for further remand to the Superior Court, Davie County, for reinstatement of the summary judgment for defendant on the duty-to-defend issue.

For the foregoing reasons, I respectfully dissent.

Justices MEYER and WEBB join in this dissenting opinion.

---

2. The question of whether defendant discharged its contractual obligations to plaintiffs in good faith is not argued. "The duty of an insurance company to defend its insured arises solely from the language of the insurance contract. A breach of the duty to defend can be determined objectively from the contract itself without regard to the good or bad faith of the insurer." *Schiebout v. Citizens Ins. Co. of America*, 140 Mich. App. 804, 813, 366 N.W.2d 45, 49 (1985). An insurance company has a fiduciary duty to defend its insured and to consider the insured's interest. *Pareti v. Sentry Indem. Co.*, 536 So. 2d at 423. "An insurer which hastily enters a questionable settlement simply to avoid further defense obligations under the policy clearly is not acting in good faith and may be held liable for damages caused to the insured." *Id.*; *see also* Zulkey & Pollard, *The Duty to Defend After Exhaustion of Policy Limits*, For The Defense, June 1985, at 21, 28.

> [A]ny payment of the policy limits which does not release the insured from a pending claim (e.g., unilateral tender of policy limits to the court, the claimant or the insured), even if sufficient to terminate the duty to defend under the wording of the policy involved, raises serious questions as to whether the insurer has discharged its policy obligations in good faith.

Pareti, 536 So. 2d at 424; *see also* Van Vugt, *Termination of the Insurer's Duty to Defend By Exhaustion of Policy Limits*, 44 Ins. Couns. J. 254, 264 (1977).

STATE OF NORTH CAROLINA v. ROBERT BACON, JR.

No. 364A87

(Filed 5 April 1990)

1. **Criminal Law § 686 (NCI4th)— capital case—failure to record charge conferences—harmless error**

Even though the trial court's failure in a capital trial to have two in chambers charge conferences recorded may have constituted error, defendant was not prejudiced where the court summarized the unrecorded conferences for the record, counsel for each side was given the opportunity to state for the record any further objections, disagreements or dissatisfaction with the court's summations, and no concerns were raised by counsel. N.C.G.S. §§ 15A-1241, 15A-1231(b).

Am Jur 2d, Criminal Law § 880; Trial §§ 573-575.

2. **Criminal Law § 75.7 (NCI3d)— inculpatory statements to police—absence of custodial interrogation—Miranda warnings not required**

Although defendant had not been given the Miranda warnings before he made inculpatory statements to the police at his residence on the night of a murder, the statements were admissible at defendant's murder trial because defendant (1) was not in custody or under arrest at the time he made the statements in that a reasonable person in defendant's position would not have considered himself in custody, and (2) defendant's statements were not the product of questions or interrogation by the police, where the record shows: officers found the victim dead from stab wounds and his estranged wife injured in a car in a parking lot; officers were informed that a violent robbery of the victim and his estranged wife had occurred and that the wife's children were at home with a baby sitter; when officers went to the home to check on the children, defendant opened the door wearing a bathrobe and a shower cap; an officer told defendant that he was there "investigating a very serious matter" and inquired as to his identification; defendant invited the officers into his bedroom when asked if they could speak privately; an officer asked defendant "if he would object to our looking around the bedroom for any evidence of a crime that had been committed"; an

officer told defendant that he was not under arrest at that time and defendant readily gave permission to a search; the search revealed a pair of dark pants with a dark stain on them; defendant was then asked if he owned a pair of tennis shoes; when defendant denied owning shoes such as the ones described by eyewitnesses, an officer remarked that "if we locate a pair of white shoes in this bedroom, and if they have blood on them, then it's all over"; an officer also told defendant that the victim was dead and that "he can't tell us what happened, but if you are involved, it may have been self-defense, so you are the only one that can shed any light on what has happened"; defendant then admitted that he had been involved in a confrontation with the victim and that he had killed him; defendant directed officers to the remainder of his bloodstained clothes and to the area where he had discarded the knife with which he had stabbed the victim; and defendant was then arrested and transported to the police station where he was advised of his constitutional rights.

Am Jur 2d, Evidence §§ 545, 552, 555-557.

3. Jury § 7.14 (NCI3d)— capital case—qualms about death penalty—peremptory challenges

It was neither constitutionally nor otherwise improper for the prosecution to use its peremptory challenges to excuse potential jurors who expressed qualms or some hesitancy about the death penalty but who were not excludable under *Witherspoon v. Illinois*, 392 U.S. 520.

Am Jur 2d, Jury § 289.

4. Criminal Law § 252 (NCI4th)— alleged illness of defendant—refusal to recess trial

The trial judge in a capital case did not abuse his discretion in proceeding with jury selection and failing to recess the trial when informed by defense counsel that defendant was so physically ill that it was interfering with his ability to participate in the proceedings where a physician examined defendant and reported to the court that there was no evidence that defendant was sick, and defendant failed to demonstrate even one occasion when he was unable to comprehend the proceedings or to communicate his opinions of the jurors to his counsel as a result of his alleged illness.

Am Jur 2d, Continuance § 39.

5. Criminal Law § 497 (NCI4th)— police report not in evidence— denial of jury's request to review

The trial court properly determined that the focus of the jury's request to review evidence during its deliberations was a written police report, and the court properly denied the jury's request where the police report had not been placed into evidence but was used by a witness only to refresh his recollection.

Am Jur 2d, Trial § 1028.

6. Criminal Law § 1363 (NCI4th)— capital case—mitigating circumstance—aiding apprehension of another capital felon— erroneous failure to submit

The trial court in a first degree murder case committed prejudicial error in failing to submit the mitigating circumstance that "defendant aided in the apprehension of another capital felon," N.C.G.S. § 15A-2000(f)(8), where the evidence showed that the victim's estranged wife, who was defendant's accomplice, told police that the victim had been killed by mysterious assailants who had opened her car door and rendered her unconscious; at approximately the same time, defendant told police officers that he had been in the automobile with the victim's wife and the victim, that the victim made a racial remark to him and pulled a knife on him, and that he grabbed the knife from the victim and stabbed him; and although defendant's story did not turn out to be totally accurate with respect to motive and intent, it caused officers to focus on the victim's wife as a possible accomplice in the murder. This error was not cured by the court's instruction on the law as to the "apprehension" circumstance where the written issues submitted to the jury included only an issue as to whether defendant aided in the "prosecution" of another felon.

Am Jur 2d, Criminal Law §§ 598, 599.

APPEAL of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a death sentence for murder in the first degree entered by *Stevens, J.*, at the 18 May 1987 Criminal Session of Superior Court, ONSLOW County. Heard in the Supreme Court 12 February 1990.

Lacy H. Thornburg, Attorney General, by David Roy Blackwell, Special Deputy Attorney General, for the state.

Malcolm Ray Hunter, Jr., Appellate Defender, by David W. Dorey, Assistant Appellate Defender, for defendant-appellant.

MARTIN, Justice.

Defendant was convicted of murder in the first degree and common law conspiracy to commit murder. The jury recommended the death sentence and the trial court sentenced accordingly. The trial court further imposed a sentence of three years imprisonment for the conspiracy. Having performed a careful and thorough review of the record, we conclude that as to the guilt phase defendant received a fair trial free of prejudicial error. However, with respect to his sentencing hearing, defendant contends that the trial court failed to submit a statutory mitigating factor. We agree and conclude that this constituted prejudicial error in the penalty phase of defendant's trial. Thus, we remand for a new capital sentencing hearing. We find no error on the conspiracy charge.

The state's evidence tended to show the following:

On 1 February 1987, the body of Glennie Leroy Clark, a United States Marine Corps staff sergeant, was discovered at approximately 11:00 p.m. in a gray Pontiac Sunbird parked in the lot of Cinema Six Theater in Jacksonville, North Carolina. A taxi driver had noticed the vehicle with the passenger door open and notified the police. Officer J. J. Phillips, the first officer to arrive at the scene, noticed a white male lying on his left side between the bucket seats and a white female sitting in the driver's seat with her head resting on the steering wheel. As another police officer reached into the automobile to check the occupants, the female regained consciousness and started screaming, "How's Glennie? How's Glennie?" It was later determined that the occupants were Glennie Clark and his estranged wife, Bonnie Sue Clark. Clark had apparently died of numerous stab wounds. An autopsy was performed which revealed that the victim had been stabbed sixteen times. The three most serious wounds consisted of a one-inch deep wound in the chest and two in the abdominal cavity, each approximately one and one-half inches in depth. The chest wound was fatal.

David Black, also a member of the United States Marine Corps, had taken his fiancee to dinner and the couple was planning to

go to a movie. Arriving at the theater at 8:30 p.m., Mr. Black noticed a yellow Camaro or Firebird driven by a black male pull into the parking lot followed by a small gray car driven by a white female. He later identified the two drivers as the defendant, Robert Bacon, and Bonnie Sue Clark. Defendant got into the gray car with Bonnie Sue and they drove away. After the movie, Mr. Black noticed several police cars surrounding the gray car which had been returned to the parking lot. While speaking with the investigating police officers, he further noticed that the windshield of the gray car had a fresh crack in it which had not been present earlier in the evening.

Deputy Chief of Police Delma G. Collins and several officers proceeded to 121 Shadowbrook Road where defendant currently lived with Bonnie Sue Clark. Upon arrival, they noticed a yellow Pontiac Firebird parked in the garage. Defendant answered the door. He was wearing a shower cap and a bathrobe and appeared to have just showered. Chief Collins identified himself and defendant invited the officers into his home. Defendant led the officers into his bedroom when asked if they could speak privately. Defendant also agreed to allow the officers to look around the room. Commander Buchanan found a pair of dark trousers with a dark stain on them. Chief Collins told defendant, "Robert, if we locate a pair of white tennis shoes in this bedroom and if they have blood on them, you know it's all over. . . . If you're involved, it may have been self-defense, so you're the only one that can shed any light on what happened." Defendant replied that the victim had become belligerent while he and Bonnie Sue were discussing a problem and that the victim called him a "nigger" and pulled a knife on him. Defendant stated that he acted in self-defense and grabbed the knife and stabbed the victim sixteen times. Defendant then directed the officers to the remainder of the clothing he had been wearing when the incident occurred. At this point, defendant was placed under arrest.

Defendant was advised of his Miranda rights but later signed a waiver and gave a statement to the police including the following information: Earlier in the evening of 1 February 1987 he intended to demonstrate a Kirby vacuum cleaner to a family but they were not at home; he drove to the Cinema Six Theater parking lot to meet Bonnie Sue and got into her car; they drove to pick up the victim to discuss some problems; defendant got into the back seat and allowed the victim to get into the front seat with Bonnie

Sue; as the victim got into the car he looked at defendant and asked, "What's this shit?"; the three people entered into a heated discussion concerning Bonnie Sue's relationship with defendant; the victim pulled a knife with a camouflaged handle and began waving it around in his wife's direction; defendant told the victim to put it away or he [defendant] would kill him; defendant took the knife away from the victim and began stabbing him; as they drove through the Piney Green Road section of town, defendant threw the knife away; Bonnie Sue kept driving and asked if her husband was dead; defendant checked the victim's pulse and found none; upon returning to the theater parking lot, defendant pushed Bonnie Sue's head into the windshield and drove himself home in the yellow Firebird.

Later defendant revised his statement to include the following: The knife which was used to kill Glennie Clark actually came from a box in the garage of 121 Shadowbrook Road; and, defendant and Bonnie Sue Clark had planned to kill the victim on 31 January 1987 but defendant had "chickened out." Defendant then directed the police to the area where he claimed to have thrown out the knife, and it was located in that general area.

Dale Evans, who worked and resided with defendant and Bonnie Sue Clark, testified that defendant had told him that he would receive $250,000 in February. On 31 January, he stated that defendant told him that Bonnie Sue was going out with her husband. Earlier that day, Mr. Evans recalled that defendant and Bonnie Sue stayed in the bedroom a long time and that Bonnie Sue called and asked someone if they still wanted to go out that night. Mr. Evans assumed that the person on the other end of the telephone said yes because Bonnie Sue then suggested they see a movie. That evening defendant left the house around 7:00 p.m. to make a sales presentation and Bonnie Sue Clark left at approximately 7:30 p.m. Defendant drove the yellow Firebird and Bonnie Sue was driving a gray Buick Skylark. Mr. Evans testified that it was his belief that a Saturday night sales presentation was highly unusual. After defendant and Bonnie Sue were arrested for the murder of Glennie Clark, Mr. Evans went through some papers and found an insurance policy in the amount of $50,000 on the life of Glennie Clark with Bonnie Sue Clark as the named beneficiary. Another policy in the amount of $80,000 was later discovered which also listed Bonnie Sue Clark as the beneficiary.

The state produced extensive corroborating evidence including a forensic serologist who found the blood on defendant's clothing to be that of the victim; a fingerprint and footprint expert who determined that it was defendant's bloody shoe print on the seat of the car; a fiber analyst who determined that the fibers removed from the knife came from the victim's shirt; and, a pathologist who testified that the cause of death was a stab wound which penetrated the heart and that the time of death was approximately 9:30 p.m.

Defendant did not testify and presented no additional evidence. The jury returned a verdict of guilty of murder in the first degree and felonious conspiracy to commit murder.

At the sentencing hearing, the state introduced no further evidence. The defendant testified in his own behalf that: He met Bonnie Sue Clark in 1986 when they were both working for the Kirby Company; they shared a house and finally a bedroom but he denied any romantic involvement; he knew of her difficulties with her husband (particularly his drinking and abuse of Bonnie Sue and the children); Bonnie Sue at some point had told him that she wished her husband was dead and did he know of anyone who would kill him; he knew the victim possessed insurance but denied killing him for the proceeds of the policies; he finally agreed to kill the victim; the two planned the murder for the night of 31 January 1987 but he found he could not do it; he told Bonnie Sue that the presence of police and other persons prevented it; he and Bonnie Sue did not discuss the murder plan on Sunday (the day of the actual murder); they met with the victim on that night merely to discuss the problem of his numerous telephone calls to Bonnie Sue; the attack occurred as previously described except that the victim never had the knife; they returned to the parking lot; defendant faked a robbery and he returned home. Defendant further testified that he killed the victim out of anger—not for money. He denied being in love with Bonnie Sue and stated that he disliked her two children. Nineteen additional witnesses testified in defendant's behalf including his parents and sister. They stated that he was well-behaved, hard working and a non-violent person who normally went out of his way to avoid conflict.

The jury found beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances and recom-

mended the death sentence. The trial court duly sentenced defendant to death on 4 June 1987.

GUILT-INNOCENCE PHASE

I.

[1] Defendant first assigns as error the trial court's partial denial of defendant's motion for complete recordation in that it precluded recordation of bench conferences and in chamber proceedings. We hold that, although the court's decision may have constituted error under the applicable statutes, defendant was not prejudiced as a result thereof.

N.C.G.S. § 15A-1241 requires that, in capital cases, a true, complete and accurate record be made of all proceedings except opening statements, final jury arguments and arguments of counsel on questions of law. Upon proper motion by counsel, these proceedings must also be duly recorded.

Defendant in his brief does not raise the issue of any unrecorded bench conferences. He does argue that two charge conferences were unrecorded. N.C.G.S. § 15A-1231(b) sets forth the following in pertinent part:

> (b) Before the arguments to the jury, the judge must hold a recorded conference on instructions out of the presence of the jury. . . . The failure of the judge to comply fully with the provisions of this subsection does not constitute grounds for appeal unless his failure, not corrected prior to the end of the trial, materially prejudiced the case of the defendant.

In the case *sub judice*, the trial court conducted an unrecorded conference on jury instructions in chambers. For the record, the court noted that

> [o]pportunity was given to counsel representing both sides to request additional instructions or object to any of the instructions proposed by the Court; that thereafter all counsel on both sides agreed in substance to the charge to be given and to the possible jury verdicts to be submitted. Is that correct, Mr. Solicitor?

The District Attorney and defense counsel each replied affirmatively. Later, during the sentencing phase, the trial court conducted

a second unrecorded conference in chambers. The court summarized the conference as follows:

> That an opportunity was given to attorneys representing the State and the defendant to request additional instructions or object to any of the instructions proposed by the Judge. That thereafter all counsel agreed in substance to the charge to be given in this second or sentencing hearing and the issues and recommendations to be submitted, except that the defendant objected to the submission of the two alleged factors in aggravation, being No. 1, that the murder was committed for pecuniary gain; and second, the murder was especially heinous, atrocious and cruel, and the Court gave specific exception upon that objection, which the Court overruled and will submit as being, in its opinion, proper. Gentlemen, is there anything else?

At this point, defense counsel again consented to the accuracy of the court's summation of the proceeding. In both instances, counsel for both sides was given the opportunity to state, for the record, any *further* objections, disagreements or dissatisfaction he had with the court's summations. In both instances, no further concerns were raised. Defendant has failed to demonstrate how he was materially prejudiced by the failure of the trial court to record the bench conferences or the in chambers conferences. N.C.G.S. § 15A-1231(b) (1988).

II.

[2] Defendant next contends that the trial court erred in denying his motion to suppress statements made to the police at his residence on the night of the murder. He argues that the statements were the product of an unconstitutional custodial interrogation in violation of his fifth amendment right to be free from compelled self-incrimination and to have legal counsel present. *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). We disagree and hold that the evidence supports the court's findings of fact, conclusions of law and the order denying defendant's motion to suppress. The statements made by defendant to the officers as well as the blood-soaked clothing and towels taken from defendant's residence were properly admitted into evidence.

The question here turns on whether a reasonable person in defendant's position would believe that "he had been taken into custody or otherwise deprived of his freedom of action in any

significant way." *State v. Davis*, 305 N.C. 400, 410, 290 S.E.2d 574, 580-81 (1982). Our review of the record indicates that the following events took place: Jacksonville police officers responded to a call at approximately 11:00 p.m. at the Cinema Six parking lot; upon arrival, they found Bonnie Sue Clark injured and her estranged husband dead apparently from numerous stab wounds; Chief Collins was informed that the Clarks were the victims of a violent robbery; Chief Collins was further informed that Bonnie Sue Clark's children were at home with a baby sitter; Chief Collins dispatched Officer Phillips to 121 Shadowbrook Road to "stand by" until he arrived; Chief Collins and other officers arrived later and knocked on the front door of the house to check on the children; Robert Bacon, Jr. (defendant) opened the door wearing a bathrobe and a shower cap; Chief Collins told him that he was there "investigating a very serious matter" and "inquired as to his identification"; defendant invited the officers into the foyer and then into his bedroom when asked if they could speak privately; after they entered and the door was closed, Chief Collins asked defendant "if he would object to our looking around in the bedroom for any evidence of a crime that had been committed"; Chief Collins told defendant that he was not under arrest at that time and defendant readily gave permission to a search; the search revealed a pair of dark pants with a dark stain on them; defendant was then asked if he owned a pair of tennis shoes; when he denied owning shoes such as the ones described by eyewitnesses, Chief Collins remarked that "if we locate a pair of white shoes in this bedroom, and if they have blood on them, then it's all over"; Chief Collins also told defendant that "Glennie Clark is dead and he can't tell us what happened, but if you are involved, it may have been self-defense, so you are the only one that can shed any light on what has happened"; defendant then admitted that he had been involved in a confrontation with Glennie Clark and that he had killed him; defendant directed them to the remainder of his bloodstained clothes and to the area where he had discarded the knife with which he had stabbed Clark; and then defendant was arrested and transported to the police station where he was advised of his constitutional rights. Following advice and a waiver of rights, defendant provided the police officers with a further account of the conspiracy and the murder.

Our further analysis of the record indicates that: Defendant voluntarily admitted Chief Collins and the other officers into his

home; police officers had no search warrant because at the time they entered the home they did not believe they had sufficient information to obtain a warrant; at no time did the police officers threaten defendant; defendant never declined to answer questions; defendant never asked the officers to leave; the conversation was conducted in a cordial manner throughout the incident; and, the early morning hour was inconsequential since defendant received the officers after having just taken a shower rather than having been rudely awakened in the middle of a sound night's sleep. Although defendant had not been given his Miranda warnings before he made the inculpatory statement, this did not constitute error. First, defendant was not in custody or under arrest at the time he made the statement. Second, defendant's statement was not the product of questions or interrogation by the officers. The trial court properly concluded that a reasonable person in defendant's position would not have considered himself in custody at the moment he made inculpatory statements to the police regarding the murder of Glennie Clark. *State v. Jackson*, 308 N.C. 549, 304 S.E.2d 134 (1983), *judgment vacated on other grounds, Jackson v. North Carolina*, 479 U.S. 1077, 94 L. Ed. 2d 133 (1987). This assignment of error is without merit.

III.

[3] In his third assignment of error, defendant argues that the prosecutor unconstitutionally compiled a jury uncommonly willing to condemn a man to die by using his peremptory challenges to remove potential jurors who were not sufficiently enthusiastic about the imposition of the death penalty. Defendant concedes that this Court has rejected his argument several times—most recently in *State v. Allen*, 323 N.C. 208, 372 S.E.2d 855 (1988), *death sentence vacated on other grounds, Allen v. North Carolina*, --- U.S. ---, 108 L. Ed. 2d 601 (1990). We decline defendant's request to reconsider the constitutionality of the holding in *Allen* and its precedent. It was neither constitutionally nor otherwise improper for the prosecution to use its challenges to excuse potential jurors who were not excludable for cause pursuant to *Witherspoon v. Illinois*, 391 U.S. 510, 20 L. Ed. 2d 776, *reh'g denied*, 393 U.S. 898, 21 L. Ed. 2d 186 (1968), but who expressed qualms or some hesitancy about their ability to impose the death penalty. *See Wainwright v. Witt*, 469 U.S. 412, 83 L. Ed. 2d 841 (1985). Our prior holdings stand.

IV.

[4] Defendant next contends that the trial court abused its discretion in proceeding with jury selection when informed by defense counsel that defendant was so physically ill it was interfering with his ability to participate in the proceedings. Although defendant did not move for a continuance or a recess, he contends that the court's failure to recess the trial violated his constitutional rights of due process, effective assistance of counsel and confrontation. We disagree.

During jury selection, defense counsel informed Judge Stevens that defendant was not feeling well. A physician was summoned who examined defendant and reported to the court the following:

> Your Honor, I examined the patient and he gave a history that he throwed [sic] up once this morning but on further questioning with inmates there, they deny seeing him throw up, and also an examination by [sic] his blood pressure was fine. His pulse was a little high which is understandable. There is no evidence that he is sick and I think he's basically fit to undergo the trial.

The trial court determined that, based on this report, jury selection would continue. Defendant objected and the court allowed him to "say how he feels for the record":

> THE DEFENDANT: I just have a headache and upset stomach and I don't—I don't feel good.
>
> THE COURT: Of course the pressures—I'm not a doctor but that in itself, sir, has not in any way affected your abilities to understand these charges against you and what you are being tried for and what's going on, has it?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: And you are not impaired from communicating and talking about your case, are you?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: In what respect?
>
> THE DEFENDANT: Because they want me to pay attention to what the Jurors say and I can't because my head is pounding.
>
> THE COURT: Are you sick to your stomach now?

THE DEFENDANT: Yes, sir.

THE COURT: And you have got a headache?

THE DEFENDANT: Yes, sir.

THE COURT: And because of that you're saying you can't pay attention?

THE DEFENDANT: Yes, sir.

Judge Stevens then noted that defendant appeared well and stated, "I am going to continue, gentlemen. If you feel like that he can't communicate at any time and you can give me some assurance of that, I will take a look at it. Until that time we will continue." The record contains no subsequent statements to this effect from defense counsel.

Even if defendant had moved for a continuance or recess, such decision "rests in the sound discretion of the presiding judge and his decision will not be disturbed on appeal, except for abuse of discretion or a showing the defendant has been deprived of a fair trial." *State v. Ipock*, 242 N.C. 119, 120-21, 86 S.E.2d 798, 800 (1955). Defendant fails to demonstrate even one occasion where he was unable to comprehend the proceedings or to communicate his opinions of the jurors to his counsel as a result of his alleged illness. Defendant's reliance upon N.C.G.S. § 15A-1001 is misplaced as that statute is only concerned with defendant's mental capacity to proceed. No abuse of discretion is shown.

V.

[5] Defendant's last assignment of error in the guilt-innocence phase of his trial is that the trial court improperly denied the jury's request to review certain portions of the evidence. Defendant interprets the jury's request to indicate it wanted to review Chief Collins' testimony concerning Bacon's statement.

During deliberations, the foreman indicated to the bailiff that the jury felt the need to further review evidence. The jury was brought back into the courtroom and the following exchange took place:

THE FOREMAN: Yes, your Honor. The Jury has a problem in our minds. We were wondering if there is any of the evidence that we can view at this time.

THE COURT: Specifically, Mr. Foreman, did you have in mind—

THE FOREMAN: Sir, the question that we have is concerning some of the—

THE COURT: Just tell me the exhibit you want, if you know what it is.

THE FOREMAN: Not by number, but the *police report.* (emphasis added).

THE COURT: Sir?

THE FOREMAN: The report that the defendant made in the presence of the policeman.

. . . .

THE COURT: Mr. Foreman, ladies and gentlemen, the Court has conferred with counsel for the State and for the defendant and as the Court recollects that the witness referred to the document that you asked for the purpose only of refreshing his recollection. The Court remembers that in his opinion, which is shared by lawyers on both sides, that the document was never admitted into evidence. Therefore, it is not an exhibit. Therefore, it is not subject to scrutiny by the Jury. Was there any other document or anything else you wanted to see?

THE FOREMAN: No, sir.

THE COURT: Is that it?

THE FOREMAN: Yes, sir.

Our careful review of the record reveals that the court properly determined that the focus of the jury's request was the written police report. This report was not placed into evidence; therefore, it is not reviewable by the jury during its deliberations. This assignment of error is without merit.

PENALTY PHASE

[6] Defendant contends that it was prejudicial error for the trial court to fail to submit the mitigating circumstance that "defendant aided in the apprehension of another capital felon." N.C.G.S. § 15A-2000(f)(8) (1988). We agree and hereby remand the case to the trial court for a new sentencing hearing.

N.C.G.S. § 15A-2000(f) states, in pertinent part:

> (f) Mitigating Circumstances.—Mitigating circumstances which may be considered shall include, but not be limited to, the following: . . . (8) The defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.

The form entitled "Issues and Recommendation as to Punishment" which was submitted to the jury listed as a mitigating circumstance that the defendant aided in the *prosecution* of another felon but not that the defendant aided in the *apprehension* of another capital felon.

It is well settled in our jurisdiction that "[w]hen evidence is presented in a capital case which may support a statutory mitigating circumstance, the trial court is mandated by the language in N.C.G.S. § 15A-2000(b) to submit that circumstance to the jury for its consideration." *State v. Lloyd*, 321 N.C. 301, 311-12, 364 S.E.2d 316, 323, *vacated and remanded on other grounds*, --- U.S. ---, 102 L. Ed. 2d 18, *reinstated*, 323 N.C. 622, 374 S.E.2d 277 (1988), *death sentence vacated on other grounds, Lloyd v. North Carolina*, --- U.S. ---, 108 L. Ed. 2d 601 (1990) "[C]ommon sense, fundamental fairness and judicial economy dictate that any reasonable doubt concerning the submission of a statutory or requested mitigating factor be resolved in the defendant's favor to ensure the accomplishment of complete justice at the first sentencing hearing." *State v. Pinch*, 306 N.C. 1, 27, 292 S.E.2d 203, 223, *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). Our review is thus limited to whether the record reveals any evidence to support a reasonable finding by the jury that this defendant "aided in the apprehension" of Bonnie Sue Clark.

The record reveals that on the night of the murder Bonnie Sue Clark told the police that mysterious assailants had opened her car door and slammed her head against the steering wheel thus rendering her unconscious. She was unable to provide further information as to her assailants. After being examined at the hospital, she reiterated her exculpatory statements and reduced them to writing at the police station. *See State v. Clark*, 324 N.C. 146, 377 S.E.2d 54 (1989). At approximately the same time, defendant told police officers that: He had been in the automobile with Bonnie Sue Clark and the victim, Glennie Leroy Clark; the victim called

him a "nigger" and pulled a knife on him; he grabbed the knife from the victim and stabbed him; and, all of this took place while Bonnie Sue Clark was in the vehicle. It was at this point that the investigators first began to focus on Bonnie Sue Clark as a possible accomplice in the murder. Obviously if defendant's version of the events was proven true, then Bonnie Sue Clark was lying. Defendant's story did not turn out to be totally accurate with respect to motive, intent, etc. However the fact that defendant, not mysterious assailants, did the killing was sufficient to arouse the suspicions of the investigating police officers as to Bonnie Sue's role in this killing. This is sufficient to submit the mitigating circumstance of aiding "in the apprehension of another capital felon" to the jury. It was error not to do so.

In order to show reversible error in the trial court's omission of a statutory mitigating circumstance in a capital case, defendant must affirmatively establish three things:

> (1) that the particular factor was one which the jury could have reasonably deemed to have mitigating value (this is presumed to be so when the factor is listed in G.S. 15A-2000(f)); (2) that there was sufficient evidence of the existence of the factor; and (3) that, considering the case as a whole, the exclusion of the factor from the jury's consideration resulted in ascertainable prejudice to the defendant.

State v. Pinch, 306 N.C. at 27, 292 S.E.2d at 223-24. In the case *sub judice*, the presumption that circumstances listed in N.C.G.S. § 15A-2000(f) have mitigating value is applicable. We have further found that there was sufficient evidence to support the assertion that defendant aided in the apprehension of his co-conspirator. Now we find that the omission of this factor potentially worked to the prejudice of defendant and, as a result, he is entitled to a new sentencing hearing.

We are aware that the trial court charged the jury on the law as to the "apprehension" circumstance. The state argues that this instruction cured the error of failing to submit the "apprehension" mitigating circumstance on the written issues to be answered by the jury. We reject this argument. The instruction on "apprehension" was completely irrelevant to the issue on "prosecution" which was before the jury; this is manifested by its negative answer to the issue. The jury's "no" answer to the "prosecution" circumstance was entirely proper, there being no evidence to support the cir-

cumstance and no instructions by the trial court on the issue. This left the instructions as to the "apprehension" circumstance floating in a void, without any reference to written issues before the jury. *See State v. Harris*, 289 N.C. 275, 221 S.E.2d 343 (1976). Failing to submit the proper mitigating circumstance created too great a "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Lockett v. Ohio*, 438 U.S. 586, 605, 57 L. Ed. 2d 973, 990 (1978).

It is impossible for the reviewing court to conclusively determine the extent of the prejudice suffered by defendant; however, defendant has shown that there is a reasonable possibility that had this mitigating circumstance been submitted to the jury, a different result would have been reached at the sentencing hearing. N.C.G.S. § 15A-1443(a) (1988).

We are cognizant of the recent holding in *McKoy v. North Carolina*, --- U.S. ---, 108 L. Ed. 2d 369 (1990), and its probable effect on the sentencing hearing in this case. However, as defendant is being awarded a new sentencing hearing for the reasons stated, we do not find it appropriate to discuss *McKoy* in this opinion.

We find no prejudicial error in the guilt phase of defendant's trial. For error in the sentencing phase of defendant's trial, the death sentence is vacated and the cause is remanded to Superior Court, Onslow County, for a new sentencing hearing.

Guilt Phase—no error.

Sentencing Phase—death sentence vacated; remanded for a new sentencing hearing.

STATE OF NORTH CAROLINA v. ROBERT LANE WISE

No. 161PA89

(Filed 5 April 1990)

1. **Criminal Law §§ 65, 86.8 (NCI3d)— rape counselor—description of victim as genuine—no improper comment on credibility**

A counselor's response of "genuine" to a question asking her to describe an alleged child rape victim while she was telling her story during counseling sessions was not a comment upon the credibility of the victim which violated N.C.G.S. § 8C-1, Rules 405(a) and 608(a) but was merely a description of the witness's personal observation of the victim's emotional state during counseling sessions.

Am Jur 2d, Expert and Opinion Evidence § 191; Rape § 68.

2. **Witnesses § 8.4 (NCI3d)— disallowance of argumentative question—prevention of witness harassment—impeachment by inconsistent statement not denied**

Defense counsel's question to an alleged rape victim, "So what you're saying earlier wasn't true?" was an argumentative restatement of counsel's previous question, and the trial court's sustention of the State's objection thereto was within the court's discretion to prevent harassment of witnesses and did not violate defendant's constitutional right to impeach the witness through questioning about prior inconsistent statements. N.C.G.S. § 8C-1, Rule 611(a).

Am Jur 2d, Witnesses §§ 507, 596, 629.

3. **Constitutional Law § 30 (NCI3d)— rape case—failure to disclose examination results—knowledge by defense counsel—due process**

The State did not withhold exculpatory evidence in violation of a rape defendant's due process rights by failing to offer the testimony of the doctor who first examined the child victim or to disclose the results of his examination where the record shows that defense counsel had a copy of a report of an examination of the victim by a second doctor which referred to a prior pelvic examination of the victim by another doctor, and that defense counsel knew the name of the doctor

who performed the first examination and thus could have subpoenaed him.

Am Jur 2d, Criminal Law § 1010; Rape § 63.

4. **Criminal Law § 51 (NCI3d); Rape and Allied Offenses § 4 (NCI3d)— characteristics of abused children—testimony by counselor—absence of formal finding of qualification as expert**

The trial court's overruling of defense counsel's objection to opinion testimony by a professional counselor concerning the characteristics of abused children constituted an implicit finding that the witness was an expert where defendant never requested a specific finding by the trial court as to the witness's qualifications as an expert, and evidence before the court that the witness possesses a master's degree in education and counseling, is a nationally certified and registered counselor, and has received extensive training and clinical experience in the field of sexually abused children was sufficient to support a finding that the witness was qualified to testify as an expert in the characteristics of abused children. Furthermore, there was no need for the court to make a formal ruling that the witness was an expert because evidence of the nature of her job and of the experience she possessed affirmatively showed that she was better qualified than the jury to form an opinion and testify about the characteristics of abused children.

Am Jur 2d, Expert and Opinion Evidence §§ 180, 181.

5. **Criminal Law § 686 (NCI4th)— failure to record charge conference—absence of prejudice**

Defendant failed to show material prejudice from the trial court's failure to record the charge conference, N.C.G.S. § 15A-1231(b), where the record shows that the trial judge advised that he would make the standard charge to the jury, neither side had any special request for instructions, and both sides indicated that they were satisfied with the charge as given and did not have any corrections or additions.

Am Jur 2d, Criminal Law § 880; Trial §§ 573-575.

6. **Constitutional Law § 66 (NCI3d)— charge conference—absence of defendant—harmless error**

Error, if any, in holding the charge conference outside the presence of defendant was harmless where defendant made

no request to attend the charge conference; defendant's counsel was present during the conference, and the trial court announced the proposed instructions on the record and gave defense counsel the opportunity to be heard; and defendant was present when the actual charge was given to the jury and did not object to its contents.

Am Jur 2d, Criminal Law § 916.

7. **Criminal Law § 685 (NCI4th); Rape and Allied Offenses § 6 (NCI3d)— instructions—inference from absence of medical report—ease of bringing sexual charges—failure to make request**

The trial court in a rape case did not err in failing to charge the jury that it should infer from the State's failure to produce the results of the first medical examination of the child victim that this evidence was not favorable to the State's position or in failing to charge on the ease of bringing charges of sexual misconduct where defense counsel submitted no request for special instructions, failed to object to the charge given, and stated that he had no request for additional instructions. Furthermore, the State's failure to present evidence of the first examination of the victim would not support an inference that such evidence would have been unfavorable to the State's case in light of the fact that defendant had an equal opportunity to call the doctor who performed the examination but apparently failed to do so because his findings corroborated those of a second doctor who examined the victim and testified for the State. N.C.G.S. § 15A-1231(a); Appellate Rule 10(b)(2).

Am Jur 2d, Rape §§ 108, 109.

ON appeal and discretionary review pursuant to N.C.G.S. § 7A-31 of the decision of the Court of Appeals, 93 N.C. App. 305, 377 S.E.2d 769 (1989), setting aside a judgment entered by *Collier, J.*, in Superior Court, CABARRUS County, on 19 January 1988 and awarding defendant a new trial. Heard in the Supreme Court 12 December 1989.

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

Cruse and Spence, by Thomas K. Spence and Kenneth B. Cruse, for defendant-appellee.

MEYER, Justice.

On 5 October 1987, the Grand Jury of Cabarrus County returned two bills of indictment against defendant, one charging first-degree rape occurring on 14 June 1986 and the other charging the same offense occurring on 30 May 1987. The cases were consolidated for trial, and the jury found defendant guilty only of the rape occurring on 14 June 1986. The trial judge imposed a mandatory life sentence. Defendant appealed to the Court of Appeals, which concluded that the trial court improperly admitted expert opinion testimony and ordered a new trial on that basis. This Court granted the State's petition for discretionary review on 4 May 1989. In the appellee's response to the State's petition for discretionary review, eight additional points of error were assigned as cross-assignments of error for consideration by this Court. These errors had been raised by the appellee before the Court of Appeals and were summarily overruled by that court. For reasons stated subsequently, we review these cross-assignments of error.

The State's evidence tended to show that on 14 June 1986 defendant, the victim's stepuncle and neighbor, asked the victim, an eleven-year-old girl, to come to his home to baby sit his young son. When she arrived, he asked her to accompany him to a warehouse to help him pick up something. After they had obtained the item and had walked to one end of the warehouse, the victim fell. At that point, defendant held her down on the floor, took off her shorts, and proceeded to engage in sexual intercourse with her. The victim also testified, not to the jury's satisfaction, that the defendant again raped her in the warehouse on 30 May 1987. In June or July of 1987, the victim confided in her pastor's wife and told her of the incidents. The pastor's wife in turn informed the victim's mother of the incidents. Defendant was subsequently charged with two counts of rape. His defenses to both charges were denial and alibi.

The victim was examined by two doctors, Dr. Furr and Dr. Oliver, both of whom indicated that her vagina had been sexually penetrated. Dr. Oliver testified at trial regarding his physical ex-

amination of the child. Gail Mason, a professional counselor who worked with the victim during the investigation of the case, also testified for the State. Her testimony formed the basis for the holding of the Court of Appeals and is the subject of the State's present assignment of error.

[1] Mason testified with regard to what the victim told her in counseling sessions concerning the two alleged incidents. During the course of the direct examination, the following exchange took place between the prosecutor and the witness:

> A. . . . [The victim] was referred to me through victims' assistance. I was in a counseling—that was the way I perceived it, as far as a counseling endeavor.
>
> Q. Now ma'am, could you describe her emotionally when she was telling you these things during these counseling sessions?
>
> A. Genuine.
>
> [DEFENSE ATTORNEY]: Objection.
>
> A. Emotionally. Emotional. Not extremely emotional as far as crying, not furious, anger, related the story, there were tears, there was sadness, but not extreme.
>
> Q. What else did you note about her emotionally when she told you these things?
>
> A. That she was hurting inside and feeling very guilty.

We note at the outset that defendant's objection is not properly preserved and that it came after the witness' answer and was not followed by a motion to strike. When an objection is not timely made, it is waived. *State v. Banks*, 295 N.C. 399, 245 S.E.2d 743 (1978). We nevertheless elect to address this issue.

In its opinion, the Court of Appeals held that the word "genuine" in response to the question asking the witness to describe the victim emotionally amounted to an expert opinion that the victim was telling the truth and therefore violated Rules 405(a) and 608(a) of the North Carolina Rules of Evidence. Because we are convinced that the answer was not a comment upon the credibility of the victim, but was rather a description of the witness' observation of the victim's emotional state during the counseling session, we reverse the holding of the Court of Appeals and remand the case for reinstatement of the judgment of the trial court.

The law in this state with regard to the scope of expert opinion testimony as to a witness' credibility is well settled. Rule 405(a) of the North Carolina Rules of Evidence, which governs methods of proving character, provides in part that "[e]xpert testimony on character or a trait of character is not admissible as circumstantial evidence of behavior." Rule 608(a) addresses impeachment and rehabilitation of a witness' credibility and provides that "[t]he credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion as provided in Rule 405(a)." The reference to Rule 405(a) was inserted in this rule to make it clear that expert testimony as to the credibility of a witness is not admissible. *State v. Aguallo*, 318 N.C. 590, 350 S.E.2d 76 (1986), *appeal on remand*, 322 N.C. 818, 370 S.E.2d 676 (1988). As the Court of Appeals pointed out below, this Court has prohibited expert opinion testimony as to the credibility of a witness on more than one occasion.

In *State v. Heath*, 316 N.C. 337, 341 S.E.2d 565 (1986), this Court held that the trial court erroneously permitted the prosecutor to pose a question to an expert in clinical psychology regarding whether the thirteen-year-old victim was suffering from a mental condition which might cause her to fabricate a story about an alleged sexual assault. This Court further concluded that it was error for the trial court to permit the expert witness to testify that "[t]here is nothing in the record or current behavior that indicates that [the victim] has a record of lying." *Id.* at 340, 341 S.E.2d at 567.

In *State v. Aguallo*, 318 N.C. 590, 350 S.E.2d 76, this Court held that the following examination of an expert pediatrician was improper:

> "Q. . . . [D]id you form an opinion about whether [the victim] was believable or not?
>
> ". . . .
>
> "A. I think she's believable."

Id. at 599, 350 S.E.2d at 81.

In *State v. Kim*, 318 N.C. 614, 350 S.E.2d 347 (1986), this Court concluded that the following testimony was an improper expression of expert opinion on the credibility of a witness:

"Q. Dr. Barnette, as you evaluated and treated [the victim], did you ever find her untruthful with you?

"[DEFENSE COUNSEL]: OBJECTION.

"COURT: OVERRULED.

"A. She's never been untruthful with me about it. Everything she had to say to me somehow I'd find out later that she was telling the truth."

Id. at 619-20, 350 S.E.2d at 350-51.

However, we are not convinced that the testimony at issue in the case *sub judice* falls within the Rules' prohibitions as illustrated by the above examples. When asked to "describe her [the victim] emotionally" while she was telling her story during the counseling sessions, the witness responded, "Genuine." The witness was testifying that the emotions of the victim during the counseling session were genuine emotions. The victim was described as tearful and sad, but not angry or overly distraught. The witness was not testifying that she believed what the victim told her was true, nor did she give her opinion as to the victim's character for truthfulness in general. She merely described her personal observations concerning the emotions of the victim during the counseling sessions.

Such a response is proper under this Court's decision in *State v. Kennedy*, 320 N.C. 20, 357 S.E.2d 359 (1987). In that case, a psychologist testified that a victim responded on a psychological test in an " 'honest fashion . . . admitting that she was in a fair amount of emotional distress.' " *Id.* at 30, 357 S.E.2d at 365. This Court held:

> We do not consider the testimony of this witness . . . to be an expert opinion as to [the victim's] character or credibility. It was merely a statement of opinion by a trained professional based upon personal knowledge and professional expertise that the test results were reliable because the victim seemed to respond to the questions in an honest fashion . . . . By this answer [the doctor] was not saying that she believed the victim to be truthful, but rather that she gave truthful answers to the test questions.

Id. at 31, 357 S.E.2d at 366.

The Court concluded in that case that "[t]he mental and emotional state of the victim before, during, and after the offenses as well as her intelligence, although not elements of the crime, are relevant factors to be considered by the jury in arriving at its verdicts." *Id.* at 30-31, 357 S.E.2d at 366.

We have reviewed the transcript of this witness' testimony and we are convinced that the counselor's response to the prosecutor's question was merely a description of her observation of the victim's emotional state during the sessions. We therefore hold that the Court of Appeals erred in granting defendant a new trial on this basis, and the decision of that court is reversed.

Because this holding has the effect of reinstating defendant's sentence, we now review his cross-assignments of error to determine if they have merit. Our review of the record reveals that defendant, as appellee, has properly preserved these questions in his response to the State's petition for discretionary review under the provisions of Rule 15(d) of the North Carolina Rules of Appellate Procedure. This Court has recognized that allowing cross-assignments of error "provides protection for appellees who have been deprived in the trial court of an alternative basis in law on which their favorable judgment could be supported, and who face the possibility that on appeal prejudicial error will be found in the ground on which their judgment was actually based." *Carawan v. Tate*, 304 N.C. 696, 701, 286 S.E.2d 99, 102 (1982). We have conducted a thorough review of the record and the briefs, and, for the reasons stated below, we conclude that defendant received a fair trial free of prejudicial error.

[2] Defendant first assigns error to the trial court's decision to sustain a State objection to defense counsel's questioning of the victim regarding a prior inconsistent statement. During her direct examination, the victim testified that she periodically visited defendant's home because she received attention from defendant that she did not get at home. Later, she testified that she was in fact getting attention at home. During cross-examination of the witness, defense counsel attempted to ask her whether her earlier statement was true, and the trial court sustained the State's objection to this question.

Defendant contends that it was his constitutional right to impeach the witness through questioning about prior inconsistent statements. The State responds that its objection was properly

sustained because the question was argumentative and because the ruling was within the trial court's discretion to prevent harassment of witnesses. We agree. Rule 611(a) of the North Carolina Rules of Evidence provides that the trial court shall have complete discretion to control the trial and to protect witnesses from harassment. The question at issue here, "So what you're saying earlier wasn't true?" was an argumentative restatement of counsel's previous question. The court sustained no other objections by the State. We perceive no abuse of discretion in the trial court's ruling. We therefore reject this assignment of error.

[3] Defendant's next assignment of error relates to the prosecutor's failure to disclose the results of the first medical examination performed on the victim. It is well established under *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963), that the federal constitutional guarantee of due process requires that the State disclose to a criminal defendant exculpatory evidence within its knowledge or possession. This rule applies regardless of whether there has been a specific request for the evidence. *United States v. Agurs*, 427 U.S. 97, 49 L. Ed. 2d 342 (1976).

Drs. Furr and Oliver examined the prosecuting witness. While the State presented the testimony of Dr. Oliver, it neither disclosed nor presented the results of Dr. Furr's examination, which was performed prior to Dr. Oliver's examination. Defendant contends that because the State did not offer the results of that examination, it can be inferred that they were exculpatory and that defendant is therefore entitled to a new trial.

The State counters that the *Brady* mandate applies only to exculpatory information of which the defendant has no knowledge. In this case, the trial transcript reveals that defense counsel was aware of Dr. Furr's examination and the results thereof. During cross-examination, defense counsel asked the victim whether she was examined by Dr. Furr, and she responded affirmatively. Further, defense counsel had a copy of Dr. Oliver's report, which set out the victim's history, including the fact that she had been examined by a doctor who had also performed a pelvic examination prior to Dr. Oliver's examination.

Because defense counsel had in his possession a copy of Dr. Oliver's report and because defense counsel knew the name of the other physician, Dr. Furr, defendant has failed to make a showing that the State withheld exculpatory evidence by failing to offer

either Dr. Furr's testimony or the results of his examination. Defendant could have subpoenaed Dr. Furr to testify at trial. We reject this assignment of error.

[4] Defendant next contends that the trial court erred in allowing Gail Mason, the counselor, to testify as an expert when in fact she was never properly qualified as an expert. Initially, Mason was not offered by the State as an expert witness, and it was not until redirect examination of Mason by the State that defense counsel objected to testimony that she gave that constituted an expert opinion:

> A. Children, if sexual abuse occurs at an early age, even before this incident, and they grow up in disfunctional families or environments, the reason she would go back to a situation, if indeed it did happen, the reason the child would go back to that—
>
> [DEFENSE COUNSEL]: Your Honor, I'm going to object, this is an opinion—
>
> A. It's not an opinion, it's a fact. After a lot of study. It's a fact.
>
> THE COURT: She's entitled as an expert.
>
> [DEFENSE COUNSEL]: I don't think she's been qualified as an expert.
>
> [PROSECUTOR]: I tender her.
>
> THE COURT: You wish to cross-examine her as to her qualifications?

On recross-examination, defense counsel questioned Mason as to her qualifications and then renewed his objection. This objection was overruled. Defendant points out that at no time did the trial court rule on the prosecutor's tender or make a finding that Mason qualified as an expert and that such omission constituted reversible error.

The State counters, and we agree, that the trial court's overruling of defense counsel's objection to the opinion testimony constituted an implicit finding that the witness was an expert. We find our holding in *State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984), instructive on this issue. In that case, we held that the trial court did not err in permitting an anthropologist to testify as an expert in bare footprint comparison, where the trial judge

implicitly found that the witness was qualified when he overruled defense counsel's objection to the State's offer of the witness as an expert in the comparison of footprint impressions and where there was evidence to support a finding by the trial judge that the witness was qualified to testify as an expert in footprint comparison.

In the instant case, as in *Bullard*, defendant interposed only general objections to the testimony which is the subject of this assignment of error. He never requested a specific finding by the trial court as to the witness' qualifications as an expert. In the absence of such a request, a finding that the witness is qualified as an expert is implicit in the trial court's ruling admitting the opinion testimony. *State v. Perry*, 275 N.C. 565, 169 S.E.2d 839 (1969).

We further hold that there was no need for the court to make a formal ruling that the witness was an expert because her qualifications had already been presented to the court. In *State v. Aguallo*, 322 N.C. 818, 370 S.E.2d 676 (1988), this Court held that the trial court properly admitted testimony of a law enforcement officer and a Department of Social Services worker who gave opinions as to characteristics of abused children. The Court found that "[i]t is evident that the nature of their jobs and the experience which they possessed made them better qualified than the jury to form an opinion as to the characteristics of abused children." *Id.* at 821, 370 S.E.2d at 677. That Court relied on *State v. Phifer*, 290 N.C. 203, 225 S.E.2d 786 (1976), *cert. denied*, 429 U.S. 1123, 51 L. Ed. 2d 573 (1977), in which two agents for the State Bureau of Investigation who had not been formally qualified as experts were nevertheless permitted to give their opinions concerning a gun residue test because the nature of their jobs and their experience made them better qualified than the jury to form an opinion on this matter.

Similarly, the evidence of the nature of Mason's job and of the experience which she possesses affirmatively shows that she was better qualified than the jury to form an opinion as to, and to testify about, the characteristics of abused children. She possesses master's degrees in education and counseling, she is a nationally certified and registered counselor, and she has received extensive training and clinical experience in the field of sexually abused children. We conclude that this litany of qualifications supports

the trial court's decision to permit her to testify as an expert and that the court did not abuse its discretion in this regard.

Assuming arguendo that the trial court's failure to formally qualify the witness as an expert was error, it was harmless error in light of the evidence of her qualifications, the court's obvious conviction that the witness was an expert, and the fact that the witness' opinion testimony fit within the definition of expert testimony. It is undisputed that expert testimony is properly admissible when such testimony can assist the jury in drawing certain inferences from the facts because the expert is better qualified. The trial judge is afforded wide latitude and discretion when making a determination about the admissibility of such testimony. *State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370. Defendant's assignment of error is rejected.

[5] Defendant next assigns error to the trial court's failure to record the charge conference. N.C.G.S. § 15A-1231(b) provides that "[b]efore the arguments to the jury, the judge must hold a recorded conference on instructions out of the presence of the jury." Defendant concedes that the statute also requires a showing of prejudice in order for the failure to comply fully with this subsection to constitute grounds for appeal, but contends that, because the unrecorded charge conference prevented him from presenting any errors occurring during the conference, he was unable to obtain effective appellate review. Defendant contends that this is a proper basis for granting him a new trial.

The State submits that the record shows that at the conclusion of all of the evidence, the judge advised that he would make the standard charge to the jury and that neither side had any special request for instructions. At the conclusion of the instructions to the jury and before sending the jury the verdict sheet, the court inquired of counsel whether either side had additions or corrections they wished to make. Both sides indicated that they were satisfied with the charge. Defendant therefore cannot show material prejudice, as required by the statute, from the failure to record the charge conference. We agree with the State and reject defendant's assignment of error.

[6] Defendant also asserts that the charge conference was flawed because it was held outside of the presence of defendant, thus violating his constitutional right to be present at all stages of his trial. The State responds that because defendant was not ex-

cluded from the charge conference and did not request to be present and because his attorney attended it and made no objection to the procedure, defendant waived his right to attend the conference. The State further contends that the charge conference only pertained to matters of law and did not take place in front of the jury; therefore, defendant's absence was not prejudicial error.

In *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985), the trial court conducted a *voir dire* hearing on the admissibility of certain testimony outside the presence of both the jury and the defendant. This Court held that defendant's constitutional right to be present at all stages of the trial was a purely personal right that could be waived expressly or by his failure to assert it. The Court concluded that defendant waived his right to be present because he knew or should have known that a hearing would be held, because neither defendant nor his counsel asserted his right to attend, and because his counsel was present at the hearing. The Court further held that any error made was harmless in light of the fact that defendant was present when the testimony was presented to the jury.

We find *Braswell* dispositive and conclude that, under these similar circumstances, error, if any, in excluding defendant from the charge conference was harmless. The right to be present at all critical stages of the prosecution is subject to harmless error analysis. *Rushen v. Spain*, 464 U.S. 114, 78 L. Ed. 2d 267 (1983), *reh'g denied*, 465 U.S. 1055, 79 L. Ed. 2d 730 (1984); *Braswell*, 312 N.C. 553, 324 S.E.2d 241. Defendant's counsel was present during the conference, and the trial court subsequently announced the proposed instructions on the record and gave defense counsel the opportunity to be heard. Furthermore, defendant was present when the actual charge was given to the jury and did not object to its contents. We hold that this assignment of error has no merit, and it is rejected.

[7] Finally, defendant contends that the trial court erred in failing to charge the jury that it should infer from the State's failure to produce the medical examination performed by Dr. Furr that this evidence was not favorable to the State's position. Defendant asserts that the trial court also erred in failing to instruct on the ease of bringing charges of sexual misconduct. We disagree with both contentions.

N.C.G.S. § 15A-1231(a) provides that if special instructions are desired, they should be submitted in writing to the trial judge. Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure provides that if a party fails to object to a jury charge before the jury retires to consider its verdict, the objection is waived. *State v. Horner*, 310 N.C. 274, 311 S.E.2d 281 (1984). Furthermore, in the case *sub judice*, before allowing the jury to begin its deliberations, the trial judge announced that he would consider any requests for corrections to the charge "or any additional matters that either of you feel are necessary or appropriate to submit a proper and accurate charge to the jury." Defense counsel replied that he had none. We further note that the State's failure to present evidence regarding Dr. Furr's examination would not have enabled the jury to draw the inference that the doctor's testimony would have been unfavorable to the State's case in light of the fact that defendant had an equal opportunity to call Dr. Furr but apparently did not because his findings corroborated those of Dr. Oliver.

In conclusion, we hold that defendant received a fair trial free of prejudicial error, and we reverse the decision of the Court of Appeals in which defendant was granted a new trial. The case is remanded to that court for further remand to the Superior Court, Cabarrus County, for reinstatement of the sentence of mandatory life imprisonment imposed by the trial judge.

Reversed.

STATE OF NORTH CAROLINA v. MITCHELL JOHN PAKULSKI AND ELLIOT CLIFFORD ROWE, III

No. 407A89

(Filed 5 April 1990)

Criminal Law § 980 (NCI4th)— felony murder—arrest of judgment on underlying felony—murder conviction reversed—sentencing on arrested judgment

The trial court did not err by entering judgment and imposing sentence on convictions for felonious breaking or entering and felonious larceny where defendant was originally convicted of first degree murder on the felony murder theory;

judgment on the underlying felonies was arrested; the felony murder conviction was overturned on appeal; and the State subsequently prayed for judgment on the felonious breaking or entering and felonious larceny convictions. When judgment is arrested on predicate felonies in a felony murder case to avoid a double jeopardy problem, the guilty verdicts on the underlying felonies remain on the docket and judgment can be entered if the conviction for murder is later reversed on appeal and the convictions on the predicate felonies are not disturbed on appeal.

Am Jur 2d, Criminal Law §§ 521, 524; Homicide §§ 72, 190.

APPEAL by the State of North Carolina pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 95 N.C. App. 517, 383 S.E.2d 442 (1989), reversing the judgment of *Freeman, J.*, at the 28 March 1988 session of Superior Court, HAYWOOD County. Heard in the Supreme Court 13 March 1990.

Lacy H. Thornburg, Attorney General, by William P. Hart, Assistant Attorney General, and John H. Watters, Assistant Attorney General, for the state-appellant.

Malcolm Ray Hunter, Jr., Appellate Defender, by Gordon Widenhouse, Assistant Appellate Defender, for defendant-appellee Pakulski; Russell McLean, III for defendant-appellee Rowe.

MARTIN, Justice.

The sole question raised on appeal is whether Judge Freeman erred in sentencing the defendants on the charges of felonious breaking or entering and felonious larceny after Judge Fountain had arrested judgment on these charges following a jury verdict of guilty on each. At the trial before Judge Fountain, defendants were convicted of murder in the first degree on the felony murder theory. We hold that Judge Fountain arrested judgment on the breaking or entering charge because it constituted the predicate felony for the conviction of murder in the first degree resulting from the same trial. We further conclude that he arrested judgment on the larceny charge because he mistakenly believed that it, too, was an underlying felony to the murder charge. On appeal of that trial, this Court reversed the felony murder conviction and remanded for a new trial. *State v. Pakulski*, 319 N.C. 562, 356 S.E.2d

319 (1987). A new trial resulted in a mistrial, and the state elected to pray for judgment on the breaking or entering and larceny convictions before the presiding judge, the Honorable William H. Freeman. We hold that following the reversal on appeal of the felony murder conviction, there was no legal impediment to entry of judgment and imposition of sentence on the valid verdicts of guilty of breaking or entering and larceny. Therefore, Judge Freeman did not err in imposing the challenged sentences.

The facts surrounding the crime itself have little bearing on this appeal and have been set out in detail by this Court in *State v. Pakulski*, 319 N.C. at 565-67, 356 S.E.2d at 321-22. In brief, the evidence tends to show that the defendants and a third accomplice broke into the offices of Dr. Guy Abbate of Waynesville on or about 16 September 1978 where they ransacked the office and stole a number of items including but not limited to Darvocet tablets, two kitchen knives, and a syringe-type device. While the perpetrators were in the office, a security guard arrived. A scuffle ensued and the guard, Mr. Willard Setzer, was shot in the back of the head with his own gun and died. Approximately $600.00 was taken from Mr. Setzer's body following the shooting, and defendants then fled to Ohio in Mr. Setzer's automobile.

We turn now to a review of the lengthy procedural history of the case, which has considerable bearing on the appeal before us. Although a Haywood County Grand Jury returned true bills of indictment against the defendants charging them with murder in the first degree on 17 September 1978, extradition litigation in Ohio delayed trial until May of 1984. *See Pakulski v. Hickey*, 731 F.2d 382 (6th Cir. 1984); *In re Rowe*, 67 Ohio St.2d 115, 423 N.E.2d 167 (1981). In the meantime, a Haywood County Grand Jury had returned additional indictments charging the defendants with robbery with a dangerous weapon, larceny of a motor vehicle, felonious breaking or entering, larceny, and conspiracy to commit murder and conspiracy to break or enter. The first trial ended in a mistrial, and the cases were retried at the 23 July 1984 session of court. That trial resulted in a mistrial as well.

Defendants were tried for a third time at the 29 October 1984 session of the Superior Court for Haywood County resulting in convictions of both defendants on the charges of murder in the first degree, larceny of a motor vehicle, felonious breaking or entering, felonious larceny, robbery with a firearm, and conspiracy to

commit felonious breaking or entering and larceny. After the jury recommended life sentences for the murder, the Honorable George M. Fountain, judge presiding, imposed a life sentence, a consecutive term of ten years for larceny of a motor vehicle, and a concurrent term of ten years for conspiracy to commit breaking or entering and larceny for each defendant. Judge Fountain arrested judgment on the guilty verdicts for felonious breaking or entering and larceny as well as for armed robbery.

The trial court instructed the jury that it could find the defendants guilty of murder in the first degree if it found that Mr. Setzer had been killed by the defendants while they were in the process of committing armed robbery or in the perpetration of a breaking or entering with the intent to commit larceny. As the underlying felonies supporting the verdict of guilty of murder in the first degree, then, the convictions for armed robbery and breaking or entering necessarily merged with the conviction for murder. The constitutional prohibition against double jeopardy therefore would have prevented imposition of sentences on these predicate felonies as long as sentences had been imposed on the greater crime of felony murder. *See State v. Silhan*, 302 N.C. 223, 275 S.E.2d 450 (1981); *State v. Squire*, 292 N.C. 494, 234 S.E.2d 563 (1977); *State v. Thompson*, 280 N.C. 202, 185 S.E.2d 666 (1972) (all addressing the merger of an underlying felony with the greater crime of murder in the first degree). *See also State v. Dudley*, 319 N.C. 656, 356 S.E.2d 361 (1987); *State v. Belton*, 318 N.C. 141, 347 S.E.2d 755 (1986); *State v. Freeland*, 316 N.C. 13, 340 S.E.2d 35 (1986) (all applying double jeopardy protection in simultaneous convictions for sexual offenses and first degree kidnapping based on the underlying sexual offense).

Defendants appealed their convictions which were affirmed in part and reversed in part by this Court. *State v. Pakulski*, 319 N.C. 562, 356 S.E.2d 319. In that decision, this Court expressly found no error as to the convictions for armed robbery, felonious breaking or entering, larceny of an automobile, and conspiracy to commit felonious breaking or entering. The Court made no express findings regarding the validity of the conviction for felonious larceny which had been included as a separate count on the indictment for felonious breaking or entering. We note, however, that defendants made no specific assignments of error nor did they put forth any arguments challenging the validity of that conviction

other than two general requests for new trials on all charges which were denied by this Court.

Error was found on the conviction for murder in the first degree and a new trial was granted on that charge. The new trial was granted because this Court found that the defendants had been convicted under a theory of felony murder with armed robbery and felonious breaking or entering both constituting the underlying predicate felonies. There was insufficient evidence on the record that defendants had possessed a weapon during the original break-in to support submission of felony murder to the jury using felonious breaking or entering as the underlying felony. *State v. Fields*, 315 N.C. 191, 337 S.E.2d 518 (1985). Although the Court found that armed robbery had been properly submitted as a predicate felony on the facts of the case, since both felonies had been submitted to the jury it was impossible to tell if the jury had, in fact, relied only on the erroneously submitted breaking or entering charge. Consequently, the case was remanded and a new trial ordered on the felony murder charge.

On remand, the retrial of the charge of murder in the first degree using armed robbery as the predicate felony ended in a mistrial when the jury was unable to reach a verdict. At that point, the state prayed judgment on the felonious breaking or entering and felonious larceny convictions. The Honorable William H. Freeman, judge presiding, entered judgment imposing consecutive ten-year sentences on these two charges.

The sole question for review on this appeal is whether it was proper under the facts of this case for Judge Freeman to have imposed sentences for the underlying felonies after Judge Fountain had arrested judgment on the guilty verdicts which had been returned on those charges. We conclude that the sentencing was proper in this case because judgment was arrested only because "these offenses formed the offenses upon which the convictions of felony murder were predicated." *State v. Pakulski*, 319 N.C. at 564, 356 S.E.2d at 321. Once a new trial was ordered on appeal of the felony murder conviction, it was no longer necessary to arrest judgment on the underlying felonies. When the state elected not to pursue the charge of murder in the first degree based on felonious breaking or entering and felonious larceny as the predicate felonies, there was no legal impediment to the imposition of sentence on those convictions.

As long ago as 1803, William Blackstone noted in his Commentaries that "[a]rrests of judgment arise from *intrinsic* causes, appearing upon the face of the record." 3 W. Blackstone, Commentaries *393. In our own jurisdiction, "[a] motion in arrest of judgment is generally made after verdict to prevent entry of judgment based on a defective indictment or some fatal defect on the face of the record proper." *State v. Davis*, 282 N.C. 107, 117, 191 S.E.2d 664, 670 (1972). *See also State v. Brown*, 315 N.C. 40, 337 S.E. 2d 808 (1985); *State v. McNeil*, 280 N.C. 159, 185 S.E.2d 156 (1971). A court is free to arrest judgment in a proper case on its own motion, as was the case here, and an arrest of judgment has been recognized as appropriate in a number of situations:

> A motion in arrest of judgment is proper when it is apparent that no judgment against the defendant could be lawfully entered because of some fatal error appearing in (1) the organization of the court, (2) the charge made against the defendant (the information, warrant or indictment), (3) the arraignment and plea, (4) the verdict, and (5) the judgment. (Citations omitted.) *State v. Perry*, 291 N.C. 586, 589, 231 S.E.2d 262, 265 (1977).

State v. McGaha, 306 N.C. 699, 702, 295 S.E.2d 449, 451 (1982).

Defendants argue that the effect of arresting judgment is necessarily and uniformly to vacate the verdict and return a criminal defendant to the position he had been in prior to trial. While we agree that in certain cases an arrest of judgment does indeed have the effect of vacating the verdict, we find that in other situations an arrest of judgment serves only to withhold judgment on a valid verdict which remains intact. When judgment is arrested because of a fatal flaw which appears on the face of the record, such as a substantive error on the indictment, the verdict itself is vacated and the state must seek a new indictment if it elects to proceed again against the defendant. *State v. Benton*, 275 N.C. 378, 167 S.E.2d 775 (1969); *State v. Cook*, 272 N.C. 728, 158 S.E.2d 820 (1968); *State v. Covington*, 267 N.C. 292, 148 S.E.2d 138 (1966). *See also* 21 Am. Jur. 2d *Criminal Law* § 524 (1981) ("The granting of a motion in arrest of judgment does not operate as an acquittal but only places the defendant in the same situation in which he was before the prosecution was begun."). However, we hold that when judgment is arrested on predicate felonies in a felony murder case to avoid a double jeopardy problem, the guilty verdicts on the underlying felonies remain on the docket and judgment can

be entered if the conviction for the murder is later reversed on appeal, and the convictions on the predicate felonies are not disturbed upon appeal.

Our decision is supported in a number of related situations where this Court has recognized that an arrest of judgment does not void the underlying verdict. For example, in the lead case of *State v. Hall*, 183 N.C. 806, 112 S.E. 431 (1922), the trial court had arrested judgment on a manslaughter conviction under a mistaken assumption that both defendants could not be found guilty simultaneously. On appeal, this Court ruled that there was no legal impediment to the simultaneous convictions and therefore it set aside the arrest of judgment and remanded the case to superior court for sentencing on the guilty verdict "which was left standing upon the docket." *State v. Hall*, 183 N.C. at 813, 112 S.E. at 435. Similarly, in *State v. Davis*, 290 N.C. 511, 227 S.E.2d 97 (1976), this Court arrested judgment on appeal for the first time in cases where the death penalty had been imposed but had later been declared unconstitutional. Those cases were remanded to the trial court for imposition of life sentences upon the verdicts of guilty which were left untouched by the arrest of judgment of the sentence of death. Finally, in a series of cases involving multiple convictions for kidnapping and various sexual offenses, this Court held that judgment on either the first degree kidnapping charge or the underlying sexual offense upon which the kidnapping conviction had been based had to be arrested to avoid a double jeopardy problem. In those opinions, this Court remanded with directions to the trial court that it could decide to arrest judgment on the first degree kidnapping charge and instead enter judgment on a second degree kidnapping offense. By inference, then, it was recognized that defendant could be sentenced on second degree kidnapping even though judgment had been arrested on the first degree kidnapping conviction. *See, e.g., State v. Dudley*, 319 N.C. 656, 356 S.E.2d 361; *State v. Belton*, 318 N.C. 141, 347 S.E.2d 755. *See also* 23A C.J.S. *Criminal Law* § 1453 (1989) ("Arrest of judgment is the act of staying or withholding judgment for errors appearing on the face of the record.").

Defendants argue that even if an arrest of judgment does not operate to void a verdict where judgment was arrested to avoid a double jeopardy problem, under the facts of this case it is impossible to determine the underlying reasons for Judge Fountain's decision to arrest judgment. Hence, defendants contend that

reversal on appeal of the felony murder conviction should not free the trial court to sentence on the underlying felonies. We disagree with defendants' contention that Judge Fountain's rationale for arresting judgment cannot be found on the record. To the contrary, we find that the law of this case on this question was clearly settled in the prior appeal, *State v. Pakulski*, 319 N.C. 562, 356 S.E.2d 319, and is controlling here.

In the prior appeal, this Court stated, "[j]udgments were arrested on the offenses of armed robbery and felonious breaking or entering, as these offenses formed the offenses upon which the convictions of felony murder were predicated." *Id.* at 562, 356 S.E. 2d at 321. Later in the opinion, the Court noted again, "we hold that defendants are entitled to a new trial on the first-degree murder charges because of the improper submission of breaking or entering as a possible predicate felony of the felony murder." *Id.* at 576, 356 S.E.2d at 327. Defendants say that these comments in the prior ruling amount to mere *dicta*, but we disagree. The trial judge clearly instructed the jury in his final charge that breaking or entering could be considered as the underlying felony to the felony murder charge. As no other assignments of error were brought forward by the defendants as to this charge nor found by this Court in reviewing the record on appeal in this case and in the prior case, the only explanation for the arrest of judgment was that it was ordered by Judge Fountain because the breaking or entering conviction had merged with the greater crime of felony murder.

Although Judge Fountain had not instructed the jury that felonious larceny could support the felony murder conviction and this Court did not state in its prior decision that the larceny charge constituted a predicate felony, we find that an examination of the record on this appeal reveals that judgment on that charge was similarly arrested because Judge Fountain considered it to be support for the felony murder conviction. For both defendants, the charge of larceny of the miscellaneous items taken from Dr. Abbate's office was included as a separate count on the same indictment as the charge of breaking or entering. Similarly, the verdict sheets returned by the jury stated that each defendant was found guilty of "felonious breaking, entering and larceny." Thus, despite the fact that the indictment clearly charged each defendant with breaking or entering and with larceny as separate offenses, they began to be treated together semantically. Since Judge Fountain only

instructed the jury that breaking or entering and armed robbery were to be considered as predicate felonies to the murder charge, he would have been free to enter judgment and sentence on the larceny charge without implicating the double jeopardy clause. Nonetheless, he elected to arrest judgment on this charge as well. Defendants raised no question as to the validity of the convictions for the larceny charges on the first appeal when it was appropriate to do so, other than to raise two questions regarding the trial as a whole which were not upheld by this Court. Our own close examination of the record reveals no error on the face of the record which would justify an arrest of judgment. We therefore conclude that Judge Fountain arrested judgment on this charge out of the mistaken belief that he was compelled by law to do so. As was the situation in *State v. Hall*, 183 N.C. 806, 112 S.E. 431, where the trial court recognizes the validity of a verdict by arresting judgment rather than vacating the verdict but arrests judgment under a mistaken belief of law, there is no legal impediment to imposition of a proper judgment and sentence when it is later held on appeal that the arrest of judgment was made under a mistake of law.

We note that defendants argue strenuously that there might well be reasons for Judge Fountain's decision to arrest judgment other than to avoid a double jeopardy problem. Defendants contend that the lack of argument on any errors in the convictions for breaking or entering and larceny on the prior appeal should not be taken as an indication that no such errors exist. To the contrary, defendants speculate that Judge Fountain might have determined that the five and one-half year delay between the date of the offenses at issue and the issuance of an arrest warrant and subsequent indictment against the defendants constituted a violation of due process. Similarly, they argue that the verdict forms used were fatally defective because they listed breaking or entering *and* larceny together, rather than listing each separately. Furthermore, defendants contend that Judge Fountain might have concluded that his instructions to the jury were insufficient as he failed to set forth explicitly the various elements of both charges. Finally, defendants speculate that Judge Fountain could have arrested judgment because he felt the constitutional protections against double jeopardy precluded the imposition of separate judgments and sentences for breaking or entering and larceny. We find no support on the record to indicate that any of these conjectures

are valid nor that they constituted the rationale underlying Judge Fountain's decision to arrest judgment. In particular, we note that any defect on the verdict sheet operated in defendants' favor because the sheet as written required the jury to find defendants guilty of *both* charges in order to return a guilty verdict as to either. At oral argument, defendants further contended that any errors in the convictions on these charges have not yet been appealed. It is the defendants' position that since judgment had been arrested on these convictions, they had no need to appeal errors in the trials. We disagree and note that defendants in fact requested new trials on all charges, including these, in two arguments presented in the prior appeal. Their arguments were rejected and a new trial was ordered on the felony murder charge alone for the reasons previously cited. The opportunity to appeal errors in the larceny and breaking or entering charges was afforded defendants in the prior case. They availed themselves of that opportunity and will not now be heard to argue that the appeal was not complete.

Defendants' final contention is that Judge Freeman, the sentencing judge, lacked the authority to set aside the prior order of Judge Fountain arresting judgment on the verdicts of guilty of breaking or entering and larceny. Relying on *Michigan National Bank v. Hanner*, 268 N.C. 668, 151 S.E.2d 579 (1966), defendants argue that "[t]he power of one judge of the superior court is equal to and coordinate with that of another, and a judge holding a succeeding term of court has no power to review a judgment rendered at a former term on the ground that the judgment is erroneous." *Id.* at 670, 151 S.E.2d at 580. While this quote is a correct statement of the law, we find it inapposite in this situation. We hold that in the case before us, Judge Freeman did not overrule or reverse Judge Fountain's order, nor did he determine that Judge Fountain's order was erroneous. Rather, once this Court reversed the felony murder conviction which had compelled the arrest of judgment on the breaking or entering and larceny charges, the legal impediment to entry of judgment and sentencing on those charges was removed. It has long been recognized that where circumstances prevent pronouncement of a proper sentence during the term of court in which a case is tried, the court may impose sentence at a subsequent term. "In this jurisdiction the right to do so is not denied either by statute or usage." *State v. Graham*, 225 N.C. 217, 219, 34 S.E.2d 146, 147 (1945). Under the facts of this case, then, we hold that once this Court reversed the conviction on

the felony murder charge in the prior appeal, on remand Judge Freeman was free to enter judgment and impose sentence on motion of the state on the convictions for felonious breaking or entering and felonious larceny.

Reversed.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY v. MELINDA BAREFOOT WARREN AND CATHERINE POPKIN

No. 307PA89

(Filed 5 April 1990)

Insurance § 85 (NCI3d) — automobile insurance — medical resident — nonowned vehicle not furnished for regular use — exclusion from policy

A state-owned van driven daily by a medical resident between East Carolina University in Greenville and Wayne County Memorial Hospital in Goldsboro, where she was on an eight-week rotation, was "furnished for [her] regular use" within the meaning of her automobile insurance policy with plaintiff insurer, thus excluding it from liability coverage.

Am Jur 2d, Automobile Insurance § 244.

Justice MARTIN dissenting.

ON discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 94 N.C. App. 591, 380 S.E.2d 790 (1989), which affirmed summary judgment entered for defendants by *Reid, Jr., J.*, at the 7 August 1987 Civil Session of Superior Court, PITT County. Heard in the Supreme Court 14 March 1990.

Baker, Jenkins & Jones, P.A., by Ronald G. Baker and Robert E. Ruegger, for plaintiff-appellant.

Henderson, Baxter & Alford, P.A., by B. Hunt Baxter, Jr., for defendant-appellee Warren.

Law Offices of Marvin Blount, Jr., by Marvin Blount, Jr. and Albert Charles Ellis, for defendant-appellee Popkin.

WHICHARD, Justice.

The single question in this declaratory judgment action is whether a state-owned van driven daily by a medical resident between East Carolina University in Greenville and Wayne County Memorial Hospital in Goldsboro, where she was on an eight-week rotation, was "furnished for [her] regular use" within the meaning of her automobile insurance policy with plaintiff insurer, thus excluding it from liability coverage. The trial court denied plaintiff insurer's motion for summary judgment and allowed that of defendants, the medical resident and her passenger, a medical student. Holding that such use was not "regular" for purposes of the policy's exclusion from coverage, the Court of Appeals affirmed. *N.C. Farm Bureau Mutual Ins. Co. v. Warren*, 94 N.C. App. 591, 380 S.E.2d 790 (1989). We allowed discretionary review on 5 October 1989. We now reverse the Court of Appeals.

The pleadings, depositions, and affidavits before the trial court on the parties' motions for summary judgment established the following facts:

On 29 January 1985 an accident occurred involving a van driven by defendant Melinda Barefoot Warren, a medical resident at East Carolina University. Catherine Popkin, a medical student at East Carolina University and a passenger in the van, was injured. The van was owned by the East Area Health Education Agency and had been furnished to Dr. Warren in order for her to drive to and from Wayne County Memorial Hospital in Goldsboro for an eight-week rotation. The rotation, which had begun about the first of January, required that Dr. Warren go to Wayne County Memorial Hospital five to seven times a week. Dr. Warren's use of the vehicle included driving various East Carolina University medical students, who were on two-week rotations in the same hospital, to and from Goldsboro, but she was not permitted to use the van for personal business or pleasure. Although Dr. Warren retained the keys to the vehicle for the three- or four-week interval of the rotation preceding the accident, and although she habitually kept the van in her driveway overnight between trips to Goldsboro, occasionally a medical student would drive the van and Dr. Warren would ride with another. On such occasions the medical student would return the van to Dr. Warren's driveway at the day's end. When Dr. Warren was on call in Goldsboro, she would keep the vehicle there overnight. In her deposition Ms. Popkin stated that transpor-

tation to and from hospitals at which medical students had scheduled rotations "was always made available to residents and medical students who had to do rotations at . . . hospitals other than . . . Pitt County Memorial Hospital."

Dr. Warren and her husband were the named insureds on a policy of automobile liability insurance with plaintiff insurer. The policy provided that the insurer would "pay damages for bodily injury or property damage for which any covered person becomes legally responsible because of an auto accident," and that it would settle or defend any claim asking for these damages from the insured. Among the listed exclusions was the following:

> B. We do not provide Liability Coverage for the ownership, maintenance or use of:
>
> 1. Any vehicle, other than your covered auto, which is
>
> a. owned by you; or
>
> b. furnished for your regular use.

The meaning of "regular use" is not included among the policy's definitions, nor is the term defined in the Motor Vehicle Safety-Responsibility Act of 1953, N.C.G.S. §§ 20-279.1 to 20-279.39 (1989). Indeed, this Court has recognized that "[n]o absolute definition can be established for the term 'furnished for regular use.' Each case must be decided on its own facts and circumstances." *Whaley v. Insurance Co.*, 259 N.C. 545, 552, 131 S.E.2d 491, 496-97 (1963) (quoting *Home Insurance Company v. Kennedy*, 2 Storey 42, 152 A.2d 115 (Del. Super. 1959)). Accordingly, the definition stated in each case construing this policy phrase has depended upon the particular facts of that case. Their facts have tended to cause such cases to fall into two general groups. In the first class of cases the driver is an employee who was using an employer-provided vehicle for personal business or pleasure, with or without the employer's permission. *See, e.g., Whaley v. Insurance Co.*, 259 N.C. 545, 131 S.E.2d 491 (frequent personal use, without permission, is "regular use"); *Whisnant v. Insurance Co.*, 264 N.C. 195, 141 S.E.2d 268 (1965) (isolated, casual, unauthorized use in an emergency not an occasion upon which vehicle "furnished for regular use"). *See also Insurance Co. v. Bullock*, 21 N.C. App. 208, 203 S.E.2d 650 (1974) (non-employee driver, but frequent, permissive, personal use is "regular use"). In these cases the courts consistently stated that whether a vehicle is for a driver's regular use is to be deter-

mined by both its availability and the frequency of its use. *Whisnant v. Insurance Co.*, 264 N.C. at 198, 141 S.E.2d at 270; *Whaley v. Insurance Co.*, 259 N.C. at 554, 131 S.E.2d at 498; *Insurance Co. v. Bullock*, 21 N.C. App. at 210, 203 S.E.2d at 652. *See also Jenkins v. Aetna Casualty and Surety Co.*, 324 N.C. 394, 401, 378 S.E.2d 773, 778 (1989).

In the second class of cases a vehicle has been purchased and handed over to the purchaser, but there has been no transfer of the certificate of title, the statutory requisite for a vehicle to be "owned" within the meaning of the law. *See* N.C.G.S. § 20-4.01 (26) (1989). In these cases, again, the availability for use and the frequency of the driver's use of the car have been analyzed in determining whether that use has been "regular." *See, e.g., Jenkins v. Aetna Casualty and Surety Co.*, 324 N.C. 394, 378 S.E.2d 773 (car possessed for two years prior to accident, but unfit for "regular use," thus not within exception); *Gaddy v. Insurance Co. and Ramsey v. Insurance Co.*, 32 N.C. App. 714, 233 S.E.2d 613 (1977) (where certificate of title held by another and insured has unrestricted use and possession of vehicle, it is "furnished for the regular use of" the insured driver); *Devine v. Casualty & Surety Co.*, 19 N.C. App. 198, 198 S.E.2d 471 (1973) (continuous possession for regular use without restrictions constitutes "regular use"). *See also Indiana Lumbermens Ins. Co. v. Unigard Indemnity Co.*, 76 N.C. App. 88, 331 S.E.2d 741, *cert. denied*, 314 N.C. 666, 335 S.E.2d 494 (1985) (vehicle "furnished for regular use" and not entitled to coverage as "non-owned" car where father held certificate of title but gave son possession and permissive, non-restricted use of vehicle).

Unlike the many fact variations to which the definition of "furnished for regular use" has had to be applied in prior cases, the facts in the case before us do not require a specialized definition. The driver in this case was operating a vehicle owned not by her, but by the Eastern Area Health Education Agency. As it customarily did for other residents and students with rotations at hospitals in other counties, the agency had put the van at the driver's disposal for the eight-week period of her rotation at Wayne County Memorial Hospital. Her use of the van was to make scheduled, virtually daily trips. This pattern of use accords with one typical, dictionary definition of "regular": "steady or uniform . . . in practice or occurrence; . . . returning or recurring at stated or fixed times or uniform intervals." *Webster's International Dictionary of the English Language* 2099 (2d ed. 1950). Under the

facts and circumstances of this case, for Dr. Warren's use of the van to have been "regular," it was not necessary that the van's availability be exclusive or permanent. *Cf. Insurance Co. v. Bullock*, 21 N.C. App. at 210, 203 S.E.2d at 651-52. Nor, under the facts and circumstances of this case, was it necessary for her use of the van to be full and unrestricted, a critical fact in cases in which an employee uses an employer's vehicle for personal business, but one irrelevant here. *Compare Whaley v. Insurance Co.*, 259 N.C. 545, 131 S.E.2d 491, *with Whisnant v. Insurance Co.*, 264 N.C. 195, 141 S.E.2d 268. We hold that a van made available on a recurring basis at virtually daily intervals for a period of some weeks also fits the definition of "furnished for regular use," and that this use fell squarely within the list of exclusions stated in Dr. Warren's liability policy with plaintiff insurer.

We accordingly reverse the decision of the Court of Appeals and remand this case to that court for its further remand to the Superior Court, Pitt County, to strike summary judgment entered for the defendants and to enter summary judgment instead for the plaintiff.

Reversed and remanded.

Justice MARTIN dissenting.

Believing as I do that the majority has failed to properly interpret and apply the policy exclusion under consideration, I respectfully dissent.

At the outset it is settled law in this jurisdiction that exclusions contained in liability policies of insurance are to be construed against the insurer. *Grant v. Insurance Co.*, 295 N.C. 39, 243 S.E.2d 894 (1978). This Court has adopted a two-prong test to determine whether a non-owned vehicle is furnished to the insured for his or her "regular use" and is thereby excluded from coverage under the policy provision in question. In *Whaley v. Insurance Co.*, 259 N.C. 545, 131 S.E.2d 491 (1963), this Court held that coverage in such cases would depend upon the availability of the vehicle for use and the frequency of its use by the insured. Each case is to be decided upon its own facts and circumstances. In *Whaley*, the vehicle was available to the driver for both personal and business use, and he actually took full advantage of this availability on numerous occasions. This Court held that the car was indeed available

for Whaley's "regular use" and that the exclusion should apply. *See also Indiana Lumbermens Mut. Ins. Co. v. Unigard Indemnity Co.*, 76 N.C. App. 88, 331 S.E.2d 741 (1985) (no restrictions placed on use of vehicle and uninterrupted possession was sufficient to support the trial court's finding that the vehicle was furnished for regular use). To the same effect are *Gaddy v. Insurance Co.*, 32 N.C. App. 714, 233 S.E.2d 613 (1977); *Insurance Co. v. Bullock*, 21 N.C. App. 208, 203 S.E.2d 650 (1974); *Devine v. Casualty & Surety Co.*, 19 N.C. App. 198, 198 S.E.2d 471 (1973).

In contrast to the facts in the above cases, Dr. Warren's use of the automobile was limited to driving to and from the hospital, a very restricted use. The vehicle was not available for her regular use. She did not drive the car during the day for other business purposes nor did she make any other use whatsoever of the vehicle. In addition, her use of the vehicle was not exclusive nor was her possession of the vehicle exclusive. Other students used the vehicle during the same period of time that Dr. Warren was entitled to use the vehicle.

The use of the the word "regular" in the exclusion creates an ambiguity and such ambiguities must be construed against the insurance company. *Grant v. Insurance Co.*, 295 N.C. 39, 243 S.E.2d 894. The American Heritage Dictionary of the English Language 1096 (1980) gives as one definition of "regular" the meaning "usual." Certainly, Dr. Warren's use of the vehicle was not the "usual" use of an automobile. Usually people use automobiles for such purposes as they may choose. Here, Dr. Warren's use of the motor vehicle was limited and certainly did not give her the right to use the vehicle in a usual or regular fashion.

Likewise, "regular" means "ordinary." Rodale, *The Synonym Finder* 1024 (1967). Certainly, the limited availability of the vehicle for restricted use by Dr. Warren was neither ordinary nor regular within the policy terms. This case is strikingly similar to *Central Security Mutual Insurance Co. v. DePinto*, 235 Kan. 331, 681 P.2d 15 (Kansas 1984). In *DePinto*, the driver was a student nurse who, as a part of her training, was participating in a clinical program at outlying hospitals. She was furnished a van in which to transport herself and other nursing students to and from such hospitals. She did not have permission to use the van for personal errands or other purposes and did not so use the vehicle. The Kansas court noted that her use was not continuous, was not normal use

for all purposes, and was not an unlimited use. Thereupon, the court found that the "furnished for regular use" exclusion was not applicable in that case. In *DePinto*, the Kansas Supreme Court held that "regular use" was continuous use, uninterrupted normal use for all purposes without limitation as to use, and customary use as opposed to occasional or special use. I find the Kansas definition to be the applicable definition in North Carolina in the light of our holding in *Whaley*. When one looks at the availability of the vehicle for use and the actual frequency of its use, it is clear that Dr. Warren's use of the vehicle in this case was not continuous, uninterrupted, normal, or without limitation and was not the customary use as opposed to a special use of the vehicle. I find that the vehicle in this case was furnished for use limited as to time, route, purpose and possession. This conclusion is also supported by *Travelers Indemnity Co. v. Hudson*, 15 Ariz. App. 371, 488 P.2d 1008 (1971); *State Farm v. Townsend*, 361 N.W.2d 332 (Iowa Ct. App. 1984) and *Grace v. Hartford Accident and Indemnity Co.*, 324 F.Supp. 953 (N.D. Ga. 1970), *aff'd*, 440 F.2d 411 (5th Cir. 1971).

Finally, the use by Dr. Warren of the vehicle in this case does not violate the purpose for which insurance companies have inserted this exclusion in their policies. The insurance companies want to exclude vehicles used habitually by an insured without the payment of insurance premiums. The policy is to prevent a family or person from having two or more automobiles that are used interchangeably with only one automobile being insured. *Whaley v. Insurance Co.*, 259 N.C. 545, 131 S.E.2d 491. *See* 12A Couch on Insurance 2d § 45:1074 (1981 and Supp. 1985). The vehicle being furnished in this case does not violate the purposes for which the insurance company included the exclusion in the policy. In the event that insurance companies desire to be more specific in the meaning of their language in this exclusion, it is a simple matter for them to provide a definition of the term "regular use" in the definition section of their policy. Otherwise, we should reconcile this ambiguous question against the drafter, the insurance company, and allow coverage in this case. It is not up to the courts to fill in the gaps which the insurance company could have done had it chosen to do so in order to exclude insureds from policy coverage. I vote to affirm the decision of the Court of Appeals.

STATE OF NORTH CAROLINA v. ALPHONZA THORPE

No. 267PA89

(Filed 5 April 1990)

Narcotics § 4.3 (NCI3d)— possession with intent to sell—felonious sale—circumstantial evidence—sufficient

The evidence was sufficient to take charges of possession with intent to sell and deliver the controlled substance dilaudid and felonious sale of that controlled substance to the jury where there was ample evidence that defendant was the owner of the game room where both sales transactions took place; the evidence of control was bolstered by the exercise of physical custody; the inference of knowledge and possession by virtue of ownership and custody of the game room was buttressed by defendant's presence either on the premises or nearby; defendant's participation in the sale could be deduced from testimony that he had directed an undercover agent to enter his store on one occasion and to "come on inside" on another; and the inference of defendant's participation was further supported by an apparent principal-agent relationship with the man from whom the undercover agent purchased the drugs.

Am Jur 2d, Drugs, Narcotics, and Poisons § 47.

Justice MITCHELL dissenting.

APPEAL 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 94 N.C. App. 270, 380 S.E.2d 777 (1989), finding no error in part and reversing in part judgments of imprisonment entered by *Lee, J.*, at the 25 January 1988 Criminal Session of Superior Court, DURHAM County. Heard in the Supreme Court 13 February 1990.

Lacy H. Thornburg, Attorney General, by James P. Erwin, Jr., Special Deputy Attorney General, for the State-appellant.

Loflin & Loflin, by Thomas F. Loflin III, for defendant-appellee.

WHICHARD, Justice.

The jury returned verdicts finding defendant guilty of two counts of knowingly maintaining a building used for keeping or

selling the controlled substance dilaudid, a misdemeanor; two charges of possession with intent to sell or deliver the controlled substance dilaudid, a felony; and two charges of the felonious sale of that controlled substance. The trial court sentenced defendant to a total of sixteen years imprisonment.

The Court of Appeals affirmed the misdemeanor convictions, but a majority held that the trial court had erred in denying defendant's motion for nonsuit on the felony charges. Chief Judge Hedrick dissented, concluding that the evidence was sufficient to take the felony charges to the jury. *State v. Thorpe*, 94 N.C. App. 270, 279, 380 S.E.2d 777, 782 (1989). The State appealed as a matter of right. N.C.G.S. § 7A-30(2) (1989).

Our assessment of the evidence implicating defendant in the felonies charged, considered as a whole and taken in the light most favorable to the State, establishes that the evidence was sufficient to take those charges to the jury. We thus reverse.

Testimony by witnesses for the State tended to show the following: On 9 April 1986, an undercover agent for the State Bureau of Investigation stopped the van she was driving in the vicinity of Doris' Game Room, a poolroom and bar at the corner of North Roxboro and Corporation Streets in Durham. Defendant was standing on the corner with a man later identified as Charles Henry Thomas. The agent had seen defendant standing on the corner with Thomas a month earlier, when she had purchased a single dilaudid tablet from Thomas from her van window. The agent rolled down her window; defendant approached, greeted her, and asked what she needed. She responded that she wanted to get some "fours," a street name for dilaudid. The agent testified that defendant then said, "Well, go on inside." When she said she could not, he reassured her, saying, "Go on inside. It's my store. It's okay." The agent and her companion entered Doris' Game Room. Thomas was sitting in front of the bar. The agent approached Thomas and reiterated her request. Thomas stepped behind the bar, took two pills from a tin foil packet, and placed them on the bar counter. The agent took the pills and handed Thomas $100. When she left the poolroom, the agent saw defendant still standing on the street corner and thanked him. He acknowledged her thanks.

That afternoon the agent returned to the game room. She saw Thomas in a chair by the bar and asked to buy what she

had bought in the morning. When she asked Thomas where the owner was, he told her nobody was there who owned the place.

On 16 April 1986, the agent returned a fourth time to the corner of North Roxboro and Corporation Streets. She and her companion saw defendant on the corner. Defendant approached the pair, greeted the agent, and asked what she wanted. The agent told defendant that they wanted to buy some "fours," but that she was uncomfortable being in the store and its neighborhood because she was white. Defendant responded, "Well, come on inside." He accompanied the two agents to the door, but did not enter. There were seven other people, including defendant's wife, in the game room at the time. Defendant subsequently entered and asked the agent if she had gotten her "fours." She responded that she had not—that she was waiting for him. Defendant motioned towards Thomas, who was standing at the bar, and told the agent to go over to him for the "fours." As she approached, Thomas went behind the bar and again pulled out a packet containing pills. He gave her two, and she paid for them.

As the agents left, they saw defendant outside on the corner once again. He came up to the agents and asked if they had gotten "it." The first agent replied that she had, but said that she was afraid of being seen around the store and of being around people she did not know. She told defendant she preferred to deal with only one person. Defendant replied that she could get the pills from him.

A federal parole officer testified that she knew Doris Burnette Thorpe, who is not legally married to defendant but considers herself his wife. The officer testified that Ms. Thorpe told her that defendant had provided the capital for the game room by selling his Cadillac. A Durham vice squad investigator testified that he was familiar with Doris' Game Room and that he had known it as long as defendant had owned it. Another federal parole officer testified that he once asked defendant why defendant was seen so frequently in front of Doris' Game Room, and defendant replied that he owned the establishment. A third parole officer testified that he had known defendant and the game room since 1982 and that he had seen defendant there alone around the pool tables and behind the bar. On one occasion when the officer attempted to enter the game room, it was locked, and defendant had unlocked the door and let the officer in.

The elements that the State must prove to establish possession of narcotics with the intent to sell or deliver are "(1) defendant's possession of the drug, and (2) defendant's intention to 'sell or deliver' the drug." *State v. Creason*, 313 N.C. 122, 129, 326 S.E.2d 24, 28 (1985). In the context of the controlled substance statutes, " '[d]eliver' . . . means the actual[,] constructive, or attempted transfer from one person to another of a controlled substance." N.C.G.S. § 90-87(7) (1985); *see State v. Creason*, 313 N.C. at 129, 326 S.E.2d at 28. When sale and delivery are part of the same transaction, they may be charged as a single offense, *State v. Dietz*, 289 N.C. 488, 498-99, 223 S.E.2d 357, 363-64 (1976), and this Court has noted that "[w]ithin the intent of the legislature, the terms are synonymous, the gist of the offense being possession with the intent to *transfer* the contraband." *State v. Creason*, 313 N.C. at 130, 326 S.E.2d at 28. Thus "sale" of a controlled substance is, like the statutory definition of "deliver," an actual, constructive, or attempted transfer of that substance, but one "for a specified price payable in money." *State v. Creason*, 313 N.C. at 129, 326 S.E.2d at 28.

Possession, like delivery, may be either actual or constructive: "An accused has possession of [contraband] . . . when he has both the power and the intent to control its disposition or use." *State v. Fuqua*, 234 N.C. 168, 170, 66 S.E.2d 667, 668 (1951). Where direct evidence of power and intent to control are absent, however, these manifestations of actual possession must be inferred from the circumstances.

> Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession. [T]he State may overcome a motion to dismiss or motion for judgment as of nonsuit by presenting evidence which places the accused 'within such close juxtaposition to the narcotic drugs as to justify the jury in concluding that the same was in his possession.'

State v. Brown, 310 N.C. 563, 569, 313 S.E.2d 585, 589 (1984) (quoting *State v. Harvey*, 281 N.C. 1, 12-13, 187 S.E.2d 706, 714 (1972)). *See also State v. Williams*, 307 N.C. 452, 455, 298 S.E.2d 372, 375 (1983); *State v. Allen*, 279 N.C. 406, 410, 183 S.E.2d 680, 683 (1971). Constructive possession has been found when the contraband was on the property in which the defendant had some exclusive

possessory interest and there was evidence of his or her presence on the property, *e.g.*, *State v. Harvey*, 281 N.C. 1, 187 S.E.2d 706 (defendant in own home near drugs); and it has been found where possession is not exclusive but defendant exercises sole or joint physical custody, *e.g.*, *State v. Brown*, 310 N.C. 563, 313 S.E.2d 585 (defendant had key and was seen repeatedly at apartment where contraband was found). *See State v. Baize*, 71 N.C. App. 521, 529, 323 S.E.2d 36, 41 (1984), *cert. denied*, 313 N.C. 174, 326 S.E.2d 34 (1985).

"As with other questions of intent, proof of constructive possession usually involves proof by circumstantial evidence." *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986). Circumstantial evidence is evidence that is applied indirectly "by means of circumstances from which the existence of the principal fact may reasonably be deduced or inferred." 1 Brandis on North Carolina Evidence 3d § 76 (1988). The principle that circumstantial evidence may support proof of facts through inference or deduction is the same principle underlying constructive possession and transfer: from circumstances indicating the power and intent to control contraband, its possession with intent to transfer and the transfer itself may be inferred. Whether the evidence of constructive possession or transfer is direct, circumstantial, or both, the trial court, in ruling on the motion for nonsuit, must consider "evidence favorable to the State . . . *as a whole* in determining its sufficiency." *State v. Beaver*, 317 N.C. at 648, 346 S.E.2d at 479 (quoting *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980)).

We hold that, considered as a whole, as required, the circumstantial evidence of defendant's power and intent to control the sale of dilaudid on both dates listed in the indictments was sufficient to support an inference of both his possession with an intent to sell or deliver that controlled substance and his participation in the transfer transactions themselves. First, constructive possession can be reasonably inferred from the fact of ownership of premises where contraband is found. Such ownership is strong evidence of control and "gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession." *State v. Harvey*, 281 N.C. at 12, 187 S.E.2d at 714. There was ample evidence that defendant was the owner of Doris' Game Room, where both sales transactions took place. This evidence of control was bolstered by the exercise of physical custody evinced by defendant's letting

one parole officer into Doris' Game Room with his key and by another officer's observing defendant alone in the game room or behind its bar on more than one occasion. The inference of knowledge and possession by virtue of ownership and custody of the game room was buttressed on both occasions cited in the indictments by defendant's presence either on the premises or nearby.

Second, defendant's participation in the sale of dilaudid could be deduced from testimony that he had directed the agent to enter the store on April 9th and to "come on inside" on April 16th. This, combined with his knowledge of the aim of her errand, contributed strongly to the totality of circumstances indicating his participation in the sale of the dilaudid. This inference was further supported by an apparent principal-agent relationship with Thomas: on April 16th, defendant motioned towards Thomas when he told the agent to go to him for her "fours," and on both occasions specified in the indictments Thomas went behind the bar for the dilaudid tablets, a location where typically only employees, or employers, are permitted.

The evidence of defendant's constructive possession and sale of the contraband, considered as a whole, thus was sufficient to support the trial court's denial of defendant's motion for nonsuit, and the trial court did not err in so ruling. Accordingly, the decision of the Court of Appeals is

Reversed.

Justice MITCHELL dissenting.

For the reasons fully set forth by Judge Orr in the opinion for the majority in the Court of Appeals, 94 N.C. App. 270, 380 S.E.2d 777 (1989), I dissent.

STATE OF NORTH CAROLINA v. RODNEY KEMP JETER, A/K/A AHIAH AHI ISREAL

No. 199PA89

(Filed 5 April 1990)

Criminal Law § 34.5 (NCI3d)— rape and burglary—prior offense—admissible to show identity

The trial court did not err in a prosecution for first degree rape and first degree burglary by admitting evidence of a similar rape and burglary that had occurred five months earlier at a location about five miles away. The circumstantial evidence that defendant was the perpetrator of the offense committed five months earlier, including both similar fingerprint evidence and the similar pattern of its perpetration, demonstrates a potent, logical pertinence to the question of the assailant's identity in the offense on trial. In particular, fingerprint and palm print evidence found at the scene of the crimes, coupled with strong circumstantial evidence that the nights of the offenses were the only occasions upon which defendant's prints could have been made on the respective premises, was evidence of considerable probative force, far outweighing any possibility of unfair prejudice. N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Evidence § 322.

ON discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 93 N.C. App. 588, 378 S.E.2d 818 (1989), which set aside judgments sentencing defendant to life imprisonment upon his conviction of rape in the first degree and to forty years imprisonment upon his conviction of burglary in the first degree, entered by *Fountain, J.*, at the 25 January 1988 Mixed Session of Superior Court, WAKE County, and awarded a new trial. Heard in the Supreme Court 14 March 1990.

Lacy H. Thornburg, Attorney General, by Donald W. Laton, Assistant Attorney General, for the State-appellant.

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

WHICHARD, Justice.

Defendant was convicted of rape and burglary, both in the first degree. The single question is whether the trial court erred in admitting evidence of a similar rape and burglary that had been perpetrated five months earlier at a location approximately five miles away. The Court of Appeals concluded that it had, and accordingly awarded a new trial. *State v. Jeter*, 93 N.C. App. 588, 378 S.E.2d 818 (1989). We allowed discretionary review on 6 September 1989. We now conclude that admission of such evidence was proper under the circumstances of this case, and we thus reverse the Court of Appeals.

Under N.C.R. Evid. 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." However, such evidence may be admissible to prove, for example, the identity of the perpetrator. N.C.G.S. § 8C-1, Rule 404(b) (1988). The probative value of such evidence must substantially outweigh any danger of unfair prejudice. N.C.G.S. § 8C-1, Rule 403 (1988). "Where . . . such evidence reasonably tends to prove a material fact in issue in the crime charged, it will not be rejected merely because it incidentally proves the defendant guilty of another crime," but only if the sole logical relevancy of that evidence is to suggest defendant's predisposition to commit the type of offense with which he is presently charged. *State v. Johnson*, 317 N.C. 417, 425, 347 S.E.2d 7, 12 (1986). In a criminal case, the identity of the perpetrator of the crime charged is always a material fact. *Id.* Under the common law prior to adoption of the current Rules of Evidence, and under Rule 404(b), "[w]here the accused is not definitely identified as the perpetrator of the crime charged and the circumstances tend to show that the crime charged and another offense were committed by the same person, evidence that the accused committed the other offense is admissible to identify him as the perpetrator of the crime charged." *State v. McClain*, 240 N.C. 171, 175, 81 S.E.2d 364, 367 (1954).

This Court has stated that "[t]he dangerous tendency of this class of evidence to mislead and raise a legally spurious presumption of guilt requires that its admissibility should be subjected to strict scrutiny by the courts." *State v. Johnson*, 317 N.C. at 430, 347 S.E.2d at 15. *See also State v. McClain*, 240 N.C. at 177, 81 S.E.2d at 368. This determination has led to the concern that

identification of the perpetrator in the other offense be "positive" before that evidence may be ruled admissible. *See State v. Breeden*, 306 N.C. 533, 537, 293 S.E.2d 788, 791 (1982); *State v. Freeman*, 303 N.C. 299, 302, 278 S.E.2d 207, 208 (1981). In *Johnson* this Court read *Breeden* as stating a requirement that such positive identification be no less than "direct evidence link[ing] . . . defendant [to] the other crimes." *Johnson*, 317 N.C. at 429, 347 S.E.2d at 14.

Breeden, however, preceded the codification of N.C.R. Evid. 404(b). That rule includes no requisite that the evidence tending to prove defendant's identity as the perpetrator of another crime be direct evidence, exclusively. Neither the rule nor its application indicates that examples of other provisions—such as admissibility of evidence of other offenses to prove motive, opportunity, intent, preparation, or plan—rest solely upon direct evidence. *E.g.*, *State v. Price*, 326 N.C. 56, 388 S.E.2d 84 (1990) (circumstantial evidence of defendant's perpetration of "virtually identical" strangulation, proximate in time, showing preparation, plan, knowledge or identity). Under the statutory scheme of Rules 403 and 404, the concern that anything other than direct evidence of a defendant's identity in a similar offense might "mislead [the jury] and raise a legally spurious presumption of guilt" is met instead by the balancing test required by Rule 403: the critical inquiry regarding evidence of other offenses introduced for purposes of showing defendant's identity as the perpetrator of the offense for which he is being tried is not whether it is direct or circumstantial, but whether its tendency to prove identity in the charged offense substantially outweighs any tendency unfairly to prejudice the defendant.

Moreover, not only has this Court employed a "markedly liberal" interpretation of Rule 404(b) when the State was seeking to introduce evidence of prior, similar sex offenses by a defendant, *State v. Cotton*, 318 N.C. 663, 666, 351 S.E.2d 277, 279 (1987), but we have stressed repeatedly that the rule is, at bottom, one of relevancy. Accordingly, a careful reading of its provisions "clearly shows [that] evidence of other offenses is admissible so long as it is relevant to any fact or issue other than the character of the accused." *State v. Weaver*, 318 N.C. 400, 403, 348 S.E.2d 791, 793 (1986) (citing 1 Brandis on North Carolina Evidence § 91 (2d rev. ed. 1982)). A more recent and more accurate perspective on the appropriate use of Rule 404(b) is as a "general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54

(1990). This rule of inclusion is "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." *Id.* at 279, 389 S.E.2d at 55.

In this case the State introduced evidence of "circumstances tend[ing] to show that the crime charged and another offense were committed by the same person"—*State v. McClain*, 240 N.C. at 175, 81 S.E.2d at 367—under the Rule 404(b) provision allowing evidence tending to prove the identity of the perpetrator of the offenses charged. Although this was not "direct" evidence, it demonstrated offenses so similar in the means of their perpetration and included circumstantial identification evidence so strongly implicating defendant as the perpetrator of each, that any concern about a "legally spurious presumption of guilt" is obliterated in light of its probative value.

Shortly after the victim here had gone to sleep at 11:30 p.m. on 20 May 1987, she was awakened by a man lying on top of her, holding a knife to her forehead. The man did not disrobe her, except to raise her nightgown and take off her underpants. He warned her repeatedly to "shut up" and "be quiet," and not to move or he would hurt her. Pushing her face into a pillow, he forced her to have intercourse from the rear. The assault took five to ten minutes, after which the assailant asked the victim if she had either money or a gun, and, holding the pillow between the victim's head and himself, he forced the victim to walk with him to the door. The victim later discovered that she had been threatened with a new knife from her own kitchen drawer and that a screen had been removed from a living room window.

Investigators lifted overlapping fingerprints from the screen and a palm print matching that of defendant from a recently painted windowsill. No evidence from defendant nor any evidence offered by the State suggested any explanation for the presence of defendant's palm print other than his entry into the victim's house on the night of the offense.

The victim described the voice of her assailant as that of a black male between twenty and thirty years of age. She described the perpetrator as being of medium build and approximately five feet, eight inches tall. Defendant, whom police officers had seen peeping into apartment bedroom windows in the hours after mid-

night on 11 June 1987, was apprehended in a neighborhood adjoining the victim's yard.

At trial the State offered the following circumstantial evidence of a prior, similar offense under Rule 404(b) as proof of defendant's identity as the assailant in the 20 May 1987 burglary and rape. Five months earlier, five or six miles away, another rape victim was awakened after midnight, this time by the sensation that someone was standing over her. The assailant first attempted fellatio, but this was prevented by the victim's orthodontic apparatus. He proceeded to force the victim onto her stomach, to remove her underpants but not to disrobe her further, and to force her to have vaginal intercourse. As in the subsequent rape, the assailant held one of the victim's own knives against her face and pushed her face away from him into the pillow. He repeatedly charged the victim to "shut up" and threatened to hurt her if she did not do as he wished. The assault took five to ten minutes, then the assailant left. Investigators later discovered that the assailant had pried open a window in order to enter the victim's ground-floor apartment.

Shortly after the assailant's departure in the prior episode, the victim found that the contents of her pocketbook had been spilled. Some cash was missing, and police investigators lifted a print matching that of defendant's little finger from the address book that had been in the pocketbook. The victim testified that she could not conceive of any time the address book might have been in defendant's possession, other than the night of the rape. Like the victim in the rape here, the earlier victim described her assailant as a black male of medium build whose height was similar to that of defendant.

The "acid test" for whether evidence of other distinct crimes properly falls within the identity provision in Rule 404(b) and its common law precursor "is its logical relevancy to the particular . . . purpose . . . for which it is sought to be introduced." *State v. McClain*, 240 N.C. at 177, 81 S.E.2d at 368. We hold that the circumstantial evidence that defendant was the perpetrator of the offense committed five months earlier—including both similar fingerprint evidence and the similar pattern of its perpetration—demonstrates a potent, logical pertinence to the question of the assailant's identity in the offense on trial. In particular, fingerprint and palm print evidence found at the scene of the crimes, coupled

with strong circumstantial evidence that the nights of the offenses were the only occasions upon which defendant's prints could have been made on the respective premises, was evidence of considerable probative force, far outweighing any possibility of unfair prejudicial effect. Thus, under the circumstances of the crime charged and those of the offense admitted for the purpose of proving identity under Rule 404(b), the trial court did not err in admitting evidence of the other, similar offense, which shared strong circumstantial indicia that defendant had been the perpetrator. The decision of the Court of Appeals holding otherwise is therefore

Reversed.

JAMES SIDNEY DAVIS v. WILLIAM S. HIATT, COMMISSIONER, NORTH CAROLINA DIVISION OF MOTOR VEHICLES

No. 155PA89

(Filed 5 April 1990)

1. **Automobiles and Other Vehicles § 2.3 (NCI3d)— mandatory revocation of driver's license—no right of appeal**

The suspension of petitioner's driver's license was mandatory under N.C.G.S. §§ 20-17(2) and 20-19(e), and petitioner thus did not have the right to appeal under N.C.G.S. § 20-25. Nor did petitioner have a right of appeal under the Administrative Procedure Act since cases involving a license issued under Ch. 20 are expressly excluded by N.C.G.S. § 150B-2(3) from those cases which may be appealed under the Administrative Procedure Act. N.C.G.S. § 150B-43.

Am Jur 2d, Automobiles and Highway Traffic § 144.

2. **Automobiles and Other Vehicles § 2.3 (NCI3d)— mandatory revocation of driver's license—superior court review by certiorari**

The superior court had jurisdiction to review the mandatory revocation of petitioner's driver's license by the Commissioner of Motor Vehicles by a writ of certiorari. Where the petition alleged facts sufficient to establish the right of review by certiorari, its validity as a pleading was not impaired

by the fact that petitioner did not specifically pray that the court issue a writ of certiorari.

Am Jur 2d, Automobiles and Highway Traffic § 144.

3. Automobiles and Other Vehicles § 2.4 (NCI3d)— revocation of driver's license—impaired driving—use of prior no contest plea

The judgment entered on a plea of no contest to a previous charge of driving with a blood alcohol content of .10 percent or more may be used as a prior conviction by the Division of Motor Vehicles for purposes of revoking a driver's license since the court must now make a finding that there is a factual basis for a plea of no contest before it may accept the plea, and this amounts to an adjudication of guilt. N.C.G.S. § 15A-1022(c) (1989).

Am Jur 2d, Automobiles and Highway Traffic §§ 117, 134.

Justice FRYE concurring in result.

ON discretionary review of a decision of the Court of Appeals, 92 N.C. App. 748, 376 S.E.2d 44 (1989), affirming the judgment entered by *McLelland, J.*, at the 25 March 1988 Civil Session of Superior Court, WAKE County, reversing an order of the Division of Motor Vehicles (DMV). Heard in the Supreme Court 13 November 1989.

This case involves the revocation of a driver's license. The record shows the petitioner was convicted of operating a motor vehicle with a blood alcohol content of .10 or more on 14 March 1979. His driver's license was revoked for one year until 14 March 1980. On 31 August 1983 the petitioner pled no contest to operating a motor vehicle with a blood alcohol content of .10 or more. His driver's license was revoked until 31 August 1984. On 19 October 1987 the petitioner was convicted of driving while impaired. The Commissioner of Motor Vehicles notified the petitioner that based on N.C.G.S. § 20-17(2) and N.C.G.S. § 20-19(e) his driving privilege had been permanently revoked.

Mr. Davis filed a petition in superior court asking for review of the Commissioner's action. The respondent filed an answer and moved to dismiss the petition for lack of jurisdiction. The superior court denied the motion to dismiss and held that the Commissioner

erred in permanently revoking the petitioner's driving privilege. The court ordered that the revocation be for one year. The Court of Appeals affirmed the order of the superior court.

We allowed the Commissioner's petition for discretionary review.

George R. Barrett for petitioner appellee.

Lacy H. Thornburg, Attorney General, by Jane P. Gray, Special Deputy Attorney General, and Mabel Y. Bullock, Assistant Attorney General, for respondent appellant.

WEBB, Justice.

[1] The appellant argues first that the superior court did not have jurisdiction to determine the questions raised in the petition. We agree with the Court of Appeals that the suspension of the petitioner's driving privilege was mandatory under N.C.G.S. § 20-17(2) and N.C.G.S. § 20-19(e) and the petitioner did not have the right to appeal under N.C.G.S. § 20-25. *Underwood v. Howland, Comr. of Motor Vehicles*, 274 N.C. 473, 164 S.E.2d 2 (1968); *Fox v. Scheidt, Comr. of Motor Vehicles*, 241 N.C. 31, 84 S.E.2d 259 (1954).

We do not agree with the Court of Appeals that the petitioner has a right of appeal under Chapter 150B of the North Carolina General Statutes, the Administrative Procedure Act. N.C.G.S. § 150B-43 provides in part:

> Any person who is aggrieved by the final decision in a contested case . . . is entitled to judicial review of the decision under this Article, unless adequate procedure for judicial review is provided by another statute. . . .

N.C.G.S. § 150B-2 provides in part:

> (2) "Contested case" means an administrative proceeding pursuant to this Chapter to resolve a dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty. "Contested case" does not include rulemaking, declaratory rulings, or the award or denial of a scholarship or grant.
>
> . . . .
>
> (3) "License" means any certificate, permit or other evidence, by whatever name called, of a right or privilege to engage

> in any activity, except licenses issued under Chapter 20 and Subchapter I of Chapter 105 of the General Statutes and occupational licenses.

N.C.G.S. § 150B-43 provides that any person who is an aggrieved party in a contested case is entitled to judicial review if it is not otherwise available. N.C.G.S. § 150B-2 says that contested cases include disputes about licenses, except licenses issued under Chapter 20 of the General Statutes. This case involves a driver's license which was issued pursuant to Chapter 20. It is expressly excluded from those cases which may be appealed under the Administrative Procedure Act. The petitioner had no right of appeal under N.C.G.S. § 150B-43.

[2] The superior court could review the actions of the Commissioner by issuing a writ of certiorari. In *Russ v. Board of Education*, 232 N.C. 128, 59 S.E.2d 589 (1950), the petitioner filed an action in superior court to review the action of the Board of Education of Brunswick County in dismissing him from his position as member of a school committee. The superior court overruled a demurrer to the action and this Court affirmed. Justice Ervin, writing for this Court, said "G.S. 1-269 expressly stipulates that 'writs of *certiorari* . . . are authorized as heretofore in use.' It is well settled in this jurisdiction that *certiorari* is the appropriate process to review the proceedings of inferior courts and of bodies and officers exercising judicial or quasi-judicial functions in cases where no appeal is provided by law." *Id.* at 130, 59 S.E.2d at 591. We held in that case that the act of ousting the petitioner from the school committee was quasi-judicial in nature and may be reviewed by the superior court by certiorari. We also held in that case that if a petition alleges facts sufficient to establish the right of review on certiorari its validity as a pleading is not impaired by the fact the petitioner does not specifically pray that the court issue a writ of certiorari. In this case the petitioner pled sufficient facts to show he did not have a right to appeal from a final decision of an agency. He could then petition for a writ of certiorari to have the case reviewed by the superior court. We hold the superior court had jurisdiction to review the case.

[3] The substantive question in this case is whether the judgment entered on a plea of no contest to a previous charge of driving with a blood alcohol content of .10 percent or more may be used as a prior conviction by the Department of Motor Vehicles for

purposes of revoking a driver's license. We hold that it may be so used.

In *State v. Outlaw*, 326 N.C. 467, 390 S.E.2d 336 (1990), we discussed the use of a judgment imposed after a no contest plea. We cited several cases passing on this question. *State Bar v. Hall*, 293 N.C. 539, 238 S.E.2d 521 (1977); *Winesett v. Scheidt, Comr. of Motor Vehicles*, 239 N.C. 190, 79 S.E.2d 501 (1954); *State v. Thomas*, 236 N.C. 196, 72 S.E.2d 525 (1952); and *In re Stiers*, 204 N.C. 48, 167 S.E. 382 (1933). *See also Lane-Reticker, Nolo Contendere in North Carolina*, 34 N.C.L. Rev. 280 (1955). The rule from these cases is that a plea of no contest is not an admission and may not be used against the defendant in another case. In those cases it was also held that when a no contest plea was accepted the court must impose a sentence based on the plea and may not adjudge the defendant guilty. Because a court could not adjudge the defendant guilty on a no contest plea there was not a conviction to be used in another case.

N.C.G.S. § 15A-1022(c) (1989) has changed the rule that a court may not adjudicate the defendant's guilt on a plea of no contest. Before a court may now accept a plea of no contest it must make a finding that there is a factual basis for the plea. This amounts to an adjudication of guilt. There is now an adjudication of guilt on a no contest plea and the rationale of the above cases that there is not an adjudication on a no contest plea which may not be used in another case no longer applies. The adjudication of guilt on the no contest plea was properly used by the Commissioner in this case to revoke the petitioner's driving privilege.

Reversed.

Justice FRYE concurring in result.

The Court's decisions today in this case and in *State v. Outlaw*, 326 N.C. 467, 390 S.E.2d 366 (1990), follow naturally from this Court's holding in *State v. Holden*, 321 N.C. 125, 161-62, 362 S.E.2d 513, 535-36 (1987), to which I dissented. While I continue to believe that *Holden* was incorrectly decided insofar as it held that a no contest plea and final judgment entered thereon constituted a conviction under N.C.G.S. § 15A-2000(e), it is now the law of this State, and I am bound thereby. Accordingly, I concur in the result reached by the Court.

STATE OF NORTH CAROLINA v. RAYMOND LEE OUTLAW

No. 324A89

(Filed 5 April 1990)

Criminal Law § 86.3 (NCI3d)— prior plea of no contest—admissible for impeachment purposes

The trial court did not err in a prosecution for felonious breaking or entering and felonious larceny by denying defendant's pretrial motion in limine to prohibit the State from questioning him for impeachment purposes as to prior cases in which he had pled no contest to charges of breaking or entering and larceny. The trial court is required by N.C.G.S. § 15A-1022(c) to make a determination that there is a factual basis for the plea before accepting a no contest plea; this finding and entry of judgment thereon constitute an adjudication of guilt and would be a conviction within a meaning of N.C.G.S. § 8C-1, Rule 609(a). The testimony here was properly allowed because defendant was asked whether he had been convicted of breaking or entering and larceny charges, so that the question was based on the factual determination by the court which accepted the plea that defendant was guilty. There was error in *State v. Hedgepeth*, 66 N.C. App. 390, where the State asked defendant whether he had pled no contest because defendant by his plea did not admit that he had committed the crime.

Am Jur 2d, Criminal Law § 499; Witnesses § 570.

Justice FRYE concurring in the result.

APPEAL as of right pursuant to N.C.G.S. § 7A-30(2) from a decision of the Court of Appeals, 94 N.C. App. 491, 380 S.E.2d 531 (1989), which found no error in a trial by *Stephens, J.*, at the 2 May 1988 Criminal Session of Superior Court, BERTIE County. Heard in the Supreme Court 12 February 1990.

The defendant was convicted in the Superior Court of Bertie County of felonious breaking or entering and felonious larceny. He was sentenced to five years in prison. Prior to the trial the defendant made a motion in limine to prohibit the State from questioning him for impeachment purposes as to prior cases in which he had pled no contest to charges of breaking or entering and

larceny. This motion was denied. On cross-examination the defendant testified he had previously been convicted of misdemeanor breaking or entering and larceny.

The Court of Appeals found no error with one judge dissenting. The defendant appealed to this Court.

Lacy H. Thornburg, Attorney General, by Henry T. Rosser, Special Deputy Attorney General, for the State.

M. Braxton Gilliam III for the defendant appellant.

WEBB, Justice.

The question posed by this appeal is whether a defendant may be impeached by requiring him to answer a question as to whether he has been convicted of another crime when his plea of no contest to such a crime has been accepted. N.C.G.S. § 8C-1, Rule 609(a) provides:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime punishable by more than 60 days confinement shall be admitted if elicited from him or established by public record during cross-examination or thereafter.

The resolution of this appeal depends on whether the phrase "has been convicted" in Rule 609 includes the acceptance of a plea of no contest.

We have had several cases in which we considered the way in which pleas of no contest may be used in other cases. *See State Bar v. Hall*, 293 N.C. 539, 238 S.E.2d 521 (1977); *Fox v. Scheidt, Comr. of Motor Vehicles*, 241 N.C. 31, 84 S.E.2d 259 (1954); *Winesett v. Scheidt, Comr. of Motor Vehicles*, 239 N.C. 190, 79 S.E.2d 501 (1954); *State v. Thomas*, 236 N.C. 196, 72 S.E.2d 525 (1952); *In re Stiers*, 204 N.C. 48, 167 S.E. 382 (1933); and *Lane-Reticker, Nolo Contendere in North Carolina*, 34 N.C.L. Rev. 280 (1955). We believe the rule from these cases was that generally a plea of nolo contendere may not be used against the defendant in another case. This rule was based on two factors. First, a plea of no contest is not an admission and may not be used as one in another case. Second, when a plea of no contest is accepted the court must impose a sentence based on the plea and may not adjudge the defendant guilty. If the court in which the defend-

ant pled no contest may not adjudge guilt there is not a conviction to be used in another case.

The General Assembly has enacted Chapter 15A of the General Statutes with an effective date of 1 July 1975, which would make it inapplicable to the above cases. N.C.G.S. § 15A-1022(c) provides that before a court may accept a no contest plea it must determine that there is a factual basis for the plea. This changes the rule that a court must impose a sentence based on the no contest plea and may not adjudicate the guilt of a defendant upon such a plea. When a plea of no contest is now entered there must be a finding by a court that there is a factual basis for the plea. This finding and the entry of a judgment thereon constitute an adjudication of guilt. This adjudication would be a conviction within the meaning of Rule 609(a). As a conviction it may then be used in another case to attack the credibility of a witness. *See State v. Holden*, 321 N.C. 125, 362 S.E.2d 513 (1987), in which we held that a judgment of conviction on a no contest plea could be used to establish an aggravating factor in a capital case.

In this case the defendant was not asked whether he had pled no contest to the breaking and entering and larceny charges. He was asked whether he had been convicted of them. This question was based on the factual determination by the court which accepted the no contest plea that the defendant was guilty. This would be a conviction under Rule 609(a) and the testimony was properly allowed.

This case is not inconsistent with *State v. Hedgepeth*, 66 N.C. App. 390, 310 S.E.2d 920 (1984). In that case it was held to be error for the State to be allowed to ask the defendant on cross-examination whether he had pled no contest to a charge of assault with intent to commit rape. This was an improper question because the defendant by his plea of no contest did not admit he had committed this crime. If the prosecuting attorney had asked the defendant if he had been convicted of the crime this would have been a proper question.

Affirmed.

Justice FRYE concurring in result.

The Court's decisions today in this case and in *Davis v. Hiatt*, 326 N.C. 462, 390 S.E.2d 338 (1990), follow naturally from this

Court's holding in *State v. Holden*, 321 N.C. 125, 161-62, 362 S.E.2d 513, 535-36 (1987), to which I dissented. While I continue to believe that *Holden* was incorrectly decided insofar as it held that a no contest plea and final judgment entered thereon constituted a conviction under N.C.G.S. § 15A-2000(e), it is now the law of this State, and I am bound thereby. Accordingly, I concur in the result reached by the Court.

C. WILLIAM BARKER, PLAINTIFF v. EDWARD C. AGEE, JAMES R. MABE, BRADFORD K. ROOT, FRANK E. WALL, VELPO D. WARD, JR., AND WARD & COMPANY, P.A., DEFENDANTS/THIRD-PARTY PLAINTIFFS v. CITIZENS NATIONAL BANK, THIRD-PARTY DEFENDANT

No. 224PA89

(Filed 5 April 1990)

Appeal and Error § 7 (NCI3d); Rules of Civil Procedure § 14 (NCI3d) — judgment for plaintiff against third party plaintiffs — right of third party defendants to appeal

Third party defendant bank was an aggrieved party within the meaning of N.C.G.S. § 1-271 which could appeal summary judgment entered in favor of plaintiff against defendants-third party plaintiffs where the bank fully participated in the determination of third party plaintiff's liability and is bound by the judgment in favor of plaintiff entered against defendants as third party plaintiffs. N.C.G.S. § 1A-1, Rule 14.

Am Jur 2d, Appeal and Error §§ 92, 173, 174, 182; Parties §§ 192, 194, 196.

ON discretionary review upon petitions filed by defendants/third-party plaintiffs and third-party defendant pursuant to N.C.G.S. § 7A-31 from a decision of the Court of Appeals, 93 N.C. App. 537, 378 S.E.2d 794 (1989), affirming the judgment of *Walker, J.*, entered 23 March 1988 in the Superior Court, GUILFORD County. Heard in the Supreme Court 15 March 1990.

Smith Helms Mullis & Moore, by Robert A. Wicker and Linda S. Bellows, for plaintiff-appellee.

Hendrick, Zotian, Cocklereece & Robinson, by T. Paul Hendrick and William A. Blancato, for defendants/third-party plaintiff-appellants.

Poyner & Spruill, by J. Phil Carlton and Mary Beth Johnson, for third-party defendant-appellant.

PER CURIAM.

On this appeal: (1) defendants seek reversal of summary judgment entered by the trial judge entitling plaintiff to enforce an acceleration clause and to recover against defendants amounts due under the terms of a promissory note; and (2) third-party defendant, Citizens National Bank (Bank), seeks a determination of its standing to appeal the judgment entered in the trial court against defendants. The Court of Appeals held that the Bank did not have standing to appeal from the judgment because the judgment did not affect the Bank's rights, and that therefore the Bank was not an aggrieved party. The Court of Appeals otherwise affirmed the trial court's order granting plaintiff's motion for summary judgment and awarding attorney's fees to plaintiff. We disagree with the Court of Appeals' determination that the Bank lacked standing; however, we agree with the remainder of the Court of Appeals' decision.

Plaintiff and defendants owned an accounting firm. Defendants purchased plaintiff's stock in the firm for $850,000. A down payment was made and the balance, $750,000, was to be paid in monthly installments of $6,862, due the first of each month pursuant to an interest-free promissory note executed by defendants. Upon default in the payment of an installment for fifteen or more days, the holder had the right to declare the entire unpaid balance due and, upon doing so, was entitled to interest in addition to reasonable attorney's fees. In an effort to avoid disputes and to avoid personal contact between the parties regarding whether payments were timely made and also to give the parties independent records of when the payments were made, counsel for both parties agreed that the monthly payments would be made by wire transfer. Plaintiff's counsel provided defendants' counsel with an account number in order that the wire transfers could be made to plaintiff's Merrill Lynch account. Defendants arranged to have the transfers made

from an account with third-party defendant, the Bank, by automatically transferring the funds each month.

Upon failure by the Bank to transfer the 1 March 1987 payment within the fifteen-day grace period, plaintiff notified defendants of his intention to accelerate the note and declared the unpaid balance of $514,726 immediately due. Defendants refused to pay and plaintiff commenced this action against defendants. Defendants filed a third-party complaint against the Bank. The Bank answered and thereafter all parties filed motions for summary judgment. The trial court entered summary judgment in favor of plaintiff against defendants/third-party plaintiffs. Defendants and the Bank appealed to the Court of Appeals. The Court of Appeals dismissed the Bank's appeal. The Court of Appeals concluded that the order granting summary judgment against defendants did not determine the Bank's liability and did not affect the Bank's rights; therefore, the Bank was not an aggrieved party under N.C.G.S. § 1-271 and thus lacked standing to appeal. We disagree.

The Bank's right to appeal in this case is controlled by Rule 14 of the North Carolina Rules of Civil Procedure. "Rule 14 provides that 'the third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim.' " *City of Winston-Salem v. Ferrell*, 79 N.C. App. 103, 107, 338 S.E.2d 794, 797 (1986). "When a third-party defendant has an opportunity to participate fully in the determination of third-party plaintiff's liability, it is bound by a judgment in favor of the original plaintiff." *Id.* Here the Bank not only had an opportunity to participate, but in fact did fully participate in the determination of third-party plaintiff's liability and is bound by the judgment in favor of plaintiff entered against defendants as third-party plaintiffs. Since the Bank is bound by the judgment which affects its substantial rights, it is clearly an aggrieved party within the meaning of N.C.G.S. § 1-271. The Court of Appeals thus erred in dismissing the Bank's appeal.

The Court of Appeals affirmed summary judgment entered in favor of plaintiff against defendants/third-party plaintiffs on the promissory note. On appeal to this Court, defendants and the Bank contend that the Court of Appeals erred in concluding that summary judgment for plaintiff was properly entered by the trial court. We agree with the Court of Appeals' conclusion on this issue. Accordingly, we affirm the Court of Appeals' decision affirming

summary judgment for plaintiff against defendants. On dismissal of the Bank's appeal, we reverse.

Affirmed in part; reversed in part.

IN THE MATTER OF: ANTOINE SWINDELL

No. 367PA89

(Filed 5 April 1990)

1. **Infants § 20 (NCI3d) — commitment of juvenile — failure to fully consider alternatives — moot**

An assignment of error alleging that the trial court erred by committing a juvenile to training school without first considering the alternatives was moot where the record revealed that the juvenile was subsequently conditionally released.

Am Jur 2d, Appeal and Error § 764.

2. **Infants § 10 (NCI3d) — Division of Youth Services ordered to develop new program — beyond court's authority under juvenile code**

The district court erred when committing a juvenile to training school by ordering the State of North Carolina to develop and implement a specified adolescent sex offender program. The North Carolina Juvenile Code, N.C.G.S. § 7A-516 to § 7A-749, does not grant the district courts the authority to order the state to develop and implement specific treatment programs and facilities for juveniles.

Am Jur 2d, Infants § 22.

Discretionary review of order entered by *Davis, J.*, at the 16 June 1989 Juvenile Session of ROWAN County District Court allowed *ex mero motu* prior to determination by the North Carolina Court of Appeals. Heard in the Supreme Court 15 February 1990.

Lacy H. Thornburg, Attorney General, by John R. Corne, Assistant Attorney General, for the Division of Youth Services, Department of Human Resources.

David B. Wilson, Attorney for juvenile-appellant.

Lacy H. Thornburg, Attorney General, by T. Lane Mallonee, Assistant Attorney General, for the Division of Social Services, Department of Human Resources.

Lacy H. Thornburg, Attorney General, by Doris J. Holton, Assistant Attorney General, for the state-appellee.

MARTIN, Justice.

Our decision does not require an extensive recital of the facts. In brief, the evidence showed that Antoine Swindell, age thirteen, was adjudicated delinquent on 16 June 1989 on a petition alleging he raped his eleven-year-old female cousin. Antoine is mildly retarded, has an IQ of 57, and has repeated the first, second and third grades. He resides with his mother and three sisters and has not seen his father in ten years. This was Antoine's first court appearance.

The risk assessment prepared by the court psychologist indicated that Antoine was likely to be a repeat offender. This determination was based on his difficulties in school, his negative family relationships, his minimization of the victim's hurt, his resistance to discussing the offense, his unsophisticated view of sexuality, and his history of aggressive behavior. The psychologist recommended that the court either place the juvenile on probation and arrange for outpatient treatment or place the juvenile in an inpatient adolescent sex offender treatment facility. North Carolina presently has no such facility for the treatment of juvenile sex offenders. On 12 July 1989 the trial court committed Antoine to training school and ordered the state to develop and implement an adolescent sex offender treatment program for this and other juveniles "fitting his description" on or before 13 October 1989.

[1] Two issues arise on appeal. We do not have to decide the first as it is now moot. In that issue the juvenile contends that the trial court's order committing him to training school without first fully considering possible alternative treatment measures violated N.C.G.S. § 7A-652 and was reversible error. The record discloses that the juvenile was conditionally released from custody on 19 January 1990. "[A]s a general rule this Court will not hear an appeal when the subject matter of the litigation has been settled between the parties or has ceased to exist." *Kendrick v. Cain*, 272 N.C. 719, 722, 159 S.E.2d 33, 35 (1968); *N.C. State Bar v. Randolph*, 325 N.C. 699, 701, 386 S.E.2d 185, 186 (1989). By reason

of the discharge of the juvenile from custody, the subject matter of this assignment of error has ceased to exist and the issue is moot. We therefore dismiss this assignment.

[2] Second, the Division of Youth Services contends that the trial court exceeded the scope of its authority in ordering the State of North Carolina to develop and implement a specified adolescent sex offender treatment program. We agree. The North Carolina Juvenile Code, N.C.G.S. § 7A-516 to § 7A-749, does not grant the district courts the authority to order the state, through the Division of Youth Services, to develop and implement specific treatment programs and facilities for juveniles. *In re Wharton*, 305 N.C. 565, 290 S.E.2d 688 (1982). The district court can recommend, but not order, that such facilities be developed.

Judge Davis' goal in serving the "best interests of the child" is commendable, and his plan for a special treatment program for juvenile sex offenders is highly worthwhile. However, there is a limit to what the judiciary can do. In ordering treatment and rehabilitation programs for juvenile delinquents, the courts must make do with what is currently provided by the General Assembly.

For the reasons stated, that part of the district court's order requiring the State of North Carolina, through the Division of Youth Services, to develop and implement a specified juvenile sex offender treatment program is vacated.

Dismissed in part; vacated in part.

LINDA M. HOGAN, ADMINISTRATRIX OF THE ESTATE OF JAMES C. HOGAN, DECEASED, EMPLOYEE, PLAINTIFF v. CONE MILLS CORPORATION, EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 344A89

(Filed 5 April 1990)

Master and Servant § 94.3 (NCI3d)— workers' compensation— refusal to set aside dismissal of original claim—no abuse of discretion

The Industrial Commission did not abuse its discretion in refusing to set aside its earlier dismissal of plaintiff's original claim for workers' compensation.

Am Jur 2d, Workmen's Compensation §§ 570, 598, 599.

APPEAL by defendants pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 94 N.C. App. 640, 381 S.E.2d 151 (1989), which reversed the Opinion and Award of the North Carolina Industrial Commission filed 8 March 1988. Heard in the Supreme Court 13 February 1990.

Turner, Enochs, Sparrow, Boone & Falk, P.A., by Peter F. Chastain, for plaintiff appellee.

Smith, Helms, Mulliss & Moore, by J. Donald Cowan, Jr. and W. Alexander Audilet, for defendant appellants.

PER CURIAM.

This is a workers' compensation claim originally filed in 1976. The worker, now deceased, sought benefits, now pursued by his estate, for total disability allegedly caused by his long exposure to cotton dust while in the employ of Cone Mills. The Industrial Commission (Commission) originally dismissed the claim on procedural grounds but later invited Hogan to refile his claim, believing that certain new legislation entitled him to pursue the claim. *See Hogan v. Cone Mills Corp.*, 315 N.C. 127, 337 S.E.2d 477 (1985), hereinafter *Hogan I*. Pursuant to this "invitation" Hogan filed his claim again in 1980, and the Commission concluded that Hogan was totally disabled due to byssinosis and awarded him compensation. The Court of Appeals reversed, concluding among other things that the Commission's dismissal of Hogan's original claim barred Hogan's second claim under the doctrine of *res judicata*. *Hogan*

v. Cone Mills Corp., 63 N.C. App. 439, 305 S.E.2d 213 (1983). This Court in *Hogan I* reversed the Court of Appeals and remanded the matter to the Commission for further consideration.

In *Hogan I* we agreed with the Court of Appeals that the Commission's dismissal of Hogan's original claim so long as it remained in effect barred consideration of his second claim. Believing, however, that there were compelling circumstances which might lead the Commission in the exercise of its discretionary, inherent judicial power to set aside its dismissal of Hogan's original claim, we reversed the Court of Appeals and remanded the matter to the Commission for its determination of whether its earlier dismissal should be set aside. We said:

> The decision whether to set aside the judgment [of dismissal] rests, in the first instance, within the judgment of the Commission. If the Commission refuses to set aside the former judgment, Hogan's claim will be barred by *res judicata*. If . . . the Commission does set aside the former judgment, no final judgment on the merits will exist to bar [Hogan's second claim].

Hogan I, 315 N.C. at 142, 337 S.E.2d at 486.

On remand the Commission elected not to set aside its dismissal of Hogan's first claim, and the Court of Appeals reversed this decision, with one judge dissenting.

On this appeal we have carefully considered the arguments, new briefs, the Court of Appeals' majority and dissenting opinions, the record and our decision and opinion in *Hogan I*. We are simply unable to say under the circumstances of this case, as convoluted as they are, that the Commission's refusal to set aside the dismissal was an abuse of its discretion. While there is much in the case which would have justified its setting aside of the dismissal, we cannot say the Commission's decision to the contrary is wholly unsupported by reason. On this issue we cannot substitute our judgment for the Commission's.

The Court of Appeals decision, therefore, reversing the Commission is

Reversed.

THE FEDERAL LAND BANK OF COLUMBIA, A CORPORATION v. MICHAEL B. LACKEY AND WIFE, DEBRA C. LACKEY, AND EARL DAVID GREER AND WIFE, BETTY GREER

328PA89

(Filed 5 April 1990)

ON plaintiff's petition for discretionary review of the decision of the Court of Appeals, 94 N.C. App. 553, 380 S.E.2d 538 (1989), reversing the entry of summary judgment for plaintiff by *Lamm, J.*, at the 28 March 1988 Session of CALDWELL Superior Court. Heard in the Supreme Court 15 March 1990.

Faison & Brown, by Mark C. Kirby and John F. Logan, for plaintiff-appellant.

Wilson, Palmer and Lackey, P.A., by W. C. Palmer and David S. Lackey, for defendant-appellee.

PER CURIAM.

Affirmed.

SLAUGHTER v. SLAUGHTER

[326 N.C. 479 (1990)]

JOSEPH BLAIR SLAUGHTER v. WILLIAM M. SLAUGHTER AND LEROY S. VEASEY

No. 252PA89

(Filed 5 April 1990)

ON defendant Veasey's petition for discretionary review pursuant to N.C.G.S. § 7A-31 of the decision of the Court of Appeals, 93 N.C. App. 717, 379 S.E.2d 98 (1989), reversing a judgment notwithstanding the verdict by *Stephens, J.*, at the 7 March 1988 Session of WAKE Superior Court and remanding the case for entry of judgment on the verdict in favor of plaintiff. Heard in the Supreme Court 14 March 1990.

Burns, Day & Presnell, P.A., by Lacy M. Presnell III, Daniel C. Higgins, and Susan F. Vick, for plaintiff appellee.

Broughton, Wilkins & Webb, P.A., by Charles P. Wilkins and Kenneth B. Oettinger, for defendant appellant Veasey.

PER CURIAM.

After hearing arguments and carefully considering the new briefs and record, we conclude that we improvidently allowed defendant's petition for discretionary review. The result is, therefore:

Discretionary review improvidently allowed.

NEW BERN POOL & SUPPLY COMPANY v. ELI GRAUBART D/B/A AIR MACHINES, INC.

No. 339A89

(Filed 5 April 1990)

APPEAL by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 94 N.C. App. 619, 381 S.E.2d 156 (1989), finding no error in the judgment entered by *Reid, J.*, on 25 March 1988 in Superior Court, CRAVEN County and pursuant to N.C.G.S. § 7A-31 as to additional issues. Pursuant to Rule 30(d) of the Rules of Appellate Procedure, the case was submitted on 13 March 1990 for decision by the Supreme Court on the written briefs.

Ward and Smith, P.A., by John A. J. Ward, for plaintiff-appellee.

Barker, Dunn & Mills, by Donald J. Dunn, for defendant-appellant.

PER CURIAM.

Affirmed.

ADAMS v. BASS

No. 572P89

Case below: 88 N.C.App. 599
326 N.C. 363

Motion by defendant for reconsideration of petition for writ of certiorari to the North Carolina Court of Appeals denied 5 April 1990.

BOCKWEG v. ANDERSON

No. 52PA90

Case below: 96 N.C.App. 660

Petition by several defendants for discretionary review pursuant to G.S. 7A-31 allowed 5 April 1990.

CAPITAL FORD, INC. v. GODWIN ASSOCIATES

No. 65P90

Case below: 97 N.C.App. 142

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 April 1990.

CHAPEL HILL COUNTRY CLUB v. TOWN OF CHAPEL HILL

No. 102P90

Case below: 97 N.C.App. 171

Petition by plaintiffs (Du Bose et al.) for discretionary review pursuant to G.S. 7A-31 denied 5 April 1990. Petition by plaintiffs (Pendergraph) for discretionary review pursuant to G.S. 7A-31 denied 5 April 1990. Petition by plaintiff (Chapel Hill Country Club, Inc.) for discretionary review pursuant to G.S. 7A-31 denied 5 April 1990.

DEPT. OF TRANSPORTATION v.
SEABOARD SYSTEM RAILROAD

No. 37PA90

Case below: 96 N.C.App. 679

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 5 April 1990.

HOWELL v. LANDRY

No. 36P90

Case below: 96 N.C.App. 516

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 April 1990. Plaintiff's motion to dismiss petition for failure to comply with Rules of Appellate Procedure denied 5 April 1990.

IN RE ELE, INC.

No. 93A90

Case below: 97 N.C.App. 253

Petition by Bertie County pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues dismissed 5 April 1990.

JOHNSON v. BEVERLY-HANKS & ASSOC.

No. 90A90

Case below: 97 N.C.App. 335

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues denied 5 April 1990.

JONES v. DAVIS

No. 38P90

Case below: 96 N.C.App. 679

Petition by Davis for discretionary review pursuant to G.S. 7A-31 denied 5 April 1990.

McNEILL v. HARNETT COUNTY

No. 100PA90

Case below: 97 N.C.App. 41

Petition by defendants for temporary stay allowed 19 March 1990. Petition by defendants for writ of supersedeas allowed 5 April 1990. Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 5 April 1990.

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

MARSH v. TROTMAN

No. 42P90

Case below: 96 N.C.App. 578

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 5 April 1990.

MATTHEWS v. N.C. DEPT. CORRECTION

No. 81P90

Case below: 97 N.C.App. 142

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 April 1990.

MOSER v. MOSER

No. 542P89

Case below: 96 N.C.App. 273

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 April 1990.

NASH v. MOTOROLA COMMUNICATIONS AND ELECTRONICS

No. 568PA89

Case below: 96 N.C.App. 329

Petition by several defendants for discretionary review pursuant to G.S. 7A-31 allowed 5 April 1990.

POSTON v. MORGAN-SCHULTHEISS, INC.

No. 106P90

Case below: 97 N.C.App. 142

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 April 1990.

POTTER v. HOMESTEAD PRESERVATION ASSN.

No. 146A90

Case below: 97 N.C.App. 454

Petition by defendants for temporary stay allowed 10 April 1990 on condition bond remain in full force and effect.

ROY BURT ENTERPRISES v. MARSH

No. 561PA89

Case below: 96 N.C.App. 275

Petition by defendant (Waymond Marsh) for discretionary review pursuant to G.S. 7A-31 allowed 5 April 1990.

SEGREST v. GILLETTE

No. 49PA90

Case below: 96 N.C.App. 435

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 5 April 1990. Petition by several defendants for discretionary review pursuant to G.S. 7A-31 allowed 5 April 1990.

STATE v. DAVIS

No. 83A90

Case below: 97 N.C.App. 259

Petition by defendant for writ of supersedeas allowed 5 April 1990 conditioned upon the $15,000 secured bond remaining in full force and effect. Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues denied 5 April 1990.

STATE v. FOLAND

No. 62PA90

Case below: 97 N.C.App. 309

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question denied 5 April 1990. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 5 April 1990.

STATE v. HARRINGTON

No. 46PA90

Case below: 97 N.C.App. 143

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 5 April 1990.

STATE v. HEMBY

No. 77P90

Case below: 97 N.C.App. 333

Petition by defendant for writ of supersedeas and temporary stay denied 5 April 1990. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 5 April 1990. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 April 1990.

STATE v. HILL

No. 88P90

Case below: 96 N.C.App. 680

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 5 April 1990.

STATE v. LAVISCOUNT

No. 41P90

Case below: 96 N.C.App. 680

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 April 1990.

STATE v. McDONALD

No. 59P90

Case below: 97 N.C.App. 322

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 April 1990.

STATE v. MICHAELS

No. 95P90

Case below: 97 N.C.App. 334

Petition by defendant for writ of supersedeas and temporary stay denied 5 April 1990. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 April 1990.

STATE v. MONTGOMERY

No. 47P90

Case below: 97 N.C.App. 143

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 April 1990.

STATE v. STRICKLAND

No. 53P90

Case below: 96 N.C.App. 642

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 April 1990.

STATE v. TESSENAIR

No. 51P90

Case below: 97 N.C.App. 334

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 April 1990.

SUMMEY OUTDOOR ADVERTISING v.
COUNTY OF HENDERSON

No. 34P90

Case below: 96 N.C.App. 533

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 April 1990.

SWINDELL v. FEDERAL NATIONAL MORTGAGE ASSN.

No. 70PA90

Case below: 97 N.C.App. 126

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 5 April 1990.

TROGDON v. TROGDON

No. 105P90

Case below: 97 N.C.App. 330

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 5 April 1990.

UNIVERSITY OF NORTH CAROLINA v. HILL

No. 20PA90

Case below: 96 N.C.App. 673

Petition by defendant (Alamance County) for discretionary review pursuant to G.S. 7A-31 allowed 5 April 1990.

UNRUH v. CITY OF ASHEVILLE

No. 74P90

Case below: 97 N.C.App. 287

Petition by defendant (City of Asheville) for temporary stay allowed 26 February 1990 pending receipt, consideration and determination of the petition for discretionary review. Petition by intervenor defendants for writ of supersedeas and temporary stay denied 8 March 1990. Petition by intervenor defendants for discretionary review pursuant to G.S. 7A-31 denied 8 March 1990.

WARD v. HILLHAVEN, INC.

No. 64P90

Case below: 97 N.C.App. 143

Motion by defendants to dismiss appeal for lack of substantial constitutional question allowed 5 April 1990. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 April 1990.

PETITIONS TO REHEAR

ELLIS v. NORTHERN STAR CO.

No. 192PA89

Case below: 326 N.C. 219

Petition by defendants to rehear denied 5 April 1990.

HARWOOD v. JOHNSON

No. 37PA89

Case below: 326 N.C. 231

Petition by defendants to rehear denied 5 April 1990.

STATE OF NORTH CAROLINA v. WILLIAM HOWARD PORTER

No. 724A86

(Filed 10 May 1990)

1. Jury § 6.3 (NCI3d)— first degree murder—jury selection—questions concerning racism in criminal justice system

The trial court did not err in a murder prosecution in Robeson County by permitting the prosecutor to question Indian prospective jurors regarding their perceptions of racism in the criminal justice system. The State as well as defendant is entitled to a fair trial, the case was tried at a time when racial tensions in Robeson County were particularly high, and the challenged line of questions was a permissible effort to determine whether prospective jurors' perceptions of the trial process would affect their ability to render a fair verdict.

Am Jur 2d, Jury § 202.

2. Jury § 7.14 (NCI3d)— first degree murder—jury selection—peremptory challenges—racial discrimination

Under *Batson v. Kentucky*, 476 U.S. 79, a defendant makes a *prima facie* case of purposeful discrimination in the selection of the petit jury if he shows that he is a member of a cognizable racial minority; members of his racial group have been peremptorily excused; and racial discrimination appears to have been the motivation for the challenges. When defendant makes out a *prima facie* case, the burden of production shifts to the State to come forward with a neutral explanation for each peremptory strike, and defendant has the right of surrebuttal to show that the prosecutor's explanations are a pretext. Factors to which the court should refer in assessing whether the articulated reasons are legitimate or a pretext include the susceptibility of the particular case to racial discrimination, the prosecutor's demeanor, and the explanation itself.

Am Jur 2d, Jury § 233.

3. Jury § 7.14 (NCI3d)— first degree murder—jury selection—peremptory challenges—not racial

The prosecutor did not impermissibly exercise peremptory challenges on the basis of race where the prosecutor waived argument as to whether a *prima facie* case existed;

the trial court properly required the prosecutor to explain his use of peremptory challenges given the prosecutor's waiver and the State's use of ten of thirteen peremptory challenges against Indian prospective jurors; and the prosecutor gave an individual explanation for each peremptory challenge of an Indian venireperson. It is relevant but not dispositive that the impaneled jury consisted of four Indians, four Blacks, and four Whites, mirroring exactly the racial composition of Robeson County; the victim, both defense counsel, and defendant were Indian; defense counsel peremptorily challenged two Indian prospective jurors; and defendant at trial made no attempt to show that the prosecutor's explanations were merely pretextual. Any disparate treatment which may have occurred was not the result of racial and discriminatory motivation; choosing jurors involves a complex weighing of factors in which a single factor rarely controls the decision-making process. Specific findings of fact supporting the conclusion that no discriminatory purpose was involved are not necessary where there was no material conflict in the evidence.

Am Jur 2d, Jury § 233.

4. **Constitutional Law § 32 (NCI3d)— murder—jury selection—ejection from gallery**

The trial court did not violate defendant's right to a public trial under the North Carolina Constitution by ejecting a prospective juror from the gallery where that person had remained in the courtroom gallery after being excused and advised at least one prospective juror on the meaning of aggravating and mitigating circumstances. North Carolina Constitution, art. I, § 18.

Am Jur 2d, Trial § 33.

5. **Jury § 6.3 (NCI3d); Criminal Law § 411 (NCI4th)— first degree murder—jury selection—statement that death penalty central issue—no error**

There was no error in a first degree murder prosecution where the prosecutor repeatedly stated during jury selection that the death penalty was the central question. The prosecutor did not interject an opinion but merely stated what the jury already knew.

Am Jur 2d, Jury §§ 289, 290.

6. Jury § 6.4 (NCI3d)— first degree murder—jury selection—questions concerning death penalty

There was no error in a first degree murder prosecution where the prosecutor asked each juror prior to impaneling whether they could be a part of the legal machinery which might bring about the death penalty. The prosecutor's question emphasized each juror's present participation in the decision-making process and was not made to badger or intimidate, but to determine whether the jurors could comply with the law.

Am Jur 2d, Jury §§ 289, 290.

7. Criminal Law §§ 415, 728 (NCI4th)— first degree murder—consideration of second degree murder

Although defendant in a first degree murder prosecution contended that the cumulative effect of a statement during the prosecutor's closing argument, a sustained objection to the defendant's closing argument, and an unobjected to instruction on second degree murder effectively excluded second degree murder from the consideration of the jury, there was no error in whole or in part. The prosecutor's closing argument was specifically advocating a decision based on the evidence, the trial judge properly prohibited that part of defendant's argument which referred to what the trial judge believed, and no expression of opinion by the trial judge arises merely from the comparative amount of time devoted to giving an instruction.

Am Jur 2d, Homicide §§ 463, 529, 530.

8. Homicide § 24.1 (NCI3d)— first degree murder—deadly weapon—instruction on malice

The trial judge did not commit plain error in its instruction on malice in a first degree murder prosecution where the court stated that malice was implied from a killing with a deadly weapon and peremptorily instructed the jury that a .25-caliber gun is a deadly weapon where there was no evidence of provocation on the part of the victim. All killings accomplished through the intentional use of a deadly weapon are deemed to be malicious and unlawful absent evidence of mitigating or justifying factors, and the instruction did not relieve the State of its burden of proof.

Am Jur 2d, Homicide §§ 500, 501.

9. Homicide § 25.2 (NCI3d)— first degree murder—instructions—malice as evidence of premeditation and deliberation

There was no plain error in a first degree murder prosecution from the court's instruction that the jury could consider evidence relating to expressed malice as evidence tending to show premeditation and deliberation. Although defendant argued that the jury could have convicted defendant of first degree murder without ever having found the separate elements of premeditation and deliberation, the judge had stated that threats, the manner of killing, and defendant's declarations were proper for the jury's consideration of premeditation and deliberation. Furthermore, there was no error in permitting the jury to consider evidence of defendant's conduct after the killing.

Am Jur 2d, Homicide §§ 500, 501.

10. Homicide § 26 (NCI3d)— first degree murder—instructions—provocation

The trial court did not improperly instruct the jury on provocation in a first degree murder prosecution. Even if verbal abuse or suspicions of adultery can negate deliberation and reduce first degree murder to second degree murder, mere jealousy, without more, cannot be sufficient to negate deliberation.

Am Jur 2d, Homicide § 53.

11. Criminal Law §§ 463, 465 (NCI4th)— first degree murder—prosecutor's argument

There was no prejudicial error in a prosecutor's descriptions of the elements of premeditation and deliberation in a first degree murder prosecution where the prosecutor stated that deliberation meant a cold-blooded murder and that it did not include the case where a man comes home and "finds his wife shacked up there with somebody." Such an example offered for the sake of comparison was not so grossly improper as to require the trial court to intervene *ex mero motu*. Moreover, the prosecutor's argument that defendant's statement that he had meant to kill the victim, made after shooting her three times, was evidence of premeditation and deliberation was a correct statement of the law.

Am Jur 2d, Homicide § 463.

12. Criminal Law § 442 (NCI4th)— first degree murder—prosecutor's argument—jury as body of society

There was no prejudicial error in a first degree murder prosecution from the prosecutor's argument that the jury was the body of society where the evidence of defendant's guilt was overwhelming.

Am Jur 2d, Homicide § 463.

13. Criminal Law § 1312 (NCI4th)— first degree murder—sentencing—evidence of other crimes

The trial court erred in a first degree murder prosecution by allowing the State to cross-examine defendant about prior convictions more than ten years old. The convictions were not admissible for the purpose of establishing the aggravating factors set out in N.C.G.S. § 15A-2000(e)(3) because it was not clear which of the convictions, if any, involved the threat or use of violence and there was no doubt that three and arguably five of the convictions did not involve the threat or use of violence. Moreover, the State concedes that the record does not indicate that the prosecutor gave the required notice and there was no indication that the judge indulged in the weighing process required by N.C.G.S. § 8C-1, Rule 609. There was prejudice because three of the convictions occurred prior to *Gideon v. Wainwright*, 372 U.S. 335, and defendant may have been convicted without the assistance of counsel, and defendant's criminal record assured the jury that defendant was not capable of rehabilitation and was thus a fitting subject of the death penalty.

Am Jur 2d, Criminal Law § 599.

14. Criminal Law § 1362 (NCI4th)— first degree murder—sentencing—age of defendant as mitigating circumstance—not submitted

The evidence did not support submitting defendant's age of sixty-one years as a mitigating circumstance during sentencing for first degree murder where defendant's chronological age of sixty-one and borderline I.Q. of seventy-one were balanced against defendant's youthful interest in the victim, his vigorous responses to the prosecutor's cross-examination, and his physical prowess in his attempts to escape.

Am Jur 2d, Criminal Law §§ 598, 599; Homicide §§ 554, 555.

APPEAL of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing the sentence of death entered by *Fountain, J.*, at the 1 December 1986 Criminal Session of Superior Court, ROBESON County. Heard in the Supreme Court 13 November 1989.

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

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

MEYER, Justice.

In the early hours of Sunday, 23 March 1986, defendant shot and killed his girlfriend, Jeanie Brooks, inside the Oak Ridge Club, a Lumberton nightclub. A jury convicted defendant of first-degree murder and recommended the death sentence. The trial court sentenced in accordance with the recommendation. We find no error in the guilt phase of the trial. However, for reversible error in the sentencing proceeding, we remand for a new sentencing hearing.

At about 5:00 p.m. on Saturday, 22 March 1986, witnesses saw defendant in the company of Jeanie Brooks. Pointing in the direction of Jeanie, defendant stated, "I spent my money on the s---of-a-b---- and I'll kill her before the nights [sic] over." Carl Locklear noticed at the time that defendant had a small-caliber pistol hidden in his boot.

Later in the evening, around 10:30 p.m., witnesses saw defendant and Jeanie Brooks together at the Oak Ridge Club. When Jeanie left defendant's table to speak with friends, defendant asked a companion, Ventris Brooks, "Now, lookie there, what would you do to somebody like that who plays you for a g--d--- fool." On her return, defendant told Jeanie, "What do you expect you playing me for a g--d--- fool. You don't play me for a g--d--- sucker.... I'll blow your g--d--- brains out." When Jeanie later asked her uncle, Ventris Brooks, to dance with her, defendant told her she was to "dance with no g--d--- body. You're here with me." Defendant again told Jeanie he would "blow her d--- brains out." At the time of the killing, Jeanie was twenty-two years old, and defendant was sixty-one.

Ventris Brooks testified that when he entered the club at 10:30 p.m., employees of the club had searched him for weapons

pursuant to club policy. According to club owner Edna Locklear, patrons were asked to take all discovered weapons back to their car.

At about 11:50 p.m., Jeanie left the club in the company of her nineteen-year-old first cousin, Ronnie Revels. They sat in his car for about fifteen minutes, smoking marijuana. Revels and Jeanie reentered the club shortly after they observed defendant step outside and approach his own car, which was parked alongside Revels'. Revels testified that although he had been searched for weapons when he had first arrived at the club at about 11:00 p.m., he and Jeanie were not searched when they reentered the club.

Nick Locklear, the club parking lot attendant, testified that defendant came outside seeking help to break into his car. Defendant stated that his keys were locked inside the automobile and that he needed something to knock the window out. Locklear saw defendant knock out a window, open the right front door, and retrieve an unknown object from beneath the car seat. Locklear then saw defendant return in the direction of the club entrance.

Meanwhile, Jeanie approached Gary Carter and asked if he wanted to dance. Earlier in the evening, Carter had asked Jeanie to dance, but defendant had interrupted and said that she did not want to dance. As Carter and Jeanie danced, defendant went to the dance floor, grabbed Jeanie by the arm, and told her she was not to dance with anyone else but him. Carter left the dance floor. As Carter proceeded to leave the club with his wife, he heard shots fired.

The club owner, Edna Locklear, saw defendant trap the seated Jeanie against a table and pull a pistol from his boot. Defendant threatened Locklear with the pistol, then, placing it three inches from Jeanie's stomach, fired either two or three shots. Immediately, defendant wrapped a hand in his victim's hair, pulling her out of her chair. Backing her against a wall, defendant brandished his pistol at the crowd of 215 to 220 persons, threatening to kill any who came to Jeanie's rescue. After holding the crowd at bay for a period of time (estimates varied), witnesses heard defendant tell Jeanie, "You don't do me like that." Though slumped over, she looked up at him, saying, "I'm sorry." In response, defendant aimed his pistol at her head and pulled the trigger. Jeanie jerked her head backwards, and the pistol round struck her in the shoulder.

At that moment, James Stewart, a club patron, leaped from the crowd and grabbed defendant. Four other patrons joined him

and, in the struggle for the pistol, Stewart was shot in the side. Finally, the five were able to trap defendant against a large wooden door until police arrived. When Ms. Locklear asked defendant if he realized that he might have killed the girl, defendant replied, "I meant to kill the s---of-a-b----."

Police found five spent shell casings near the dance floor. The pistol, identified as a .25-caliber automatic, contained no live rounds. Two of the three projectiles removed from Jeanie's body were examined and found to have been fired from defendant's pistol. Despite emergency surgery, Jeanie died of massive bleeding resulting from two abdominal wounds and a third wound to the shoulder. Stewart suffered a single wound to the abdominal area. Surgeons were unable to remove the bullet lodged in Stewart's body.

Defendant was seen drinking prior to the shooting, but witnesses testified that he was not intoxicated. Defendant offered no evidence during the guilt phase of the trial. After deliberating only a short period of time, the jury returned a verdict finding defendant guilty of first-degree murder.

Following a sentencing hearing, the jury found two aggravating circumstances: that defendant had previously been convicted of a felony involving the use of violence to the person, N.C.G.S. § 15A-2000(e)(3) (1988), and that the murder was part of a course of conduct that included crimes of violence against other persons, N.C.G.S. § 15A-2000(e)(11) (1988). Of ten mitigating circumstances submitted, the jury found six to be present. On finding that the mitigating circumstances were not sufficient to outweigh the aggravating circumstances and that the aggravating circumstances were sufficiently substantial to call for the death penalty, the jury recommended a sentence of death.

JURY SELECTION ISSUES

[1] The prosecutor tried this case at a time when racial tensions in Robeson County were particularly high due to the recent shooting by a Robeson County Sheriff's Deputy of a man known locally as an "Indian activist." Defendant assigns as error questions directed by the prosecutor to Indian prospective jurors regarding their perceptions of racism in the criminal justice system. Though the prosecutor informed the prospective jurors that the victim, as well as the defendant, was Indian, these jurors indicated that racism might be motivating this prosecution. The prosecutor peremptorily chal-

lenged those Indian jurors who expressed this view and others who indicated they might have adopted it. The State, as well as defendant, is entitled to a fair trial. *State v. Artis*, 325 N.C. 278, 295, 384 S.E.2d 470, 479 (1989), *cert. granted and judgment vacated on other grounds*, --- U.S. ---, 108 L. Ed. 2d 604 (1990). The challenged line of questioning was a permissible effort to determine whether prospective jurors' perceptions of the trial process would affect their ability to render a fair verdict. *See, e.g., United States v. Mitchell*, 877 F.2d 294, 302 (4th Cir. 1989) (no impermissible use of peremptory challenge where juror had strong negative reaction to press reports of previous racist comments regarding case).

[2] Defendant further asserts that the prosecutor impermissibly exercised peremptory challenges to exclude potential jurors on the basis of race. *See Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986). Under *Batson*, a defendant makes out a prima facie case of purposeful discrimination in the selection of the petit jury if he shows: (1) he is a member of a cognizable racial minority, (2) members of his racial group have been peremptorily excused, and (3) racial discrimination appears to have been the motivation for the challenges. *Id.* at 96, 90 L. Ed. 2d at 87-88. When a defendant makes out a *prima facie* case, the burden of production "shifts to the State to come forward with a neutral explanation" for each peremptory strike. *Id.* at 97, 90 L. Ed. 2d at 88. This rebuttal of the prima facie showing must be a " 'clear and reasonably specific' " explanation "related to the particular case to be tried." *Id.* at 98 & n.20, 90 L. Ed. 2d at 88 & n.20 (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 258, 67 L. Ed. 2d 207, 218 (1981)).

Following the prosecutor's rebuttal, the defendant has a right of surrebuttal to show that the prosecutor's explanations are a pretext. *State v. Greene*, 324 N.C. 238, 240, 376 S.E.2d 727, 728 (1989); *see also Stanley v. State*, 313 Md. 50, 62, 542 A.2d 1267, 1272-73 (1988); *State v. Antwine*, 743 S.W.2d 51, 64 (Mo. 1987) (en banc), *cert. denied*, 486 U.S. 1017, 100 L. Ed. 2d 217 (1988). Of course, the defendant has no right to examine the prosecuting attorney in the effort to show that the prosecutor's explanations are a pretext. *State v. Jackson*, 322 N.C. 251, 258, 368 S.E.2d 838, 842 (1988), *cert. denied*, --- U.S. ---, 104 L. Ed. 2d 1027 (1989).

Courts have analyzed closely the use of Title VII cases cited in *Batson*, 476 U.S. at 95, 98, 90 L. Ed. 2d at 87, 88-89, to conclude that the ultimate burden of persuading the court that intentional

racial discrimination has guided the use of peremptory challenges rests on the defendant. *United States v. Mathews*, 803 F.2d 325, 330 (7th Cir. 1986), *rev'd on other grounds*, 485 U.S. 58, 99 L. Ed. 2d 54 (1988); *Stanley v. State*, 313 Md. at 61, 542 A.2d at 1272. Because the trial judge's findings "largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." *Batson v. Kentucky*, 476 U.S. at 98 n.21, 90 L. Ed. 2d at 89 n.21.

Several courts have identified factors to which the judge should refer in assessing whether these articulated reasons are legitimate or a pretext. First, the judge should consider " 'the susceptibility of the particular case to racial discrimination.' " *State v. Antwine*, 743 S.W.2d at 65 (quoting *State v. Butler*, 731 S.W.2d 265, 269 (Mo. App. 1987)). The race of the defendant, the victims, and the key witnesses bears upon this determination. Second, the judge should consider the prosecutor's demeanor to determine whether the prosecutor is "engaging in a careful process of deliberation based on many factors." *United States v. Mathews*, 803 F.2d at 332. Third, the court should " 'evaluate the explanation itself.' " *State v. Antwine*, 743 S.W.2d at 65 (quoting *State v. Butler*, 731 S.W.2d at 269).

Evaluation of the prosecutor's explanation involves reference to objective and subjective criteria. *Stanley v. State*, 313 Md. at 79, 542 A.2d at 1281. The trial judge should consider whether "similarly situated white veniremen escaped the State's challenges" and "the relevance of the State's justification" to the case at trial. *State v. Antwine*, 743 S.W.2d at 65. We have held that to rebut a prima facie challenge, the State may proffer reasons that show it exercised its peremptory challenges in pursuit of a jury that is "stable, conservative, mature, government oriented, sympathetic to the plight of the victim, and sympathetic to law enforcement crime solving problems and pressures." *State v. Jackson*, 322 N.C. at 257, 368 S.E.2d at 840. These reasons "need not rise to the level justifying exercise of a challenge for cause." *Batson v. Kentucky*, 476 U.S. at 97, 90 L. Ed. 2d at 88. So long as the motive does not appear to be racial discrimination, the prosecutor may exercise peremptory challenges on the basis of "legitimate 'hunches' and past experience." *State v. Antwine*, 743 S.W.2d at 65.

The trial judge should evaluate the explanation "in light of the explanations offered for the prosecutor's other peremptory

strikes" and "the strength of the prima facie case." *Gamble v. State*, 257 Ga. 325, 327, 357 S.E.2d 792, 795 (1987). In assessing the "entire milieu of the voir dire," the judge must "compar[e] his observations and assessments of veniremen with those explained by the State," guided by his personal experiences with voir dire, trial tactics and the prosecutor and by any surrebuttal evidence offered by the defendant. *State v. Antwine*, 743 S.W.2d at 65.

[3] In the trial *sub judice*, the prosecutor waived argument as to whether a prima facie case existed. Where defendant is an American Indian, people of this heritage are a racial group cognizable for *Batson* purposes. *United States v. Iron Moccasin*, 878 F.2d 226, 229 (8th Cir. 1989); *United States v. Chalan*, 812 F.2d 1302, 1314 (10th Cir. 1987). The State used ten of thirteen peremptory challenges against Indian prospective jurors. Given the prosecutor's waiver, the trial court properly required the prosecutor to explain his use of peremptory challenges.

The prosecutor gave an individual explanation for each peremptory challenge of an Indian venireperson. Many of the peremptorily challenged venirepersons knew either one or both of the defense attorneys. The challenged potential jurors formed these acquaintanceships through attorney-client representation, as a schoolmate, as a student of one of the defense attorneys, or socially. Additionally, a challenged juror was related by marriage to one of defendant's counsel and said that this would "probably" influence her in rendering a decision. Several had been prosecuted for driving while intoxicated, and there was a history of unemployment or unsteady employment among others.

> Courts properly have held that there is nothing discriminatory about challenging jurors who express doubts concerning their ability to be fair or who do not appear to understand legal rules. Courts commonly allow prosecutors to challenge venirepersons who have criminal records or relatives with criminal records, and similarly prospective jurors who know the defendant, counsel or the family of either.

Raphael, *Discriminatory Jury Selection: Lower Court Implementation of Batson v. Kentucky*, 25 Willamette L. Rev. 293, 320-21 (1989) (citations omitted). The trial court committed no error in passing these proffered explanations.

As regards a particular challenged potential juror, Paul Bryant, the prosecutor challenged Bryant because one of the defense attorneys represented Bryant's girlfriend, and Bryant had been a defense witness for the same attorney. Bryant made constant eye contact with defense counsel, had majored in sociology, and read Rolling Stone magazine, all of which the prosecutor felt was reason enough to challenge the venireperson. Failure to make appropriate eye contact with the prosecutor when coupled with other reasons can be a legitimate reason to peremptorily challenge a prospective juror. *United States v. Terrazas-Carrasco*, 861 F.2d 93, 94 (5th Cir. 1988); *United States v. Cartlidge*, 808 F.2d 1064, 1071 (5th Cir. 1987); *State v. Tubbs*, 155 Ariz. 533, 537-38, 747 P.2d 1232, 1236 (1987). Excessive eye contact with defense counsel when coupled with other reasons can be an equally legitimate reason. Mr. Bryant's college major and reading habits indicated a point of view which the State could legitimately conclude was against the State. The trial judge could properly conclude that the State's explanation in this case was not a pretext.

Another challenged juror was a friend of Bryant's and had relied upon him to explain the meaning of aggravating and mitigating circumstances. Moreover, the venireperson seemed to accept the view that racism was present in this case. The final venireperson also seemed to have adopted the view that racism was involved and, in addition, was related by marriage to the excused prospective juror, Bryant. As we stated earlier in this opinion, a prosecutor legitimately excuses a prospective juror who believes the criminal justice system is operating unfairly before any facts have been presented.

Though not dispositive, it is relevant that the impaneled jury consisted of four Indians, four Blacks, and four Whites, mirroring exactly the racial composition of Robeson County. Other relevant factors are that the victim and both defense counsel, as well as the defendant, were Indian. Defense counsel peremptorily challenged two Indian prospective jurors. After the prosecutor defended his peremptory challenges and brought these relevant factors to the attention of the trial court, the trial court ruled that there was "no discrimination against the Indian race on the part of the State in the selection of the jury." We find no error in the conclusion of the trial court.

Defendant argues on appeal that the criteria articulated by the prosecutor were disparately applied to excuse Indian jurors only. Defendant asserts that the prosecutor passed other jurors acquainted with the defense counsel, formerly represented by the defense counsel or having unsteady job histories. Defendant argues further that the prosecutor did not pose the same questions to all jurors. However, at trial defendant "made no attempt to show that such explanations were 'merely pretextual.' " *Glenn v. State*, 754 S.W.2d 290, 291 (Tex. App. 1988). "Defense counsel was apparently satisfied with the explanations because no effort was made by the defense to demonstrate that the [S]tate's explanations were merely pretextual." *State v. Lemansky*, 780 S.W.2d 128, 131 (Mo. App. 1989). Because the trial judge is a finder of fact, we are not willing to substitute our judgment where the record discloses sufficient evidence to support his findings. *State v. Fennell*, 307 N.C. 258, 264, 297 S.E.2d 393, 396 (1982); *see also State v. Fowler*, 758 S.W.2d 99, 100 (Mo. App. 1988); *Tompkins v. State*, 774 S.W.2d 195, 202 & n.6A (Tex. Crim. App. 1987), *aff'd per curiam by an equally divided court*, --- U.S. ---, 104 L. Ed. 2d 834, *reh'g denied*, --- U.S. ---, 106 L. Ed. 2d 630 (1989).

Moreover, the alleged disparate treatment of prospective jurors would not be dispositive necessarily. Choosing jurors, more art than science, involves a complex weighing of factors. Rarely will a single factor control the decision-making process. Defendant's approach in this appeal involves finding a single factor among the several articulated by the prosecutor as to each challenged prospective juror and matching it to a passed juror who exhibited that same factor. This approach fails to address the factors as a totality which when considered together provide an image of a juror considered in the case undesirable by the State. We have previously rejected this approach. *State v. Jackson*, 322 N.C. at 256-57, 368 S.E.2d at 841. "[M]erely because some of the observations regarding each stricken venireperson may have been equally valid as to other members of the venire who were not challenged [does not] require[ ] . . . finding the reasons were pretextual." *State v. Lemansky*, 780 S.W.2d at 131. "A characteristic deemed to be unfavorable in one prospective juror, and hence grounds for a peremptory challenge, may, in a second prospective juror, be outweighed by other, favorable characteristics." *People v. Mack*, 128 Ill. 2d 231, 239, 538 N.E.2d 1107, 1111 (1989), *cert. denied*, --- U.S. ---, 107 L. Ed. 2d 1072, *reh'g denied*, --- U.S. ---, 108 L. Ed. 2d 969 (1990); *accord United*

States v. Mathews, 803 F.2d at 331. Our review of the record on voir dire reveals that any disparate treatment that may have occurred was not the result of a racially discriminatory motivation.

Defendant also urges that the failure of the trial court to make specific findings of fact renders invalid the conclusion that no discriminatory purpose was involved. Such findings are not necessary when there is no *material* conflict in the evidence. In this case, the trial court requested that the prosecutor articulate his reasons for dismissal and listened to defendant's arguments before rendering its conclusion. Defendant's arguments established no material conflict in the evidence. *See People v. Mack*, 128 Ill. 2d at 245, 538 N.E.2d at 1114 (upholding trial court finding of no *Batson* violation despite failure to enter specific findings of fact, where there was "no real contest as to the facts"); *State v. Lemansky*, 780 S.W.2d at 131 (court statement that "explanations were not insubstantial and the strikes were not made solely out of race motivation" sufficient to support finding of no *Batson* violation).

Defendant asserts further that the trial judge did not fully understand the law when concluding that the prosecutor had no racially discriminatory motive. Defendant refers specifically to a pretrial order which the court made in response to defendant's motion to prohibit the prosecutor from peremptorily challenging any Indian person. The trial court directed the prosecutor "not to excuse peremptorily jurors purely because of their race." We upheld denial of a similar motion in *State v. Mitchell*, 321 N.C. 650, 655, 365 S.E.2d 554, 557 (1988), and do so again today. We have no reason to believe the trial court failed to undertake a proper examination of the prosecutor's explanations. Consequently, we find no violation of *Batson* arising from any peremptory challenge of Indian prospective jurors by the State.

[4] Defendant next complains that the trial judge improperly ejected prospective juror Bryant from the gallery, violating defendant's right to a public trial under the North Carolina Constitution. N.C. Const. art. I, § 18; *In re Nowell*, 293 N.C. 235, 249, 237 S.E.2d 246, 255 (1977). After being peremptorily excused, Bryant remained in the courtroom gallery and advised at least one prospective juror on the meaning of aggravating and mitigating circumstances. On learning this, the trial judge asked Bryant why he remained in the courtroom. The trial judge then told Bryant firmly, "You are

excused." Assuming that defendant is correct in characterizing this exchange as an ejection from the courtroom and assuming arguendo that defendant did not waive the assignment when he failed to object at trial, we find no error in the trial judge's removal of Bryant from the courtroom.

[5] Defendant next excepts to the prosecutor's repeated statements during jury selection that the death penalty was the central question. Defendant failed to object at trial. Defendant relies upon *State v. Smith*, 279 N.C. 163, 181 S.E.2d 458 (1971), in which the prosecutor told the jury, among other things, "I know when to ask for the death penalty and when not to." *Id.* at 165, 181 S.E.2d at 459. Unlike the egregious instances cited in *Smith*, the prosecutor in this case did not interject an opinion of the case. The prosecutor merely stated what the jury already knew—that the case potentially involved the death penalty—and therefore the sentence was of primary importance. We find no error.

[6] Defendant next objects to the prosecutor's question raised to each juror prior to impaneling, "[D]o you feel that you personally can be a part of the legal machinery which might bring [the death penalty] about [in this case]?" Defendant claims this metaphor diminished the individual jurors' sense of responsibility for their sentencing decision. In *State v. Oliver*, we upheld a question by the prosecutor asking whether a juror had "the backbone to be a part of the machinery" imposing the death penalty. *State v. Oliver*, 309 N.C. at 355, 307 S.E.2d at 323. As in *Oliver*, the prosecutor's questions here when taken in context "were made not to badger or intimidate," but to determine whether the jurors "could comply with the law." *Id.* We find no error in this question.

Caldwell v. Mississippi, 472 U.S. 320, 86 L. Ed. 2d 231 (1985), and *State v. Jones*, 296 N.C. 495, 251 S.E.2d 425 (1979), cited by the defendant, are not apposite. In those cases, the prosecutor minimized the jury's responsibility for the decision to impose death by making reference to the defendant's right of appeal. In the case at hand, the prosecutor's question emphasized each juror's personal participation in the decision-making process. There was no error.

GUILT PHASE ISSUES

[7] Defendant argues in his next assignment of error that the cumulative effect of three separate errors effectively excluded second-

degree murder from the consideration of the jury. At issue are an unobjected-to statement made during the prosecutor's closing argument, a sustained objection to the defendant's closing argument, and an unobjected-to instruction on second-degree murder which defendant feels is cursory.

The prosecutor argued in his closing argument:

> Now let me tell you something. The law requires the Judge sitting up there to charge you on a lesser included offense in this case. This defendant is charged with murder in the first degree. The Judge by law must also charge you on the possibility of a verdict of second degree murder.
>
> Let me tell you at the outset, the State's position in this matter. This defendant sitting over here is guilty of first degree murder or he is guilty of nothing. He is guilty of premeditated deliberate murder or he is guilty of nothing. If you can't find him guilty of murder in the first degree, for God sakes [sic] turn him loose because all the evidence of first degree murder is here.

Defendant's counsel during closing argument stated to the jury:

> You have a horrendous decision to make. A decision that will involve the question of first degree murder, or the question of second degree murder. The reason for not guilty. The reason that you have been presented with these three possible [sic] is because His Honor in light of the law believes that you as jurors—

The trial court sustained the prosecutor's objection to this argument. Defendant notes further that the trial judge's instruction on first-degree murder greatly exceeded the time the judge spent instructing on second-degree murder.

We hold that no error occurred as to each individual assignment. "The District Attorney here specifically advocated a decision based on the evidence." *State v. Hogan*, 321 N.C. 719, 724, 365 S.E.2d 289, 291 (1988). The trial judge properly prohibited that part of defendant's argument that referred to what the trial judge believed. *See* N.C.G.S. § 15A-1222 (1983). Finally, the judge's charge on second-degree murder was a correct statement of the law in accordance with *State v. Fleming*, 296 N.C. 559, 562, 251 S.E.2d 430, 432 (1979). Just as the mere fact that the judge may spend

more time summarizing the *evidence* for the State does not amount to an expression of opinion, *State v. Rinck*, 303 N.C. 551, 563, 280 S.E.2d 912, 921 (1981), no expression of opinion arises merely from the comparative amount of time devoted to giving an *instruction*. Where there was no error as to any individual part, we find no error in the whole.

[8] Defendant next complains of the trial judge's instruction on malice. The court stated that malice "may be shown by evidence of ill-will or dislike or hatred, and it is implied in law from the killing with a deadly weapon." The court peremptorily instructed that a .25-caliber weapon is a deadly weapon. Defendant asserts that this instruction relieved the State of the burden of proof of each element of the offense of murder. *See State v. Hankerson*, 288 N.C. 632, 643, 220 S.E.2d 575, 584 (1975), *rev'd on other grounds*, 432 U.S. 233, 53 L. Ed. 2d 306 (1977). Defendant made no objection to this instruction at trial, so we analyze this assignment according to the plain error standard. *See State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304.

"The mandatory presumption is simply a way of stating our legal rule that in the absence of evidence of mitigating or justifying factors all killings accomplished through the intentional use of a deadly weapon are deemed to be malicious and unlawful." *State v. Hankerson*, 288 N.C. at 650, 220 S.E.2d at 588. There was no evidence of provocation on the part of Jeanie Brooks. Hence, the instruction did not relieve the State of its burden of proof. There was no plain error in this instruction.

[9] Defendant next takes exception to the trial court's instruction on first-degree murder. We apply the plain error standard as defendant failed to object at trial. Moreover, "it is fundamental that the charge of the court will be construed contextually, and isolated portions will not be held to constitute prejudicial error when the charge as a whole is free from objection." *State v. Hutchins*, 303 N.C. at 346, 279 S.E.2d at 803. The court instructed the jury that it could consider "evidence relating to expressed malice" as evidence tending to show premeditation and deliberation. Defendant fears that the jury erroneously believed it could use malice itself to establish premeditation and deliberation and that it used the presumption arising from the use of the pistol to infer this malice. Thus, argues defendant, the jury could have convicted him of first-

degree murder without ever having found the separate elements of premeditation and deliberation. We disagree.

The judge previously instructed the jury that the element of malice included hatred or ill-will. In stating that the jury could consider "evidence relating to expressed malice" to determine the existence of premeditation and deliberation, the judge stated that threats, the manner of killing, and defendant's declarations were proper for the jury's consideration of premeditation and deliberation. In this case, there was evidence relevant to all three elements. Defendant allegedly stated that he would kill Jeanie before the night was over and that he would shoot her if she played him for a fool. Based on the evidence presented, there was no plain error in the judge's instructions when taken as a whole.

Furthermore, there was no error in permitting the jury to consider evidence of defendant's conduct after the killing. Such conduct included a statement that he had intended to kill Jeanie Brooks. *See State v. Chavis*, 231 N.C. 307, 311, 56 S.E.2d 678, 681 (1949).

[10] Defendant argues further that the trial court improperly instructed the jury on provocation. Defendant concedes that verbal abuse or suspicions of adultery are not sufficient, of themselves, to reduce a crime from murder to manslaughter. *State v. Montague*, 298 N.C. 752, 757, 259 S.E.2d 899, 903 (1979) (verbal provocation); *State v. Ward*, 286 N.C. 304, 313, 210 S.E.2d 407, 413-14 (1974) (adultery), *judgment vacated in part*, 428 U.S. 903, 49 L. Ed. 2d 1207 (1976). However, defendant argues that such provocation can be sufficient to negate evidence of deliberation and thus reduce a crime from first-degree murder to second-degree murder. *See* Annot. "Insulting words as provocation of homicide or as reducing the degree thereof," 2 A.L.R.3d 1292, 1308 § 7 (1965 & Cum. Supp. 1989). Assuming, without deciding, that this is a correct statement of the law of this state, we find that it does not apply to this case. Wanting to dance with a person not one's beau does not rise to the level of insult, vilification, or indecent or abusive language that underpins the cases on which defendant relies. Mere jealousy, without more, cannot be sufficient to negate deliberation. *See State v. Eaton*, 154 S.W.2d 767 (Mo. 1941) (there was no provocation sufficient to negate deliberation though the deceased, who had been keeping company with defendant, refused to have anything more to do with him and later spoke the words "I don't want

to go with you"); *see also State v. Ward*, 286 N.C. at 313, 210 S.E.2d at 414 (refusing to extend the exculpatory features of *crime passionel* to the killing of a mistress).

[11] Defendant next takes exception to those portions of the prosecutor's closing argument on guilt that described the elements of premeditation and deliberation. Defendant failed to object at trial.

Our inspection of the prosecutor's argument reveals no distorting statement of the law. The prosecutor stated that deliberation meant a "cold blooded murder" and that it did not include the case where a man comes home and "finds his wife shacked up there with somebody." Such an example offered for the sake of comparison was not so grossly improper as to require the trial court to intervene *ex mero motu*. *State v. Robbins*, 319 N.C. 465, 523-24, 356 S.E.2d 279, 314, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987).

The prosecutor also argued that defendant's statement, "I meant to kill the s---of-a-b----," after defendant "pumped three rounds into the body of Jeanie Brooks" was evidence of premeditation and deliberation. This being a correct statement of the law, *State v. Chavis*, 231 N.C. at 311, 56 S.E.2d at 681, supported by the evidence, *State v. Hogan*, 321 N.C. at 724, 365 S.E.2d at 291, we find no error in this argument.

[12] In his final assignment of error in the guilt phase, defendant asserts that the trial court should have intervened to curb the prosecutor's argument that the victim's "family sitting there doesn't have anybody to turn to but you. . . . You are the body of society today. You are the body of Robeson County today. And you are the only people that society can turn to today." Defendant made no objection to this argument at trial.

> This Court has stressed that a jury's decision "must be based solely on the evidence presented at trial and the law with respect thereto, and not upon the jury's perceived accountability to the witnesses, to the victim, to the community, or to society in general." *State v. Boyd*, 311 N.C. 408, 418, 319 S.E. 2d 189, 197 (1984), *cert. denied*, 471 U.S. 1030, 85 L.Ed. 2d 324 (1985). Such arguments are not appropriate in the guilt phase of the trial, in which the jury's focus is properly upon guilt or innocence, not upon mercy, prejudice, pity or fear.

State v. Brown, 320 N.C. 179, 195-96, 358 S.E.2d 1, 13, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987). We conclude that the remarks here, like those in *Brown*, had no effect on the jury's verdict where the evidence of the defendant's guilt was so overwhelming.

SENTENCING PHASE ISSUES

[13] Defendant took the stand in the sentencing phase against the advice of his attorneys. Following his testimony, the State cross-examined the defendant regarding prior convictions more than ten years old. These convictions and dates of judgment were:

1. unlawful possession of whiskey for purposes of resale (1950)
2. transporting whiskey (1953)
3. selling a pistol without a permit (1961)
4. assault on an officer (1964)
5. carrying a concealed weapon (1969)
6. assault (1970)
7. assault (1971)
8. possession of a deadly weapon (1971)
9. assault (1973)
10. assault (1976)

There was no evidence establishing whether these old convictions were felonies or misdemeanors. The jurisdictions making these judgments included Maryland and New York. Defendant put on no evidence to support the mitigating circumstance that he had no significant history of prior criminal activity prior to the cross-examination nor subsequent to it, nor did the trial judge charge the jury on the circumstance. Previous to the cross-examination, the State introduced evidence of prior convictions of murder and assault to support the aggravating circumstance of a prior felony involving violence to the person.

N.C.G.S. § 15A-2000(e)(3) sets out that previous convictions of "a felony involving the use or threat of violence to the person" are an aggravating circumstance for consideration by the jury. There is no doubt that three and arguably five of these convictions did not involve the threat or use of violence. It is not at all clear which, if any, of these convictions were felonies. Thus, these convic-

tions were not admissible for the purpose of establishing the aggravating circumstance set out in N.C.G.S. § 15A-2000(e)(3). *State v. Brown*, 315 N.C. 40, 63, 337 S.E.2d 808, 825 (1985), *cert. denied*, 475 U.S. 1165, 90 L. Ed. 2d 733 (1986), *overruled in part on other grounds*, *State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988).

Rule 609 of the Rules of Evidence permits the introduction of convictions more than ten years old for the limited purpose of impeachment if two requirements are first met. First, the court must determine that the probative value of the convictions, supported by specific facts and circumstances, outweighs the prejudicial effect of introduction. Second, the State must give "sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence." N.C.G.S. § 8C-1, Rule 609(b) (1986). The State concedes that "the record does not indicate that the prosecutor gave the notice required." Nor is there any indication that the judge indulged in the weighing process despite timely objection from the defendant.

We have held that evidence of bad character is admissible to rebut evidence of good character presented by a defendant for the purpose of establishing a mitigating circumstance. However, such evidence of bad character is not admissible in the State's case-in-chief. *State v. Silhan*, 302 N.C. 223, 273, 275 S.E.2d 450, 484 (1981). Moreover, it is error to admit rebuttal evidence prior to evidence offered to support the circumstance. *State v. Taylor*, 304 N.C. 249, 276, 283 S.E.2d 761, 778-79 (1981), *cert. denied*, 463 U.S. 1213, 77 L. Ed. 2d 1398, *reh'g denied*, 463 U.S. 1249, 77 L. Ed. 2d 1459 (1983). We hold that admission of these convictions under these circumstances was error.

The State argues that defendant's responses to questions regarding these convictions rendered any error harmless. These responses variously consisted of admissions, denials, protestations of forgetfulness, and inartful attempts to explain the circumstances of conviction. Defendant's responses came after the trial court overruled the defense counsel's objections. By virtue of these explanations, the State says defendant suffered no prejudice.

In *Taylor*, this Court held that admitting evidence of prior convictions for the purposes of rebutting a mitigating circumstance of no significant history of prior convictions was improper when admitted in the State's case-in-chief. *State v. Taylor*, 304 N.C. at

276, 283 S.E.2d at 778-79. We held that such admission was harmless, however, because "much of the testimony objected to . . . also was competent as evidence of [various] aggravating circumstances." *Id.* at 277, 283 S.E.2d at 779. This Court further found support for its conclusion in the fact that "the jury had before it all of the evidence offered at the guilt/innocence phase as well as the additional evidence presented at the sentencing phase." *Id.* at 278, 283 S.E.2d at 779.

In *Brown*, we also concluded no prejudicial error resulted from admission in the State's case-in-chief of evidence offered to rebut the mitigating circumstance that the defendant had no significant history of prior criminal activity. Though admission of this evidence out of turn was error, *State v. Brown*, 315 N.C. at 64, 337 S.E.2d at 826, such error was harmless. The error in this case was due to improper timing in the introduction of the evidence. *Id.* Defendant had admitted the existence of these convictions in the guilt/innocence phase without specifying the number of counts.

In the case before us, defendant presented no evidence of his good reputation. The State had already introduced its evidence of prior felonies, and defendant at no time tried to suggest that he had no significant history of prior criminal activity.

Defendant argues that prejudice occurred for at least two reasons. First, three of these convictions occurred prior to *Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799 (1963) (constitutional error to convict indigent defendant not offered representation of counsel). Defendant suggests that he may have been convicted without the assistance of counsel in these cases. Admission of prior convictions obtained in violation of the right to counsel for purposes of impeachment or to affect the length of sentence violates N.C.G.S. § 15A-980. A defendant may waive the right to suppress evidence of such convictions if he fails to make a motion to suppress. N.C.G.S. § 15A-980(b) (1986); *State v. Thompson*, 309 N.C. 421, 427, 307 S.E.2d 156, 160 (1983). Though defendant made no motion to suppress these convictions, he contends this failure was the direct result of the State's failure to comport with the notice requirements set out in Rule of Evidence 609(b).

Second, defendant contends that the cross-examination as to these prior convictions was prejudicial because the introduction of defendant's thirty-seven-year-old criminal record assured the jury that defendant was not capable of rehabilitation. Thus, the jury

could conclude that defendant was a fitting subject for the death penalty. We conclude that, under the circumstances of this case, the admission of these old convictions was error. Because we conclude that this error was prejudicial, we remand for a new sentencing hearing.

[14] We address one other sentencing phase issue raised by defendant because it may recur on resentencing. Defendant asserts that it was error for the trial judge to fail to submit the defendant's age of sixty-one years as a mitigating circumstance. N.C.G.S. § 15A-2000(f)(7) (1988). Even had he requested that the trial judge submit this circumstance, which defendant did not, the evidence did not support offering it for the jury's consideration. We note parenthetically that we have not considered this issue in the context of advanced age. However, the cases considering the matter in the context of extreme youth are equally applicable. "[T]he chronological age of a defendant is not the determinative factor . . . ." *State v. Oliver*, 309 N.C. at 372, 307 S.E.2d at 333. Defendant asserts that his borderline I.Q. of seventy-one and his chronological age of sixty-one, combined, supported submission of the circumstance of his age to the jury. However, when balanced against defendant's youthful interest in the victim, his vigorous responses to the prosecutor's cross-examination, and his physical prowess in his attempts to escape, the evidence did not require submission of this circumstance.

We are cognizant of the recent decision in *McKoy v. North Carolina*, --- U.S. ---, 108 L. Ed. 2d 369 (1990), and its probable effect on the sentencing hearing in this case. However, as defendant is being awarded a new sentencing hearing for the reasons stated, we do not find it appropriate to discuss *McKoy* in this opinion.

Our review of the record on appeal indicates that defendant's other assignments of error are not likely to recur. For that reason, we do not address them.

In summary, our review of the record reveals no error in the guilt phase of the proceedings. However, in light of prejudicial error occurring in the sentencing phase, we vacate the sentence of death and remand for a new sentencing hearing.

Guilt Phase: No error.

Sentencing Phase: Death sentence vacated; remanded for new sentencing hearing.

CITY OF KANNAPOLIS v. CITY OF CONCORD

No. 460A89

(Filed 10 May 1990)

1. **Municipal Corporations § 2.1 (NCI3d)— voluntary annexation— simultaneous annexation necessary for contiguity—statutory requirements not met**

N.C.G.S. §§ 160A-31(f) and (g) do not permit a municipality to annex by voluntary means a tract of land owned by the municipality that is contiguous with its municipal boundaries only by virtue of a second tract of land that is being annexed simultaneously.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 62, 66, 67, 69.

2. **Municipal Corporations § 2.1 (NCI3d)— involuntary annexation—resolution of intent—failure to state effective date—inconsequential irregularity**

The failure of a municipality to specify in its initial resolution of intent to annex that the effective date of the involuntary annexation would be at least one year from the date of passage of the annexation ordinance was an inconsequential irregularity which did not invalidate the annexation where the correct annexation date was set forth in the annexation ordinance. N.C.G.S. § 160A-49(j).

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 62, 66, 67, 69.

3. **Municipal Corporations § 2 (NCI3d)— prior jurisdiction to annex**

The City of Kannapolis acquired prior jurisdiction over the City of Concord to annex Lake Concord property where Kannapolis adopted a valid resolution of intent to annex on 14 October 1987, a previously initiated voluntary annexation proceeding by Concord was invalid because the property was

not then contiguous to its boundaries, and a valid annexation proceeding by Concord was not initiated until 10 December 1987.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 62, 66, 67, 69.

Justice FRYE dissenting.

Justice MARTIN dissenting.

Justice FRYE joins in this dissenting opinion.

APPEAL by plaintiff pursuant to N.C.G.S. § 7A-30(2) from a decision of a divided panel of the Court of Appeals, reported at 95 N.C. App. 591, 383 S.E.2d 402 (1989), affirming summary judgment for defendant entered by *Cornelius, J.*, on 19 September 1988 in Superior Court, CABARRUS County. Defendant cross-appealed, and on 20 November 1989 we allowed discretionary review of the issue raised by the cross-appeal. Heard in the Supreme Court 14 March 1990.

Womble Carlyle Sandridge & Rice, by Roddey M. Ligon, Jr., and Rutledge, Friday, Safrit & Smith, by Walter M. Safrit, II, for plaintiff, appellant and cross-appellee.

Petree Stockton & Robinson, by W. R. Loftis, Jr., Penni P. Bradshaw, Kenneth S. Broun and J. Anthony Penry, and Johnson, Belo & Plummer, by Gordon L. Belo, for defendant, appellee and cross-appellant.

WHICHARD, Justice.

This appeal involves attempts by two municipalities to annex the same area, Lake Concord and its watershed, which abuts the City of Kannapolis, and which, prior to annexation by the City of Concord of the intervening tract, was separated from that city by an intervening tract of land consisting of eight parcels. The issue presented by defendant Concord's cross-appeal is whether the North Carolina annexation statutes permit a municipality to annex by voluntary means a tract of land that is contiguous with its municipal boundaries only by virtue of a second tract of land that is being annexed simultaneously. We hold that they do not. The issue presented by plaintiff Kannapolis' appeal is whether its failure to specify in its initial resolution of intent to annex that the effective date of the annexation would be at least one year

from the date of passage of the annexation ordinance constituted substantial incompliance with the annexation statute, thus voiding the annexation. We hold that it did not. The result is that under the "prior jurisdiction rule" plaintiff Kannapolis prevails as the first to annex.

The City of Concord is separated from Lake Concord and its watershed, both of which it owns, by a tract of land whose owners filed a petition for voluntary annexation with the Concord Board of Aldermen on or about 16 September 1987. On 24 September 1987, in accordance with the provisions of N.C.G.S. § 160A-31(c), the Board of Aldermen adopted resolutions acknowledging the submittal of this petition, directing the city clerk to investigate its sufficiency, and fixing 8 October 1987 for the public hearing mandated by the statute. The Board also adopted a third resolution stating defendant Concord's intent to annex its Lake Concord property and prescribing that the question of this annexation be addressed at the same public meeting as that set for the annexation of the first, privately-owned tract. This third resolution was adopted pursuant to N.C.G.S. § 160A-31(g), which provides that the governing board of a municipality "may initiate annexation of contiguous property owned by the municipality by adopting a resolution stating its intent to annex the property, in lieu of filing a petition." N.C.G.S. § 160A-31(g) (1987).

Notice of the public hearing was properly published. On 8 October 1987, at the conclusion of the hearing, defendant Concord's Board of Aldermen found that the landowners' petition for annexation met the requirements of N.C.G.S. § 160A-31, and it passed an ordinance annexing that eight-parcel tract to the City of Concord, to be effective 31 October 1987. The Board simultaneously passed an ordinance annexing the Lake Concord property, also to be effective 31 October 1987.

On 14 October 1987, plaintiff Kannapolis' City Council adopted a "resolution of intent" to consider the annexation of certain properties contiguous with its boundaries, including the Lake Concord property. Plaintiff Kannapolis followed the procedure for involuntary annexation detailed in N.C.G.S. § 160A-49. This statute mandates that no resolution of intent may be adopted unless the municipality's governing body has *either* identified the area under consideration for annexation at least one year prior to adopting

a resolution of intent, N.C.G.S. § 160A-49(i) (1987),[1] *or*, for cities initiating annexation with a resolution of intent rather than a resolution of consideration, by providing in the resolution of intent *and* in the ordinance annexing the area "that the effective date of the annexation shall be at least one year from the date of passage of the annexation ordinance." N.C.G.S. § 160A-49(j) (1987). *See Town of Hazelwood v. Town of Waynesville*, 320 N.C. 89, 90-91, 357 S.E.2d 686, 687, *reh'g denied*, 320 N.C. 639, 360 S.E.2d 106 (1987). Plaintiff Kannapolis' resolution of intent to consider the annexation of the Lake Concord property, while otherwise in compliance with the statute, failed to specify the effective date of annexation. The annexation ordinance, adopted 30 March 1988, however, did specify an effective date of 31 March 1989.

In its complaint under the Declaratory Judgment Act, N.C.G.S. § 1-253 through -267 (1983), plaintiff Kannapolis averred that annexation of the Lake Concord property by defendant Concord was invalid because, at the time of adoption of defendant Concord's resolution of intent to annex the Lake Concord tract, the property was not contiguous with that city's boundaries. In its answer defendant Concord asserted that plaintiff Kannapolis also had failed to comply with the statutory procedures for involuntary annexation and thus had failed to acquire prior jurisdiction[2] for annexation of the Lake Concord property.

Aware that its initial efforts to annex the Lake Concord property might have been procedurally flawed, defendant Concord attempted to repeat its annexation process properly. On 10 December 1987, the Board of Aldermen adopted a second resolution of intent to annex the Lake Concord property in accordance with N.C.G.S. § 160A-31(g). As the intervening privately-owned tract had been annexed effective 31 October 1987, the Lake Concord property was, by that date, contiguous with defendant Concord's boundaries, as was statutorily required for the annexation of municipally owned property. N.C.G.S. § 160A-31(g) (1987).

---

1. On 2 February 1987 both plaintiff Kannapolis and defendant Concord had initiated annexation of the Lake Concord area in accordance with N.C.G.S. § 160A-49(i) by adopting resolutions of consideration for the future annexation of that tract.

2. Among equivalent proceedings the "one which is prior in time is prior in jurisdiction to the exclusion of those subsequently instituted." *City of Burlington v. Town of Elon College*, 310 N.C. 723, 727, 314 S.E.2d 534, 537 (1984) (quoting 2 E. McQuillin, *The Law of Municipal Corporations* Sec. 7.22a (3d ed. 1966)).

The trial court granted summary judgment for defendant Concord, and the Court of Appeals affirmed. *City of Kannapolis v. City of Concord*, 95 N.C. App. 591, 383 S.E.2d 402 (1989). The Court of Appeals held that because annexation by defendant Concord of the intervening tract—the subject of the landowners' petition for voluntary annexation—was not effective until 31 October 1987, the Lake Concord property was not contiguous to defendant Concord at any time prior to that date, as required by N.C.G.S. § 160A-31(g) for annexation. *Id.* at 593-94, 383 S.E.2d at 403-04. The majority, however, held that the failure of plaintiff Kannapolis to comply with the requisite of N.C.G.S. § 160A-49(j) by providing in its initial resolution of intent that the annexation would take effect one year after the passage of the ordinance was fatal to its attempt to annex the property, despite plaintiff Kannapolis' averment that such a "purely procedural" mistake did not materially prejudice anyone. Stating that the absence of prejudice does not in itself guarantee "substantial compliance," the majority held that the statutory requisite is explicit and essential. *Id.* at 595, 383 S.E.2d at 404-05. Judge Phillips, dissenting, maintained that the absence of a specified effective annexation date from the resolution of intent was a minor defect and that accordingly summary judgment should have been entered for plaintiff Kannapolis. *Id.* at 596, 383 S.E.2d at 405. Plaintiff Kannapolis exercised its right to appeal. N.C.G.S. § 7A-30(2) (1989). Defendant Concord cross-appealed, and on 20 November 1989 we allowed its petition for discretionary review of the issue raised by the cross-appeal, *viz*, whether its 24 September 1987 resolution of intent to annex was invalid because the subject property was not contiguous to its boundaries at the time.

Our review is limited to the following inquiries: "(1) Did [each] municipality comply with the statutory procedures? (2) If not, will [the opposing party] 'suffer material injury' by reason of the municipality's failure to comply?" *In re Annexation Ordinance*, 278 N.C. 641, 647, 180 S.E.2d 851, 855 (1971). Where annexation proceedings "show *prima facie* that there has been substantial compliance with the requirements and provisions of the Act, the burden is upon [the opposing party] to show by competent evidence failure on the part of the municipality to comply with the statutory requirements as a matter of fact, or irregularity in proceedings which materially prejudice[s] the substantive rights of [the opposing party]." *In re Annexation Ordinance*, 255 N.C. 633, 642, 122 S.E.2d

690, 697 (1961). "Substantial compliance means compliance with the essential requirements of the Act." *Huntley v. Potter*, 255 N.C. 619, 627, 122 S.E.2d 681, 686 (1961).

[1] The question presented by the cross-appeal is whether the initial annexation of the Lake Concord property by defendant Concord was invalid because that property was not itself contiguous to any boundary of that city at the time of the adoption of the resolution of intent to annex. We hold that the Court of Appeals correctly resolved this question. The governing statute plainly states that a municipality "may initiate annexation of *contiguous* property owned by the municipality by adopting a resolution stating its intent to annex the property, in lieu of filing a petition." N.C.G.S. § 160A-31(g) (1987) (emphasis added). N.C.G.S. § 160A-31(f) provides:

> [A]n area shall be deemed "contiguous" if, at the time the petition is submitted, such area either abuts directly on the municipal boundary or is separated from the municipal boundary by a street or street right-of-way, a creek or river, or the right-of-way of a railroad or other public service corporation, lands owned by the municipality or some other political subdivision, or lands owned by the State of North Carolina.

N.C.G.S. § 160A-31(f) (1987). As the Court of Appeals noted, the privately-owned tract linking the Lake Concord property to the Concord city limits was not legally annexed on the date the Concord Board of Aldermen adopted its resolution of intent regarding the Lake Concord property, and it did not become so annexed until the effective date of the annexation ordinance, 31 October 1987. *City of Kannapolis v. City of Concord*, 95 N.C. App. at 594, 383 S.E.2d at 404. Contiguity with the boundaries of the annexing municipality at the time of the adoption of a resolution of intent pursuant to N.C.G.S. § 160A-31(g) is without question an essential requirement of N.C.G.S. §§ 160A-31(f) and (g), read together; failure to meet that requirement precludes a showing of substantial compliance with the Act's provisions and compels the holding that this resolution of intent was void. Thus, for purposes of the prior jurisdiction rule, the first valid mandatory public procedural step by defendant Concord in its attempt to annex the Lake Concord property was taken on 10 December 1987, the date of the adoption by the Concord Board of Aldermen of its second resolution of intent to annex that property.

[2] Applying the same standard of review to the question presented by plaintiff Kannapolis' appeal—whether plaintiff Kannapolis' failure to provide in its initial resolution of intent that the effective date of its annexation would be at least one year from the date of passage of the annexation ordinance precluded substantial compliance with the Act and materially injured defendant Concord—we conclude that such failure was an inconsequential irregularity.

> Absolute and literal compliance with a statute enacted describing the conditions of annexation is unnecessary; substantial compliance only is required. . . . The reason is clear. Absolute and literal compliance with the statute would result in defeating the purpose of the statute in situations where no one has been or could be misled.

In re Annexation Ordinance, 278 N.C. 641, 648, 180 S.E.2d 851, 856 (quoting *State v. Town of Benson, Cochise County*, 95 Ariz. 107, 108, 387 P.2d 807, 808 (1963)).

As we noted in *Town of Hazelwood v. Town of Waynesville*, 320 N.C. 89, 93, 357 S.E.2d 686, 688, the statute governing involuntary annexation *mandates* a waiting period of at least one year before annexation may be completed, whether the process is initiated by resolution of consideration or, as here, by resolution of intent to annex. The reason the statute requires a lengthy period of consideration preceding either the mandatory resolution of intent or the effective date of the annexation ordinance is "to require towns and cities to consider carefully the consequences of involuntary annexation of a particular territory, and it indicates the legislature's desire to enable residents of the area under consideration to anticipate and adjust to the proposed annexation." *Id.*, 357 S.E.2d at 689. It is not the specification of a date at least one year in advance of a resolution of intent to annex that provides a municipality a lengthy period of reflection on its intention and provides affected property owners an opportunity to anticipate and adjust, but the period itself, which is mandated by statute. Given that the minimum period is set by statute and that the annexation ordinance adopted by plaintiff Kannapolis on 30 March 1988 did state the date annexation was to be effective, *viz*, 31 March 1989, the failure of plaintiff Kannapolis to state that date in its resolution of intent was not an omission of an essential requirement of the statute. The statement of the effective date in the annexation ordinance allowed affected parties ample time for

action regarding the proposed annexation, thus fulfilling the notice purpose of the statute. The failure to include the effective date in the resolution of intent also thus was only a "slight irregularity," and "slight irregularities will not invalidate annexation proceedings if there has been substantial compliance with all essential provisions of the law." *In re Annexation Ordinance*, 278 N.C. at 648, 180 S.E.2d at 856.

[3] Because the first valid mandatory public procedural step taken towards the involuntary annexation of the Lake Concord property by the City of Kannapolis was its resolution of intent of 14 October 1987, its proceedings were prior in time and thus prior in jurisdiction to the valid, voluntary annexation proceedings belatedly initiated by the City of Concord on 10 December 1987. *See City of Burlington v. Town of Elon College*, 310 N.C. 723, 314 S.E.2d 534. Accordingly, the decision of the Court of Appeals affirming summary judgment for defendant City of Concord is reversed. The case is remanded to the Court of Appeals for further remand to the Superior Court, Cabarrus County, for entry of summary judgment for plaintiff City of Kannapolis.

Reversed and remanded.

Justice MARTIN dissenting.

I respectfully dissent from the opinion by my brother Whichard. The majority is correct in its holding that Concord's first valid attempt to annex the subject property was taken on 10 December 1987, however, that does not answer the entire case. Kannapolis has never filed a valid proceeding for the purpose of annexing the property in question. Its resolution of intent on 14 October 1987 was fatally defective. Kannapolis began its procedure pursuant to N.C.G.S. § 160A-49(j) which requires that the resolution of intent provide that the effective date of the annexation shall be at least one year from the date of passage of the annexation ordinance. Kannapolis concedes that it failed to include this statutory requirement in its resolution. The statutory procedure for involuntary annexation requires a one-year waiting period, and the statute clearly requires that such be stated in the resolution of intent.

Nevertheless, Kannapolis argues that it has substantially complied with the statute and that its error is not fatal. *In re Annexation Ordinance*, 255 N.C. 633, 122 S.E.2d 690 (1961). Kannapolis

argues that the mistake is purely procedural because the annexation still does not take effect for one year and because the error did not materially prejudice anyone. I find that there is such prejudice, albeit the absence of prejudice does not in itself fulfill the requirements of substantial compliance. *Id.* The statute explicitly requires that the resolution of intent state that the annexation will not take effect for one year after the adoption of the ordinance. This is an essential condition of compliance with the statute, and its omission is a fatal error.

The purpose of requiring this information to be included in the resolution of intent is not to set a period of one year aside for the annexing municipality to think great thoughts about whether it should proceed with the annexation. This appears to be the principal argument of the majority. The purpose of requiring this information in the resolution of intent is so that the affected people living in the area to be annexed, and in the other areas of the municipality, may have an opportunity to review and study the issue and to attend any meetings to be held with respect thereto and to organize on their own such groups as they might care to either favoring or disfavoring such annexation. The resolution of intent is not something for the benefit of the governing body of the municipality but is for the purpose of providing information to the affected citizens and to the affected neighboring municipalities as to the impending annexation, thus allowing those affected parties to take such action as they think proper with respect to the proposed annexation. I cannot conceive how this is simply a technical or procedural error. It is the very heart and reason for requiring the passage of the resolution of intent. Plaintiff's fatally flawed resolution of intent does not support the "prior jurisdiction rule."

The majority attempts to justify Kannapolis' proceeding by arguing that the notice in the ordinance is sufficient to substantially comply with the statute. This argument totally misses the mark. Once the ordinance is passed, affected parties have no recourse with the city. I do not know of any incidence in which a municipality has revoked an annexation ordinance.

The citizens affected by the annexation need to know the effective date so that they can take intelligent action to attack or support the *passage* of the proposed ordinance. They have no "ample time for action" once the ordinance is adopted. There is no need to lock the barn once the horse has departed.

Where a municipality embarks upon such a serious governmental function as the annexation of property, it is incumbent upon that municipality to comply strictly with the authorizing statute. This is because the statute sets out the best methods in which the citizens of the municipality may be advised as to the proposed action by the municipality. This is especially important in this case where Kannapolis seeks to annex Lake Concord, a watershed and impoundment facility, belonging to the City of Concord and included by Concord in its future planning as a water source for its citizens. By failing to follow the authorizing statute in this case, the general populace of affected parties has been deprived of information concerning this important and drastic action by their government. Governmental action without providing the citizens with proper information has been condemned in this country since the Revolution of 1776. A democratic government can only be sustained by an informed public. I vote to affirm the decision of the Court of Appeals.

Justice FRYE joins in this dissenting opinion.

Justice FRYE dissenting.

Stripped of legalese, the question in this case is whether Concord or Kannapolis took the first valid mandatory public procedural step to annex Lake Concord and its watershed. Concord made a false start but corrected it on 10 December 1987. Kannapolis made a false start on 14 October 1987 and attempted to correct it on 30 March 1988 when the annexation ordinance was adopted. Thus, Concord, not Kannapolis, wins the race. I do not believe that the failure to include the effective date in the resolution of intent is a "slight irregularity" or that putting the correct date in the annexation ordinance some five and one-half months later cures the defect so as to cut off Concord's right to annex its own property. Accordingly, I dissent from the result reached by the majority.

STATE OF NORTH CAROLINA *EX REL.* UTILITIES COMMISSION, INTERVENOR-APPELLEE, PUBLIC STAFF OF NORTH CAROLINA UTILITIES COMMISSION, INTERVENOR-APPELLEE, ATTORNEY GENERAL LACY H. THORNBURG, INTERVENOR-APPELLEE, AND THE BOULEVARD FLORIST, INC., COMPLAINANT v. SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, RESPONDENT, AND BELLSOUTH ADVERTISING & PUBLISHING CORPORATION, RESPONDENT-APPELLANT

No. 195PA89

(Filed 10 May 1990)

1. **Telecommunications § 1.1 (NCI3d)— telephone directory— correct listings—utility function**

Publishing a telephone directory with correct listings in both the white and yellow pages is a public utility function, and the Utilities Commission has jurisdiction over a telephone directory publisher with respect to complaints which arise from the publisher's performance of this function for a utility without regard to whether the publisher itself is a public utility.

Am Jur 2d, Telecommunications §§ 23, 63, 64.

2. **Telecommunications § 1.1 (NCI3d); Utilities Commission § 20 (NCI3d)— incorrect yellow pages listing—telephone book publisher—jurisdiction of Utilities Commission**

The Utilities Commission has jurisdiction over a company publishing a telephone directory for a regulated telephone utility with respect to a complaint arising from an incorrect listing in yellow pages advertising and the malfunctioning of equipment installed to direct callers to the correct number.

Am Jur 2d, Telecommunications §§ 23, 63, 64.

ON discretionary review of the decision of the Court of Appeals, 93 N.C. App. 260, 377 S.E.2d 772 (1989), affirming in part and reversing in part the 20 December 1987 order of the North Carolina Utilities Commission. Heard in the Supreme Court 12 December 1989.

North Carolina Utilities Commission Executive Director Robert P. Gruber, by Staff Attorney, Gisele L. Rankin, for Public Staff— North Carolina Utilities Commission.

Lacy H. Thornburg, Attorney General, by Lorinzo L. Joyner, Assistant Attorney General.

Petree Stockton & Robinson, by John T. Allred, for BellSouth Advertising & Publishing Corporation.

FRYE, Justice.

Two questions are presented for our consideration: (1) whether the North Carolina Utilities Commission (Commission) has the authority to exercise jurisdiction over complaints arising from incorrect listings in yellow pages advertising in a regulated telephone utility's directory; and (2) whether the Commission's finding that BellSouth Advertising and Publishing Company (BAPCO) acted as the agent or alter ego of Southern Bell Telephone and Telegraph Company (Southern Bell) is supported by competent, material, and substantial evidence. We answer the first question in the affirmative and, therefore, reverse the decision of the Court of Appeals to the contrary. We find it unnecessary to answer the second question.

This case arose out of a service complaint proceeding before the Commission instituted by Boulevard Florist, Inc. (Boulevard), a Charlotte florist, against BAPCO and Southern Bell. Prior to 1984, Southern Bell published a telephone directory for the Charlotte area and sold yellow pages advertisements for that directory. On 1 January 1984, pursuant to an agreement with Southern Bell, BAPCO began publishing the Charlotte telephone directory and selling advertisements to be placed in the yellow pages of that directory. Boulevard contracted with BAPCO to place an advertisement in the yellow pages of the 1985 Charlotte telephone directory. Boulevard informed the BAPCO representative that Boulevard would be moving its floral business to another location in Charlotte shortly after the 1985 telephone directory was to be distributed. Boulevard and BAPCO agreed that the number and address for the new location would be published in the yellow pages advertisement and that intercept equipment would be installed to direct callers to the old number until after the move. Boulevard moved into its new location on 3 March 1986, much later than originally planned.

In May, 1986, Boulevard filed a complaint with the Commission. In this complaint Boulevard alleged:

> Since the day the 1985 directory was published we have had constant interruption of that transfer recording; i.e., either it did not work at all, and anyone phoning the new number would receive only a ringing sound, with no answer. Or, at

> times, the recording would come on with a disconnect message telling callers that the number they had reached was no longer in service.

Boulevard further alleged that it reported the problems with the intercept system to both BAPCO and Southern Bell, but the problems were not corrected. Boulevard's complaint asked the Commission to investigate the charges for telephone service and yellow pages advertising which Southern Bell and BAPCO claimed Boulevard still owed them.

In response to Boulevard's complaint, BAPCO filed what it called a "special appearance/response" in which it informed the Commission that "BAPCO, whose principal business is publishing directories, including the sale of advertising therein, is not subject to the jurisdiction of the Commission. Therefore, the Commission has no authority to direct that BAPCO satisfy the demands of Boulevard Florist."

The Commission denied BAPCO's motion to dismiss in an Order Denying Motion to Dismiss, Requiring Answer To Complaint, And Scheduling Hearing filed on 22 December 1986. In that order, the Commission stated:

> Prior to the formation of BAPCO and the transfer of directory publishing operations from Southern Bell to BAPCO, the Commission exercised jurisdiction over yellow pages complaints from customers of Southern Bell, and Southern Bell accepted and acknowledged the Commission's jurisdiction by filing Answers or Notices of Settlement of the complaints. Although the Commission had no jurisdiction to award monetary damages, such as the loss of business income arising out of yellow pages errors, the Commission's complaint procedure usually resulted in bringing about the same type of relief for the complainants, such as the correction of the advertisements or the cancellation of the charges, in whole or in part, for the advertisements complained of.

The Commission further pointed out that in the Southern Bell rate case, Docket No. P-55, Sub 834, it expressly withheld Commission approval of the contract between Southern Bell and BAPCO in which Southern Bell transferred the responsibility for publishing a directory to BAPCO.

On 9 June 1987, an evidentiary hearing on the merits of Boulevard's complaint was held before Hearing Examiner Robert H. Bennink, Jr. The Hearing Examiner made certain findings of fact and conclusions for these findings in a Recommended Order Granting Complaint In Part which was filed on 1 December 1987. The recommended order in part provided:

> 1. That Southern Bell shall grant Boulevard Florist a three (3) month local service billing adjustment or credit in the amount of $450.72, as an allowance for the service problems experienced by the Complainant during the period of time from July 1985, through March 3, 1986.
>
> 2. That Southern Bell and BAPCO shall grant Boulevard Florist a three (3) month billing adjustment or credit applicable to the advertising charges for the 1985 yellow pages ad placed by the Complainant in the Charlotte telephone directory.

This recommended order became a final order on 20 December 1987, because neither BAPCO nor Southern Bell appealed the order to the full Commission. Subsequently, BAPCO appealed the final order to the Court of Appeals. The Court of Appeals held that the Commission erred in asserting jurisdiction over BAPCO and vacated the Commission's order as to BAPCO. *State ex rel. Utilities Commission v. Southern Bell*, 93 N.C. App. at 268, 377 S.E.2d at 777. The Public Staff and the Attorney General petitioned this Court for discretionary review. We allowed these petitions on 27 June 1989.

While this Court and the Court of Appeals have addressed the issue of yellow pages advertising, none of the cases have directly addressed the question in the present case of whether the Commission has jurisdiction over complaints arising from the incorrect listing of a telephone number in the yellow pages. *See State ex rel. Utilities Commission v. Southern Bell*, 307 N.C. 541, 299 S.E.2d 763 (1983) (*Southern Bell*) (whether the revenues and expenses from the yellow pages could be included in rate-making proceedings); *Gas House, Inc. v. Southern Bell Telephone Co.*, 289 N.C. 175, 221 S.E.2d 499 (1976) (*Gas House*) (whether damages in the form of lost profits can be recovered in a civil action arising from an improper listing in the yellow pages when the contract included a limitation of liability clause); and *In re Proposed Assessment v. Carolina Telephone*, 81 N.C. App. 240, 344 S.E.2d 46 (1986) (whether revenues from the yellow pages had to be included in the utility's

franchise tax base). In answering this question, we look first to the language of the statutes found in Chapter 62 of the North Carolina General Statutes which addresses the powers and duties of the Commission.

The general powers of the Commission are set out in Article 3 of our statutes:

> The Commission shall have and exercise such general power and authority to supervise and control the public utilities of the State as may be necessary to carry out the laws providing for their regulation, *and all such other powers and duties as may be necessary or incident to the proper discharge of its duties.*

N.C.G.S. § 62-30 (1989) (emphasis added). Section 62-42 is entitled "Compelling efficient service, extensions of services and facilities, additions and improvements," and it provides in part:

> (a) Except as otherwise limited in this Chapter, whenever the Commission, after notice and hearing had upon its own motion or upon *complaint*, finds:
>
> (1) *That the service of any public utility is inadequate*, insufficient or unreasonably discriminatory, or
>
> . . . .
>
> (5) That any *other act is necessary to secure reasonably adequate service* or facilities and *reasonably and adequately to serve the public convenience and necessity*,
>
> the Commission shall enter and serve an order directing that such additions, extensions, repairs, improvements, or additional services or changes shall be made or affected within a reasonable time prescribed in the order.

N.C.G.S. § 62-42(a)(1) and (5) (1989) (emphasis added).

Section 62-73 deals with the Commission's jurisdiction in complaint proceedings such as the one in this case. That statute provides in part:

> Complaints may be made by the Commission on its own motion or by any person having an interest, either direct or as a representative of any persons having a direct interest in the subject matter of such complaint by petition or complaint

> in writing setting forth *any act or thing done or omitted to be done by any public utility*, including any rule, regulation or rate heretofore established or fixed by or for any public utility in violation of any provision of law or of any order or rule of the Commission, or that any rate, service, classification, rule, regulation or practice is unjust and unreasonable.

N.C.G.S. § 62-73 (1989) (emphasis added).

BAPCO contends, and the Court of Appeals held, that the Commission has no jurisdiction over BAPCO since § 62-73 provides for complaints only against a "public utility"; *State ex rel. Utilities Commission*, 93 N.C. App. at 264, 377 S.E.2d at 774, and BAPCO is not a public utility as that term is defined in N.C.G.S. § 62-3(23)(a)(6).[1] BAPCO's contention places too much emphasis on the term "public utility" as found in the statute, rather than looking at the functions which the public utility is required by statute and by rule of the Commission to perform. In *Southern Bell*, the utility argued that the Commission could not include revenues from the yellow pages advertising in operating statistics for the purpose of ratemaking because publishing the yellow pages is not an essential part of the public utility function of providing telecommunications service. 307 N.C. at 544, 299 S.E.2d at 765. In support of this argument, the utility pointed to the definition of a public utility found in the statutes and argued that the actual transmission of messages across telephone lines does not require the publishing of a yellow pages directory. *Id.* This Court concluded:

> Although Southern Bell is technically correct in its contention that actual transmission of messages across telephone lines is not dependent on the existence of yellow pages, such an interpretation of the *public utility function* is far too narrow. Southern Bell's *utility function* is to provide adequate service to its subscribers. To suggest that the mere transmission of messages across telephone lines is adequate telephone service is ludicrous.

Id. (emphasis added). In determining the scope of the Commission's authority, *Southern Bell* clearly stands for the propositions that:

---

1. That definition provides that a public utility is a person "[c]onveying or transmitting messages or communications by telephone or telegraph, or any other means of transmission, where such service is offered to the public for compensation." N.C.G.S. § 62-3(23)(a)(6) (1989).

1) the emphasis should be placed on the *public utility function* rather than a literal reading of the statutory definition of "public utility," and 2) the statutory definition should not be read so narrowly as to preclude Commission jurisdiction over a function which is required to provide adequate service to the subscribers.

BAPCO further contends, and the Court of Appeals agreed, that the Commission does not have jurisdiction over BAPCO because the publishing of yellow pages advertising is not a utility function. *State ex rel. Utilities Commission v. Southern Bell*, 93 N.C. App. at 266, 377 S.E.2d at 775. The Public Staff and the Attorney General both contend that the Commission has jurisdiction in this case because publishing the yellow pages is a public utility function. As authority for this proposition, the Public Staff and the Attorney General rely on *Southern Bell*. While the language of *Southern Bell* may lend support to this contention, *see* 307 N.C. at 547, 299 S.E.2d at 767, deciding whether publishing the yellow pages is a public utility function is not necessary for the resolution of this case. We need not decide whether the Commission has jurisdiction over the entire yellow pages operation because the only problem complained of in the present case is poor telephone service because of an incorrect listing.

Southern Bell also made the statement that "the yellow pages have never been and are not now regulated by the Utilities Commission."[2] 307 N.C. at 544, 299 S.E.2d at 765. This language does not mean that complaints concerning telephone listings in the yellow pages may not properly come under the jurisdiction of the Commission. If a utility elects to include yellow pages advertising in the directory which it is required to publish, then clearly proper listings in the advertisements in the yellow pages become a part of the utility's "function of providing adequate service" to the public. The public is not well served by listings in the yellow pages or the white pages of the directory which are incorrect or confusing to the consuming public. In the present case, Boulevard's listing

---

2. While the Commission has not attempted any comprehensive regulation of the yellow pages, it has traditionally handled yellow pages complaints. The Commission drew attention to this fact in its order denying BAPCO's motion to dismiss issued on 22 December 1986. This statement, which is cited more fully earlier in this opinion, explained that the Commission had always exercised jurisdiction over yellow pages complaints from customers of Southern Bell. The type of relief typically given was correction of the advertisement or cancellation of all or part of the charges for the advertisement.

was incorrect and confusing to the public because the intercept equipment did not function correctly and caused potential customers to think that the line was busy or that the telephone had been disconnected. Providing a correct telephone listing in the yellow pages as well as in the white pages of the directory is a utility function, and the Commission properly has jurisdiction over complaints which arise from this function such as the complaint in the present case.

[1] While Southern Bell, the regulated public utility, is the entity which is required by tariff to publish the telephone directory, it has contracted with BAPCO to take over this duty and publish the directory. As noted earlier, BAPCO contends that it is not subject to the complaint jurisdiction of the Commission because BAPCO is not a "public utility" as defined by the statute. We have already concluded that publishing the directory, which must include proper telephone listings in both the white pages and the yellow pages, is a utility function which comes under the jurisdiction of the Commission. Since publishing the directory with correct listings is a public utility function, and since BAPCO is performing this function for Southern Bell, the Commission has jurisdiction over BAPCO to handle any complaints which arise from BAPCO's performance of this function without regard to whether BAPCO itself is a public utility. Therefore, we need not address the Court of Appeals' holding that BAPCO is not the alter ego or agent of Southern Bell and for that reason is not subject to the jurisdiction of the Commission.

[2] The real issue in this case is whether the Commission has complaint jurisdiction over a company publishing, on behalf of a regulated telephone utility, a telephone directory which also contains paid advertising. Without deciding whether the Commission has general regulatory jurisdiction over yellow pages advertising, we conclude that the Commission has jurisdiction over complaints concerning incorrect telephone number listings in the telephone directory even when the regulated utility has delegated to another company the public utility function of publishing its directory which also includes paid advertising. Providing a correct telephone listing is part of providing "reasonably adequate service" as required by N.C.G.S. § 62-42(a)(5).

We find that our conclusions are not inconsistent with those of other jurisdictions. In *Classified Directory Subscribers Ass'n*

v. Public Serv. Comm'n, 383 F.2d 510 (D.C. Cir. 1967) (*Classified Directory*), the Public Service Commission of the District of Columbia had been asked to assert comprehensive regulatory jurisdiction over the Classified Telephone Directory published by a public utility. *Id.* at 511. In its order, "the Commission concluded that it was statutorily authorized to assert jurisdiction over the 'Yellow Pages' only when necessary to protect and insure 'adequate telephone service and reasonable rates for telephone service.' " *Id.* The Commission did claim that it could assert jurisdiction over "advertising published in the 'Yellow Pages' where the rates or practices associated with such advertising 'adversely affect the recognized regulated services and rates.' " *Id.* In its opinion, the District of Columbia Circuit Court of Appeals added that the Commission claimed jurisdiction "if the Telephone Company's policies or practices rendered the 'Yellow Pages' inadequate as a convenient reference to telephone subscribers." *Id.* at 512. The Commission did not claim jurisdiction over "advertising published in the Classified Directory because such advertising was not essential to telephone service and did not, in itself, constitute a public utility service or facility." *Id.* The United States District Court for the District of Columbia granted defendant-intervenor's cross-motion for summary judgment, effectively affirming the Commission's orders, and the Circuit Court of Appeals affirmed. *Id.*

In the present case, as in *Classified Directory*, the Commission is asserting jurisdiction only over complaints which involve a disruption of the "reasonably adequate service" which the utility must provide the public. In the language of *Classified Directory*, the combination of the directory listing and the faulty intercept equipment in the present case rendered the directory "inadequate as a convenient reference to telephone subscribers" because it essentially made incorrect the number listed in every section of the directory.

In its brief, BAPCO contends that the majority rule in the United States is that yellow pages advertising is not regulated by state utilities commissions. BAPCO cites several cases for this proposition: *Modern Equip. Corp. v. Puerto Rico Tel. Co.*, 440 F. Supp. 1242 (D.P.R. 1977) (yellow pages a matter of private contract, not public service); *Pride v. Southern Bell Tel. and Tel. Co.*, 244 S.C. 615, 138 S.E.2d 155 (1964) (upholding a limitation of liability clause in a yellow pages contract); *A-ABC Appliance of Texas, Inc. v. Southwestern Bell Tel. Co.*, 670 S.W.2d 733 (Tex. App.

1984) (directory publisher was free to contract privately and refuse ad that violated its standards); and *Mountain States Tel. and Tel. Co. v. Public Serv. Comm'n*, 745 P.2d 563 (Wyo. 1987) (held unlawful the Wyoming Public Service Commission's attempt to require Mountain Bell to rescind the transfer of its publishing assets to a related corporation). *Classified Directory* is included in this list of citations, and BAPCO cites it for the holding that yellow pages advertising is not a public utility "service" or "function" within the meaning of the District of Columbia statutes. BAPCO does not discuss the part of that decision which upheld the Commission's order allowing the Commission jurisdiction if the company's "policies or practices rendered the 'Yellow Pages' inadequate as a convenient reference to telephone subscribers." *Classified Directory*, 383 F.2d at 512. None of the other cases cited by BAPCO make this distinction, and all seem to focus on the advertisements in the yellow pages rather than whether the yellow pages serve as a correct reference for telephone numbers. Since it is unnecessary for us to decide in this case whether the Commission has general regulatory jurisdiction over yellow pages advertising, the cases cited by BAPCO, with the exception of *Classified Directory*, are not directly applicable to the present case.

The Commission in *Classified Directory* seemed to be making the same distinction which we are making in this case and which the Public Staff made in its argument. During oral argument, the Public Staff made it clear that the Commission was not seeking to assert general regulatory jurisdiction over the entire yellow pages operation, but rather they seek to assert jurisdiction to ensure the customers a remedy if their numbers are listed incorrectly. The Public Staff contends that the Commission is the proper place for such complaints because the Commission can grant certain remedies, such as making the utility send out a correction in the listing, which a court could not ordinarily do.

We agree with the Public Staff that the Commission is the proper place for complaints of this nature. We conclude that our statutes support this jurisdiction in the mandate to the telephone utilities that they provide "reasonably adequate service." N.C.G.S. § 62-42(a)(5). Providing a telephone directory is a public utility function, and complaints arising from incorrect telephone number listings in the directory, whether in the white pages or the yellow pages, come under the jurisdiction of the Commission because providing incorrect telephone numbers is disruptive to the public utili-

ty service which the directory is to provide. This jurisdiction continues even though the public utility transfers its duty to publish the directory to another entity.

For the foregoing reasons, we hold that the Court of Appeals erred in vacating the Commission's 20 December 1987 order as to BAPCO. Therefore, the decision of the Court of Appeals reversing the Commission's assertion of jurisdiction over BAPCO in this case is reversed.

Reversed.

STATE OF NORTH CAROLINA v. WILLIAM KENNETH HANDY

No. 248A87

(Filed 10 May 1990)

1. **Appeal and Error §§ 23, 75 (NCI4th)— guilty plea—death sentence—motion to withdraw plea—right of appeal**

Defendant could appeal a sentence of death entered upon a plea of guilty where the trial judge denied his motion to withdraw his guilty plea. N.C.G.S. §§ 15A-1444(e), 7A-27(a).

Am Jur 2d, Appeal and Error § 271.

2. **Criminal Law § 932 (NCI4th)— withdrawal of guilty plea before sentencing—motion for appropriate relief inapplicable**

The trial judge erred in treating defendant's motion to withdraw his guilty plea in a capital case prior to sentencing as a motion for appropriate relief, since a motion for appropriate relief is a post-verdict motion (or a post-sentencing motion where there is no verdict) made to correct errors occurring prior to, during, and after a criminal trial, and a motion for appropriate relief is not proper where made prior to sentencing when there is no jury verdict.

Am Jur 2d, Criminal Law §§ 501, 502.

3. **Criminal Law § 146 (NCI4th)— presentence motions to withdraw guilty plea—liberality in granting**

While there is no absolute right to withdrawal of a guilty plea, withdrawal motions made prior to sentencing, and especial-

ly at a very early stage of the proceedings, should be granted with liberality.

Am Jur 2d, Criminal Law §§ 501, 502.

4. **Criminal Law § 146 (NCI4th)— presentence motion to withdraw guilty plea—fair and just reason**

A presentence motion to withdraw a plea of guilty should be allowed for any fair and just reason.

Am Jur 2d, Criminal Law §§ 501, 502.

5. **Criminal Law § 146 (NCI4th)— withdrawal of guilty plea—factors considered**

Some of the factors which favor withdrawal of a guilty plea include whether defendant has asserted legal innocence; the strength of the State's proffer of evidence; the length of time between entry of the guilty plea and the desire to change it; whether the accused has had competent counsel at all relevant times; misunderstanding of the consequences of a guilty plea; hasty entry; confusion; and coercion. Prejudice to the State is a germane factor against granting a motion to withdraw.

Am Jur 2d, Criminal Law §§ 501, 502.

6. **Criminal Law § 146 (NCI4th)— presentence motion to withdraw guilty plea—showing of fair and just reason**

Defendant made a sufficient showing of a fair and just reason for his motion to withdraw his guilty plea prior to sentencing in a felony murder case, and the trial judge thus erred in the denial of that motion, where he presented evidence tending to show: defendant sought to withdraw his plea less than 24 hours after he initially offered it; defendant had misgivings about the plea at the time it was entered; defendant asserted his innocence of the armed robbery underlying the felony murder plea and thought that the only factually appropriate plea of guilty would be to second degree murder; and defendant simply followed the advice of his attorneys when he pled guilty and felt that the pressure placed upon him by his attorneys impeded and overbore the exercise of his free will in entering the plea.

Am Jur 2d, Criminal Law §§ 501, 502.

APPEAL as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by *Stevens (Henry L., III), J.*, at the 30 March 1987 Criminal Session of Superior Court, ONSLOW County. Heard in the Supreme Court 14 February 1990.

Lacy H. Thornburg, Attorney General, by G. Patrick Murphy, Assistant Attorney General, for the State.

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

MEYER, Justice.

After careful consideration of the record and briefs and hearing oral argument, we conclude that defendant should have been allowed to withdraw his plea of guilty in this capital case, that defendant's sentence of death entered upon his guilty plea must be vacated, and that there must be a new disposition of the case upon the entry of a new plea. We set out only those facts necessary to an understanding of our decision.

During the course of investigation into the 3 November 1986 stabbing death of Eugene Michael Morgan, defendant told the investigating officer that Morgan had made a homosexual advance towards defendant and that he became enraged, hit Morgan, then stabbed him to death. Defendant stated he then took Morgan's wallet to make the stabbing look like a robbery.

After his arrest, defendant made two more written statements. The first repeated defendant's initial description of events. In the second statement, which was a transcript of a question and answer session between defendant and an investigating officer, defendant stated he stabbed Morgan in order to rob him. The last statement contained no mention of a homosexual advance.

At his arraignment for murder on 27 January 1987 defendant pled "not guilty." During final pretrial motions on 31 March 1987, defendant moved to withdraw his "not guilty" plea and tendered a plea of "guilty" to felony murder, with the charge of armed robbery being the underlying felony. After conducting the required statutory inquiry, the trial court accepted and recorded defendant's guilty plea. N.C.G.S. § 15A-1022 (1988). Jury selection for the capital sentencing hearing began on the same day following a luncheon

recess. Court recessed without having completed jury selection and therefore before impaneling the sentencing jury.

On the following morning, 1 April 1987, before the proceedings reconvened, defense counsel made a motion to withdraw the plea of guilty. The trial judge treated this request as a motion for appropriate relief under N.C.G.S. §§ 15A-1401 to -1420. He denied the motion in a seven-page order containing findings and conclusions to the effect that defendant's plea of guilty was his informed choice, made freely, voluntarily, and understandingly; that there was a factual basis for the plea; and that defendant's evidence to the contrary was unbelievable. The trial judge further noted that, to the extent the court had any discretion to allow or deny the right to withdraw the plea previously entered, the court, in its discretion, denied defendant's motion. We hold that the trial court applied the wrong standard.

[1] We note as an initial matter that there is no conflict between N.C.G.S. § 15A-1444(e) ("except when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest . . .") and N.C.G.S. § 7A-27(a) (appeal as of right in murder cases where the sentence is life imprisonment or death). Defendant may appeal as of right since the trial judge denied his motion to withdraw his plea of guilty. *Compare State v. Dickens*, 299 N.C. 76, 79, 261 S.E.2d 183, 185 (1980) (denial of motion to withdraw plea) *with State v. Taylor*, 308 N.C. 185, 186, 301 S.E.2d 358, 359 (1983) (defendant receiving life sentence "has no appeal of right since he entered pleas of guilty and no contest").

[2] The trial judge erred in treating defendant's motion made prior to verdict as a motion for appropriate relief. A motion for appropriate relief is a *post-verdict* motion (or a post-sentencing motion where there is no verdict) made to correct errors occurring prior to, during, and after a criminal trial. N.C.G.S. § 15A-1411 (1988); Bailey, *Trial Stage and Appellate Procedure Act: An Overview*, 14 Wake Forest L. Rev. 899, 905-06 (1978). A party may make the motion "[a]fter the verdict but not more than 10 days after entry of judgment." N.C.G.S. § 15A-1414(a) (1988). "Entry of [j]udgment" occurs "when sentence is pronounced." N.C.G.S. § 15A-101(4a) (1988). A verdict is "the answer of the *jury* concerning any matter of fact submitted to [it] for trial." *State v. Jernigan*, 255 N.C. 732, 736, 122 S.E.2d 711, 714 (1961) (emphasis added).

"[I]n a strict sense only a jury can render a verdict, and the term does not include findings by a court." 76 Am. Jur. 2d *Trial* § 1111, at 90 (1975); *see State v. Banner*, 149 N.C. 559, 563, 63 S.E. 169, 171 (1908) ("verdict" of judge is a "legal anomaly"). A motion for appropriate relief is not proper where made prior to sentencing when there is no jury verdict.

Had defendant waited to challenge his plea of guilty until after the jury had recommended and the trial court had imposed a sentence, it would have required the filing of a motion for appropriate relief.[1] A motion to withdraw a guilty plea made before sentencing is significantly different from a post-judgment or collateral attack on such a plea, which would be by a motion for appropriate relief. *See* N.C.G.S. § 15A-1420 (1988); *see generally State v. Dickens*, 299 N.C. 76, 261 S.E.2d 183 (discussing a post-judgment motion to withdraw a guilty plea). A fundamental distinction exists between situations in which a defendant pleads guilty but changes his mind and seeks to withdraw the plea before sentencing and in which a defendant only attempts to withdraw the guilty plea after he hears and is dissatisfied with the sentence. This distinction creates the need for differing legal standards for adjudicating such motions to withdraw guilty pleas, a distinction recognized by most courts.

> In a case where the defendant seeks to withdraw his guilty plea before sentence, he is generally accorded that right if he can show any fair and just reason.
>
> On the other hand, where the guilty plea is sought to be withdrawn by the defendant after sentence, it should be granted only to avoid manifest injustice.

State v. Olish, 164 W. Va. 712, 715, 266 S.E.2d 134, 136 (1980) (citations omitted); *see State v. Copple*, 218 Neb. 837, 359 N.W.2d 782 (1984); *see generally Kercheval v. United States*, 274 U.S. 220, 224, 71 L. Ed. 1009, 1012 (1927). *Compare United States v. Hancock*, 607 F.2d 337 (10th Cir. 1979) (withdrawal before sentencing) *with United States v. Tiler*, 602 F.2d 30, 35 (2d Cir. 1979) (withdrawal after sentencing). *Olish* recognized three reasons for this distinction:

---

1. Under N.C.G.S. § 15A-2002, the trial judge "shall impose" a sentence of death whenever the jury makes such a recommendation. The jury recommendation is in effect the sentence of the trial judge. Thus, in the context of a motion to withdraw a plea of guilty, the oral pronouncement of the recommendation of the jury constitutes entry of judgment as defined in N.C.G.S. § 15A-101(4a).

> First, once sentence is imposed, the defendant is more likely to view the plea bargain as a tactical mistake and therefore wish to have it set aside. Second, at the time the sentence is imposed, other portions of the plea bargain agreement will often be performed by the prosecutor, such as the dismissal of additional charges or the return or destruction of physical evidence, all of which may be difficult to undo if the defendant later attacks his guilty plea. Finally, a higher post-sentence standard for withdrawal is required by the settled policy of giving finality to criminal sentences which result from a voluntary and properly counseled guilty plea.
>
> These considerations are not present where the defendant seeks to withdraw the guilty plea prior to sentencing.

State v. Olish, 164 W. Va. at 716, 266 S.E.2d at 136 (citation omitted).

[3] While there is no absolute right to withdrawal of a guilty plea, *State v. McClure*, 280 N.C. 288, 294, 185 S.E.2d 693, 697 (1972); *State v. Banner*, 149 N.C. at 561, 63 S.E. at 170; *see also People v. Zaleski*, 375 Mich. 71, 79, 133 N.W.2d 175, 179 (1965); *Commonwealth v. Forbes*, 450 Pa. 185, 190, 299 A.2d 268, 271 (1973); *Libke v. State*, 60 Wis. 2d 121, 126, 208 N.W.2d 331, 334 (1973), withdrawal motions made prior to sentencing, and especially at a very early stage of the proceedings, should be granted with liberality, *e.g.*, *People v. Zaleski*, 375 Mich. at 79, 133 N.W.2d at 179; *Commonwealth v. Forbes*, 450 Pa. at 190, 299 A.2d at 271; *Com. v. Jones*, 389 Pa. Super. 159, ---, 566 A.2d 893, 894 (1989); *Libke v. State*, 60 Wis. 2d at 127-28, 208 N.W.2d at 334-35. "It should be easier to withdraw a plea before sentence than after." *Libke v. State*, 60 Wis. 2d at 124, 208 N.W.2d at 333. **Rule derived** from case law: *e.g.*, *Kercheval v. United States*, 274 U.S. at 224, 71 L. Ed. at 1012 (dictum); *Jordan v. United States*, 350 A.2d 735, 737 (D.C. 1976); *State v. Smith*, 61 Haw. 522, 606 P.2d 86 (1980) (per curiam); *People v. Zaleski*, 375 Mich. at 79, 133 N.W.2d at 179; *State v. Olish*, 164 W. Va. 712, 266 S.E.2d 134. **Rule established by legislative enactment or Rule of Criminal Procedure:** *e.g.*, *Wahl v. State*, 691 P.2d 1048 (Alaska App. 1984); *State v. Carrasco*, 117 Idaho 295, ---, 787 P.2d 281, 284 (1990); *State v. DeZeler*, 422 N.W.2d 32, 36 (Minn. App.), *aff'd*, 427 N.W.2d 231 (Minn. 1988); *State v. Harlow*, 346 S.E.2d 350 (W. Va. 1986). **Rule derived by reference to the American Bar Association Standards for Criminal Justice § 14-2.1(a) (2d ed. 1980) or its draft predecessors:**

e.g., *State v. Copple*, 218 Neb. 837, 359 N.W.2d 782; *Commonwealth v. Forbes*, 450 Pa. at 191, 299 A.2d at 271; *Libke v. State*, 60 Wis. 2d 121, 208 N.W.2d 331. The Federal Rules of Criminal Procedure also permit a defendant to withdraw a guilty plea prior to sentencing for "any fair and just reason." Fed. R. Crim. P. 32(d). We find only one jurisdiction that applies a higher standard when a defendant moves to withdraw a plea prior to sentencing, that standard being set by an express rule of criminal procedure (manifest injustice regardless of the stage at which the motion is made). *State v. Taylor*, 83 Wash. 2d 594, 521 P.2d 699 (1974).

There is no established rule in North Carolina governing the standard by which a judge is to decide a motion to withdraw a plea of guilty prior to sentencing. The sole North Carolina appellate decision addressing a presentence motion to withdraw a plea of guilty cites without analysis two cases addressing post-sentence motions to withdraw and a third that does not address a motion to withdraw at all. *State v. Elledge*, 13 N.C. App. 462, 464, 186 S.E.2d 192, 194 (1972) (citing *State v. Crandall*, 225 N.C. 148, 150, 33 S.E.2d 861, 862 (1945) (post-sentence motion to withdraw); *State v. Morris*, 2 N.C. App. 611, 163 S.E.2d 539 (1968) (post-sentence motion to withdraw); and *State v. Wynn*, 278 N.C. 513, 518, 180 S.E.2d 135, 139 (1971) (court did not err when it failed to *ex mero motu* advise defendant to withdraw voluntary plea of guilty)). These cases in turn rely on dicta from *State v. Banner*, 149 N.C. at 561, 63 S.E. at 170.

Banner is not a case concerning a defendant's motion to withdraw a plea. The *Banner* Court considered the authority of a trial judge to strike a defendant's plea of guilty and *ex mero motu* enter a plea of not guilty. *Banner*, in dicta, mentioned that a motion to retract a guilty plea "is addressed to the sound discretion of the court." *Id.* Thus, though North Carolina cases cite *Banner* as setting out the law on motions to withdraw a plea without regard to when such a plea is made, *Banner* is in fact not dispositive of the issue.

[4] *Banner* also states that a trial court has the authority to set aside a plea of guilty "if it was entered unadvisedly or improvidently, or *for any other good reason.*" *Id.* at 562, 63 S.E. at 170 (emphasis added). Permitting the presentence withdrawal of a plea for any good reason is tantamount to permitting withdrawal for any fair and just reason. In light of the considered opinions of other jurisdic-

tions, we hold that a presentence motion to withdraw a plea of guilty should be allowed for any fair and just reason.

"[T]he standard for judging the movant's reasons for delay remains low where the motion comes only a day or so after the plea was entered." *United States v. Barker*, 514 F.2d 208, 222 (D.C. Cir.) (en banc), *cert. denied*, 421 U.S. 1013, 44 L. Ed. 2d 682 (1975); *accord United States v. Carr*, 740 F.2d 339, 344 (5th Cir. 1984), *cert. denied*, 471 U.S. 1004, 85 L. Ed. 2d 159 (1985); *United States v. Joslin*, 434 F.2d 526 (D.C. Cir. 1970); *Kadwell v. United States*, 315 F.2d 667, 670 (9th Cir. 1963); *State v. Mesler*, 210 Mont. 92, 97, 682 P.2d 714, 717 (1984).

> A swift change of heart is itself strong indication that the plea was entered in haste and confusion; furthermore, withdrawal shortly after the event will rarely prejudice the Government's legitimate interests. By contrast, if the defendant has long delayed his withdrawal motion, and has had the full benefit of competent counsel at all times, the reasons given to support withdrawal must have considerably more force.

United States v. Barker, 514 F.2d at 222.

[5] Some of the factors which favor withdrawal include whether the defendant has asserted legal innocence, the strength of the State's proffer of evidence, the length of time between entry of the guilty plea and the desire to change it, and whether the accused has had competent counsel at all relevant times. *Gooding v. United States*, 529 A.2d 301, 306-07 (D.C. 1987). Misunderstanding of the consequences of a guilty plea, hasty entry, confusion, and coercion are also factors for consideration. *State v. Shanks*, 152 Wis. 2d 284, 290, 448 N.W.2d 264, 266-67 (1989). The State may refute the movant's showing by evidence of concrete prejudice to its case by reason of the withdrawal of the plea. Prejudice to the State is a germane factor against granting a motion to withdraw. *United States v. Savage*, 561 F.2d 554 (4th Cir. 1977); *State v. Olish*, 164 W. Va. at 717, 266 S.E.2d at 137. See generally 8A Moore's Federal Practice ¶ 32.07[1] (2d ed. 1990); Project, *Seventeenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1986-1987*, 76 Geo. L.J. 707, 866 n.1680 (1988), for a survey of federal cases.

Our independent review of the record reveals that defendant, in seeking to withdraw his plea, asserted his innocence of the

armed robbery underlying the felony murder plea. Defendant sought to withdraw his plea less than twenty-four hours after he initially offered it. On 31 March 1987, after court convened but before jury selection began, defense counsel moved to withdraw his client's plea of not guilty and tendered, in its stead, a plea of guilty to first-degree murder based upon the felony murder rule and armed robbery. The trial court accepted the plea, and jury selection for the purposes of sentencing began after the luncheon recess at approximately 2:15 p.m. on 31 March 1987. Court recessed for the evening at approximately 5:00 p.m. Before the selection proceedings reconvened the following morning, defense counsel, after a lengthy consultation with his client, informed the trial court and the prosecutor of his client's desire to withdraw his plea of guilty. The inquiry at issue then commenced.

Defendant clearly made a prompt and timely motion to withdraw his plea of guilty. *Cf. United States v. Barker*, 514 F.2d 208 (motion to withdraw came eight months after pleas were entered). Defendant's motion to withdraw his plea of guilty should have been allowed if he proffered any fair and just reason for the motion.

[6] In this case, defendant offered a sufficient basis supporting a fair and just reason for his motion. Defense counsel's comments to the court in announcing his client's desire to withdraw his plea are revealing:

> This morning at approximately 0830, I was informed that my client desired to withdraw his plea to felony murder in the first degree and to robbery with a dangerous weapon to this [c]ourt and he wishes that plea to be fully set aside. He has instructed me to ensure that that plea does not go forward in this court and he's further instructed me that he does intend to tender pleas to this [c]ourt to murder in the second degree and not guilty to robbery with a dangerous weapon. He's instructed his two attorneys—myself and Mr. Wright—to proceed with that plea and also to not proceed any further with the pleas which he's previously made in this court.
>
> Following his announcement to me, he's had an opportunity to speak with and pray with his mother and has had an opportunity to pray alone. He has had an opportunity to speak, for a period of approximately 45 minutes, with his attorneys and received the benefit of our advice. As of this minute, after approximately two hours of consultation with those per-

> sons closest to him, including his two attorneys, he once again reiterates to us that he will not proceed with the pleas which he's tendered in this court.

Defendant then testified in support of his motion. He explained that although he felt his attorneys were giving him their best advice regarding the appropriate plea, he never felt a plea of guilty to first-degree murder was factually appropriate. Furthermore, defendant had had an opportunity to more fully consider this decision and pray about it overnight, as well as discuss it with his mother and with his attorneys. Based upon these contemplations and communications, defendant felt the only appropriate plea of guilty on these facts would be to second-degree murder. He did not feel he was guilty of robbery with a dangerous weapon or murder in the first degree. On cross-examination, he stated that his answer the previous day regarding whether he personally pled guilty was done "under pressure." Defendant felt that he "was under pressure under the circumstances." As he explained:

> I felt that I had pressure coming on me from both sides to plea the way I did. It was not what I had wanted to do but I went with my lawyers' advice at first, thinking that that was the best thing. In actuality, I do not believe the same thing anymore.

Not only had defendant reached this conclusion upon further reflection, but he had misgivings about it at the time the plea was entered. He simply felt compelled based upon the pressure he felt from "[t]he whole situation and circumstances."

Defendant further explained that he had to answer the trial court's questions the previous day as he did because those answers were already on the transcript of plea. "What I had given him, the slip he had asked that question. I had to answer the question is what I had signed my name to. . . . I answered from what was put on the paper, sir."

On redirect examination, defense counsel asked defendant if they (counsel) had "come across very strongly in advising you exactly what we feel you should be doing." Defendant answered affirmatively. He explained that he simply followed the advice of his attorneys when he pled guilty. He felt that the pressure placed upon him by his attorneys impeded and actually overbore the exercise of his free will in entering this plea.

Upon inquiry by the court, defendant explained, "I think that I made the wrong decision to plead guilty to first degree when I do not believe inside myself that I am guilty of first degree." As this evidence reveals, defendant made a sufficient showing of a fair and just reason to withdraw his plea of guilty. *See Lopez v. State*, 227 So. 2d 694 (Fla. App. 1969) (presentence motion to withdraw plea of guilty should have been granted where plea was induced by undue family influence, fear that trial would endanger health of father and subject family to anxiety and scandal, and advice of counsel to enter plea was inconsistent with defendant's declarations of innocence); *People v. Hollman*, 12 Mich. App. 231, 162 N.W.2d 817 (1968) (presentence motion to withdraw plea of guilty should have been granted where defendant pled guilty at behest of wife, who was too ill to withstand pressures of trial).

The State had not yet assembled its witnesses when defendant initially entered his plea, and the State made no argument that it would be substantially prejudiced by a subsequent plea withdrawal. We conclude that under the appropriate standard defendant carried his burden of asserting a fair and just reason for withdrawing his plea of guilty and that the State failed to show that it would be prejudiced by the withdrawal of the plea at the time the motion was made. Defendant's motion to withdraw his plea of guilty should have been allowed. Accordingly, we vacate the sentence of death and remand this case for a disposition upon a new plea by defendant to the indictment.

Death sentence vacated; remanded.

STATE OF NORTH CAROLINA v. GLENN CHARLES AGEE

No. 208A89

(Filed 10 May 1990)

1. Criminal Law § 34.10 (NCI3d)— possession of LSD—evidence of concurrent possession of marijuana—relevant

Concurrent misdemeanor possession of marijuana was admissible in a prosecution for felonious possession of LSD under N.C.G.S. § 8C-1, Rule 401 where the arresting officer initially stopped defendant's vehicle because he suspected defendant

was driving while intoxicated; defendant made a threatening remark as the officer approached defendant's vehicle; this remark prompted the officer to call for assistance; the officer searched defendant's person for weapons when his backup arrived; and, after finding a bag of marijuana in defendant's pocket, the officer proceeded to search defendant's vehicle, discovering the LSD. The "chain of circumstances" rationale established in our pre-Rules cases survives the adoption of the Rules of Evidence; here, the discovery of marijuana on defendant's person constituted an event in the officer's narrative which naturally led to the search of defendant's vehicle and the subsequent detection of the LSD.

Am Jur 2d, Evidence §§ 321, 323-327.

2. Criminal Law § 34.10 (NCI3d) — felonious possession of LSD — concurrent possession of marijuana — not excludable under Rule 404(b)

Evidence of concurrent misdemeanor possession of marijuana was not required to be excluded under N.C.G.S. § 8C-1, Rule 404(b) in a prosecution for felonious possession of LSD where the evidence of defendant's marijuana possession served the purpose of establishing the chain of circumstances leading up to his arrest for possession of LSD, and was not probative only of defendant's propensity to possess illegal drugs. It was noted that N.C.G.S. § 8C-1, Rule 404(b) is a rule of inclusion, subject to the weighing of probative value versus unfair prejudice.

Am Jur 2d, Evidence §§ 321, 323-327.

3. Criminal Law § 34.10 (NCI3d) — felonious possession of LSD — concurrent possession of marijuana — admission not abuse of discretion

The trial court did not abuse its discretion in a prosecution for felonious possession of LSD by admitting evidence of defendant's concurrent misdemeanor marijuana possession, even though defendant contended the evidence should have been excluded under N.C.G.S. § 8C-1, Rule 403 because its probative value was substantially outweighed by the danger of unfair prejudice.

Am Jur 2d, Evidence §§ 321, 323-327.

4. Constitutional Law § 34 (NCI3d)— felonious possession of LSD—concurrent possession of marijuana—double jeopardy collateral estoppel

Evidence of concurrent misdemeanor marijuana possession was not constitutionally inadmissible in a prosecution for felonious possession of LSD under the collateral estoppel doctrine of the Fifth Amendment where defendant had been previously acquitted of the marijuana charge. The U. S. Supreme Court opinion in *Dowling v. United States*, 493 U.S. ---, directly controls this issue; evidence that the defendant committed the prior offense was admissible because of the different burdens of proof applicable to the two trials.

Am Jur 2d, Evidence § 332.

APPEAL by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, reported at 93 N.C. App. 346, 378 S.E.2d 533 (1989), finding no error in a judgment of imprisonment entered by *Ellis, J.*, on 10 November 1987 in Superior Court, CUMBERLAND County, upon defendant's conviction of felonious possession of LSD. Heard in the Supreme Court 11 December 1989.

Lacy H. Thornburg, Attorney General, by Clarence J. DelForge, III, Associate Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Constance H. Everhart, Assistant Appellate Defender, for defendant-appellant.

WHICHARD, Justice.

This appeal presents the question whether defendant's acquittal on a charge of misdemeanor possession of marijuana precludes the State from introducing, in a subsequent prosecution for felonious possession of lysergic acid diethylamide (LSD), evidence that defendant possessed marijuana at the time of his arrest on both charges. We answer in the negative, and we thus affirm the Court of Appeals.

Prior to defendant's trial in superior court for possession of LSD, he filed a motion in limine to preclude any reference to his arrest on 27 March 1987 for the offenses of misdemeanor possession of marijuana, driving while license revoked, and displaying a fictitious license plate. These charges all stemmed from the same

incident which led to defendant's arrest for possession of LSD. Defendant had been convicted previously in district court on the charges of driving while license revoked and displaying a fictitious license plate. He was acquitted of the charge of misdemeanor possession of marijuana. In denying the motion in limine, the trial court stated:

> As to the marijuana, it would be inappropriate as to what—to talk about what took place in District Court as to whether he was found guilty or not guilty, for the State to refer to that. But as to the transactions that went on that evening between the officer and the defendant at this point I think would be relevant to just what transpired out there, would be relevant to the case, and I'll deny the motion in limine as to that.

At the trial for felonious possession of LSD, Officer Mark W. Thomas of the Spring Lake Police Department testified that on the evening of 27 March 1987 he observed a brown Mustang automobile weaving on the road. Officer Thomas activated his siren and signalled the driver to pull over to the side of the road. After the driver pulled over, Officer Thomas turned on a "take down light" which helps illuminate the inside of a vehicle. He observed defendant, the driver, take something red, ball it up, and throw it over his shoulder. Officer Thomas approached the car, whereupon defendant, who was inebriated, made a threatening remark to him. Officer Thomas told all the occupants to get out of the automobile and place their hands on the automobile; he then called for assistance. When help arrived, Officer Thomas advised defendant he was under arrest for driving while impaired. He then searched defendant while the other officers searched the other two occupants of the car. Officer Thomas testified, over objection, that he found "a plastic bag with a green vegetable matter inside of it" in defendant's pocket, and that in his opinion the bag contained marijuana. He proceeded to search the vehicle. On the right rear floorboard he found a crumpled red Marlboro cigarette package. In between the cellophane and the package he found a small square piece of aluminum foil, which he thought to be a "blotter acid hit of LSD." Officer Thomas found no other red items in the back seat passenger area.

On direct examination, defendant admitted that the bag Officer Thomas found in his pocket contained marijuana, but denied possession of LSD. Clay Thomas, one of defendant's passengers, testified

that the LSD belonged to him. Two other witnesses, who had been at a party with defendant and Thomas earlier in the evening, testified that Thomas had some LSD wrapped in tinfoil inside a Marlboro cigarette package and offered to sell some to anyone interested. The other passenger, a female, did not testify. The State's evidence tended to dispute that Clay Thomas had been a passenger in defendant's automobile at the time of the arrest.

The jury returned a guilty verdict on the charge of felonious possession of LSD. The Court of Appeals upheld defendant's conviction, holding that the principle of double jeopardy collateral estoppel did not operate to prohibit admission of evidence of defendant's marijuana possession at his trial for possession of LSD. *State v. Agee*, 93 N.C. App. 346, 362, 378 S.E.2d 533, 542 (1989). The Court of Appeals also concluded pursuant to N.C.G.S. § 8C-1, Rule 403 that the prejudice to defendant occasioned by the admission of this evidence outweighed its minimal probative value, but that defendant had waived his objection under this rule by testifying himself that he possessed a bag of marijuana at the time of his arrest. *Id.* at 365, 378 S.E.2d at 543. Judge Becton dissented, and defendant exercised his right to appeal to this Court. N.C.G.S. § 7A-30(2) (1989).

[1] We first address whether the evidence of defendant's possession of marijuana was admissible under the Rules of Evidence. If the evidence was inadmissible on evidentiary grounds, we need not address the constitutional question raised by defendant. *State v. Creason*, 313 N.C. 122, 127, 326 S.E.2d 24, 27 (1985). Defendant argues that the evidence is irrelevant under Rule 401, more prejudicial than probative under Rule 403, and evidence of prior bad acts inadmissible under Rule 404(b).

The Court of Appeals noted that any relevance or probative value represented by the evidence was limited to establishing the context or "chain of circumstances" of the crime charged. *State v. Agee*, 93 N.C. App. at 362, 378 S.E.2d at 542. This type of evidence is sometimes called *res gestae* evidence. However, the *res gestae* formula is more properly used to describe out-of-court statements made contemporaneously with the commission of the crime, 1 Brandis on North Carolina Evidence § 158 (3d ed. 1988), and its omission from codification within the Rules of Evidence as a hearsay exception has called its continuing vitality into question. *Id.* at 717 n.70.

Evidence tending to establish the context or chain of circumstances of a crime, which incidentally establishes the commission of a prior bad act, is to be distinguished from the hearsay *res gestae* category of evidence. We have recognized the relevance of the former type of evidence in pre-Rules opinions:

> "[A]ll facts, relevant to the proof of the defendant's having committed the offense with which he is charged, may be shown by evidence, otherwise competent, even though that evidence necessarily indicates the commission by him of another criminal offense. Thus, such evidence of other offenses is competent to show . . . the *quo animo*, intent, design, guilty knowledge, or scienter, or to make out the *res gestae*, or to exhibit a chain of circumstances in respect of the matter on trial, when such crimes are so connected with the offense charged as to throw light upon one or more of these questions."

State v. Jenerett, 281 N.C. 81, 89, 187 S.E.2d 735, 740 (1972) (citations omitted) (quoting *State v. Atkinson*, 275 N.C. 288, 312-13, 167 S.E.2d 241, 256 (1969), *death sentence reversed on other grounds*, 403 U.S. 948, 29 L. Ed. 2d 859 (1971)). In *Jenerett*, evidence that defendant robbed the victim prior to murdering him was admissible as part of the chain of circumstances. *Id. See also State v. McMillan*, 59 N.C. App. 396, 401, 297 S.E.2d 164, 167 (1982) (evidence of threatening behavior leading up to assault admissible as part of chain of circumstances). The dissenting opinion in the Court of Appeals noted correctly that these chain of circumstances cases were decided prior to enactment of the Rules of Evidence. *State v. Agee*, 93 N.C. App. at 366, 378 S.E.2d at 544. However, admission of evidence of a criminal defendant's prior bad acts, received to establish the circumstances of the crime on trial by describing its immediate context, has been approved in many other jurisdictions following adoption of the Rules of Evidence. *United States v. Currier*, 821 F.2d 52 (1st Cir. 1987); *United States v. Williford*, 764 F.2d 1493 (11th Cir. 1985); *United States v. Masters*, 622 F.2d 83 (4th Cir. 1980); *State v. Chaney*, 141 Ariz. 295, 686 P.2d 1265 (1984); *People v. Czemerynski*, 786 P.2d 1100 (Colo. 1990) (en banc); *State v. Michlitsch*, 438 N.W.2d 175 (N.D. 1989); *Crozier v. State*, 723 P.2d 42 (Wyo. 1986). This exception is known variously as the "same transaction" rule, the "complete story" exception, and the "course of conduct" exception. *Crozier v. State*, 723 P.2d at 49. Such evidence is admissible if it " 'forms part of the history of the event or serves to enhance the natural development of the facts.' " *Id.* (quoting

Commonwealth v. Evans, 343 Pa. Super. 118, 132, 494 A.2d 383, 390 (1985)). We similarly hold that the "chain of circumstances" rationale established in our pre-Rules cases survives the adoption of the Rules of Evidence.

The evidence here showed that the arresting officer initially stopped defendant's vehicle because he suspected defendant was driving while intoxicated. As the officer approached defendant's vehicle, defendant made a threatening remark to him. This remark prompted the officer to call for assistance; when his backup arrived, he searched defendant's person for weapons. After finding the bag of marijuana in defendant's pocket, he proceeded to search the vehicle, culminating in discovery of the LSD. The trial court, ruling on defendant's motion in limine to exclude evidence of the marijuana possession, stated that the evidence was relevant "to just what transpired out there" on the evening of the arrest. We agree. Discovery of the marijuana on defendant's person constituted an event in the officer's narrative which led naturally to the search of defendant's vehicle and the subsequent detection of the LSD.

> Evidence, not part of the crime charged but pertaining to the chain of events explaining the context, motive and set-up of the crime, is properly admitted if linked in time and circumstances with the charged crime, or [if it] forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury.

United States v. Williford, 764 F.2d at 1499 (evidence of negotiations for purchase of cocaine admissible in trial on charges of conspiracy to import, distribute, and possess marijuana).

In *State v. Michlitsch*, 438 N.W.2d 175, the defendant was convicted of possession of marijuana with intent to deliver. During searches of the defendant's trailer, handbag, and person, officers found a marijuana cigarette, cigarette butts, and smoking devices. The North Dakota Supreme Court held that evidence of defendant's possession of these other items was admissible because their discovery was intertwined and contemporaneous with the discovery of the bags of marijuana. Here, the marijuana also was discovered during a search intertwined and contemporaneous with that revealing the presence of LSD in defendant's vehicle. *See also People v. Czemerynski*, 786 P.2d at 1109 (" '[W]here, as here, the events leading up to the crime are a part of the scenario which explain the setting in which it occurred, no error is committed by permit-

ting the jury to view the criminal episode in the context in which it happened' ") (quoting *People v. Lobato*, 187 Colo. 285, 289-90, 530 P.2d 493, 496 (1975)).

[2] Defendant contends that even if the evidence of his marijuana possession was properly admitted as relevant, it nonetheless should have been excluded under Rule 404(b). Rule 404(b) states:

> *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). Cases from other jurisdictions reveal two perspectives on the relationship between Rule 404(b) and the chain of circumstances category of evidence. Some courts view evidence of circumstances occurring contemporaneously with the commission of a crime as outside the scope of Rule 404(b), either because the "other wrong" does not occur prior to the crime charged, *People v. Czemerynski*, 786 P.2d at 1109, or because the intertwined events of the two wrongs preclude a finding that the "other wrong" is extrinsic to the crime charged. *United States v. Bass*, 794 F.2d 1305, 1312 (8th Cir. 1986); *United States v. Williford*, 764 F.2d at 1498; *United States v. Aleman*, 592 F.2d 881, 885 (1979) (usual case evoking Rule 404(b) involves "other acts" occurring at time and setting different from that of crime charged; policy underlying Rule 404(b) "simply inapplicable when some offenses committed in a single criminal episode become 'other acts' because the defendant is indicted for less than all of his actions"). Other courts engage in Rule 404(b) analysis, but hold that evidence of "other wrongs" is admissible for the purpose, not enumerated in Rule 404(b) itself, of "complet[ing] the story of a crime by proving the immediate context of events near in time and place." *United States v. Currier*, 821 F.2d at 55. *Accord, State v. Chaney*, 141 Ariz. at 309-10, 686 P.2d at 1279-80 (list of permitted uses in Rule 404(b) not exclusive). The difference between the two perspectives is more apparent than real, because under either view the evidence of the "other wrong" is admissible, subject to the weighing of probative value versus unfair prejudice mandated by Rule 403. *United States v. Montes-Cardenas*, 746 F.2d 771, 780 (11th Cir.

1984). We note, however, that the latter view is consistent with this Court's view of Rule 404(b) as a rule of inclusion, as expressed recently in *State v. Coffey*:

> Recent cases decided by this Court under Rule 404(b) state a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, 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.

Coffey, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990) (emphasis in original). Because the evidence of defendant's marijuana possession served the purpose of establishing the chain of circumstances leading up to his arrest for possession of LSD, Rule 404(b) did not require its exclusion as evidence probative *only* of defendant's propensity to possess illegal drugs.

[3] Defendant argues that the evidence concerning his possession of marijuana should have been excluded under Rule 403 because its probative value was substantially outweighed by the danger of unfair prejudice. The Court of Appeals agreed, though it held that defendant had waived his objection under Rule 403 by testifying that he did possess marijuana when arrested for possession of LSD. *State v. Agee*, 93 N.C. App. at 365, 378 S.E.2d at 543. We disagree with the Court of Appeals' initial conclusion that the trial court should have excluded the evidence under Rule 403. "Whether to exclude evidence under Rule 403 is a matter left to the sound discretion of the trial court. . . . Evidence which is probative of the State's case necessarily will have a prejudicial effect upon the defendant; the question is one of degree." *State v. Coffey*, 326 N.C. at 281, 389 S.E.2d at 56. The trial court did not abuse its discretion under Rule 403 in admitting the evidence of defendant's marijuana possession, nor did it err in admitting the evidence under Rules 401 and 404(b).

[4] Having concluded that the evidence was admissible on evidentiary grounds, we must address the constitutional issue raised: whether the doctrine of collateral estoppel, as encompassed by the fifth amendment guarantee against double jeopardy, prohibits the introduction of evidence, in a subsequent trial for a different crime, of a crime of which a defendant previously has been acquitted. Defendant bases his contentions on *Ashe v. Swenson*, 397 U.S. 436, 25 L. Ed. 2d 469 (1970), in which the United States Su-

preme Court held that the defendant's acquittal of robbing one of six alleged victims barred his subsequent prosecution for robbing another of the six victims during the same occurrence. In his dissent in the Court of Appeals, Judge Becton stated that he believed *Ashe* controlled the case at bar. *State v. Agee*, 93 N.C. App. at 365, 378 S.E.2d at 544. *Ashe* is distinguishable from the present case, however, because it held that the State was collaterally estopped from prosecuting the defendant a second time for the same robbery. *Ashe*, 397 U.S. at 446, 25 L. Ed. 2d at 477. The constitutional issue here is not whether the State could prosecute defendant, but whether evidence of defendant's marijuana possession was admitted properly in light of defendant's previous acquittal of that charge.

Since this Court heard oral arguments in this case, the United States Supreme Court has issued its opinion in *Dowling v. United States*, 493 U.S. ---, 107 L. Ed. 2d 708 (1990), which directly controls this issue. *Griffith v. Kentucky*, 479 U.S. 314, 328, 93 L. Ed. 2d 649, 661 (1987) ("a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final"); *United States v. Johnson*, 457 U.S. 537, 543, 73 L. Ed. 2d 202, 209 (1982) (common-law rule for both criminal and civil cases is "that a change in law will be given effect while a case is on direct review"). In *Dowling* the defendant allegedly robbed a bank while wearing a ski mask and carrying a handgun. A witness testified that the defendant had entered her home two weeks after the bank robbery, wearing a ski mask and carrying a handgun. The witness unmasked the robber during a struggle and identified him as the defendant. The defendant was acquitted of charges stemming from the alleged intrusion into the witness' home. The United States Supreme Court held that prior acquittal did not preclude the government from introducing evidence of the defendant's other alleged crime in the prosecution for the bank robbery, "because, unlike the situation in *Ashe v. Swenson*, the prior acquittal did not determine an ultimate issue in the present case." *Id.* at ---, 107 L. Ed. 2d at 717. It stated:

> [W]e decline to extend *Ashe v. Swenson* and the collateral estoppel component of the Double Jeopardy Clause to exclude in all circumstances . . . relevant and probative evidence that is otherwise admissible under the Rules of Evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted.

Id. Evidence that the defendant broke into the witness' home was admissible in the bank robbery trial because of the different burdens of proof applicable to the two trials. In the trial for charges stemming from the break-in at the witness' home, the government bore the burden of proving beyond a reasonable doubt that the defendant committed the crime charged. In the subsequent trial on charges of bank robbery, the government sought to introduce the witness' testimony under Rule 404(b), which requires only that "the jury can reasonably conclude that the act occurred and that the defendant was the actor." *Id.* at ---, 107 L. Ed. 2d at 718 (quoting *Huddleston v. United States*, 485 U.S. 681, 689, 99 L. Ed. 2d 771, 782 (1988)).

Dowling answers defendant's argument that introduction of his marijuana possession was constitutionally impermissible under the collateral estoppel doctrine of the fifth amendment. Having previously held that the evidence was relevant, probative, and otherwise admissible under the Rules of Evidence, we affirm the Court of Appeals opinion which found no error in defendant's trial.

Affirmed.

JOSEPH M. EWAYS, PLAINTIFF v. GOVERNOR'S ISLAND, A NORTH CAROLINA LIMITED PARTNERSHIP AND ALLEN DUKES-JONES ISLAND PARTNERSHIP, DEFENDANTS v. J. L. TODD AUCTION CO., INTERVENOR DEFENDANT

No. 389PA89

(Filed 10 May 1990)

1. Appeal and Error § 443 (NCI4th)— correct result not disturbed on appeal

Where a trial court has reached the correct result, the judgment will not be disturbed on appeal even where a different reason is assigned to the decision.

Am Jur 2d, Appeal and Error § 727.

2. Abatement, Survival, and Revival of Actions § 9 (NCI4th)—intervention by third party—effect on plea in abatement

The intervention of a third party after a motion to dismiss had been filed could not defeat a plea in abatement on the theory that the parties were no longer the same.

Am Jur 2d, Abatement, Survival, and Revival § 20.

3. Abatement, Survival, and Revival of Actions § 3 (NCI4th)—plea in abatement—prior action pending in federal court

A prior action pending in a federal court within the territorial limits of the state constitutes a ground for abatement of a subsequent state action involving substantially similar issues and parties.

Am Jur 2d, Abatement, Survival, and Revival § 18.

ON plaintiff's petition for discretionary review of the decision of the Court of Appeals, 95 N.C. App. 201, 382 S.E.2d 219 (1989), affirming the order of dismissal entered by *Small, J.*, in the Superior Court, PAMLICO County, on 28 June 1988. Heard in the Supreme Court 12 March 1990.

Henderson, Baxter & Alford, P.A., by B. Hunt Baxter, Jr., for plaintiff-appellant.

Kirby, Wallace, Creech, Sarda, Zaytoun & Cashwell, by John R. Wallace; Adams, McCullough & Beard, by Douglas Q. Wickham, for defendant-appellees; and Ward and Smith, P.A., by Michael P. Flanagan, for intervenor defendant-appellee.

MARTIN, Justice.

[1] Plaintiff challenges the trial court's dismissal of the suit he instituted to recover a security deposit held in escrow by order of the United States Bankruptcy Court for the Eastern District of North Carolina pursuant to a bid he had made to purchase property owned by the defendant Governor's Island. In response to defendants' motion to dismiss, the trial court concluded as a matter of law that it lacked subject matter jurisdiction to hear the action and dismissed the suit. Relying on *Gilliam v. Sanders*, 198 N.C. 635, 152 S.E. 888 (1930), the Court of Appeals unanimously affirmed. We agree with this result and hold that the trial court was correct in dismissing the action. In reaching this conclusion,

however, we base our reasoning not on a lack of subject matter jurisdiction, but rather on the doctrine of prior action pending. Under that doctrine, since there is a prior action still pending appeal in the federal district court sitting within the territorial limits of this state on the same matter between the same parties, the present action is necessarily abated and the suit was properly dismissed. Where a trial court has reached the correct result, the judgment will not be disturbed on appeal even where a different reason is assigned to the decision. *Shore v. Brown*, 324 N.C. 427, 378 S.E.2d 778 (1989); *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).

In 1983, defendant Governor's Island, a limited partnership, filed a petition under Chapter 11 of the United States Bankruptcy Code in the U. S. Bankruptcy Court for the Eastern District of North Carolina. Defendant Allen Dukes-Jones Island Partnership similarly filed a petition under Chapter 11 with the U.S. Bankruptcy Court for the Middle District of Georgia during that same year. Both defendants owned a property interest in an island located in Pamlico County known as Governor's Island or Jones Island. As part of the bankruptcy proceeding in North Carolina, the U.S. Bankruptcy Court ordered defendant Governor's Island to aggressively market the island for sale.

Pursuant to that order, intervenor defendant J. L. Todd Auction Company was selected to conduct a public auction of the property. After placing advertisements in local and national newspapers regarding the sale of the island and distributing sales brochures to interested parties, the auction company conducted the sale in New Bern on 14 January 1984. Just prior to the sale, it was announced that the real property was being sold subject to the rights of third parties who owned fifty percent of the oil and natural gas rights. Defendants contend that it was further announced that a fifteen acre tract belonging to a third party would not be included in the sale and that any part of the island located under navigable waters could not be sold. Although these exceptions were not included in the newspaper advertisements nor in the sales brochure distributed prior to the auction itself, the brochure did warn that any announcement made from the auction stand would take precedence over any printed matter in the brochure.

Plaintiff, who was 84 years old at the time of the auction, is an oriental rug merchant and real estate entrepreneur residing in Tampa, Florida. According to his testimony before Bankruptcy Judge Thomas Small, Mr. Eways arrived late in New Bern on the morning of the sale due to car trouble and never heard the announcements which defendants claim were made. He had not contacted an attorney nor did he inspect the property or have a title search conducted prior to the auction. Instead, he relied solely on the information contained in the newspaper advertisements and sales brochure regarding the sale. In those publications, J. L. Todd Auction Company had represented that the entire island would be sold and that the approximate total acreage on the island was 4,800 acres. The brochure also asserted that there was an estimated eight million board feet of pine timber on the island. No mention was made of the limitation on title as to mineral rights, nor that a large part of the island was nontransferable marshland, nor that a third party owned approximately fifteen acres of the island that would not be sold. At the conclusion of the public sale, plaintiff was the high bidder, having offered $1,960,000.00 for the property which he understood to include the entire island and all mineral rights therein, and to encompass approximately 4,800 acres of heavily wooded land suitable for development.

Plaintiff was required by the terms of the sale to deposit 15% of the sales price ($294,000.00) in escrow pending closing, which was to occur within 30 days of the auction. Plaintiff in fact deposited only $184,000.00 with the auction company and that amount was only deposited after his initial checks were returned to the sellers unpaid by plaintiff's bank. Plaintiff claims the parties had agreed to hold the checks until he could transfer funds to the appropriate accounts, but defendants deny that such an agreement had ever been reached. After the sale was confirmed by the bankruptcy court, plaintiff notified defendants that he would be unable to close on the property. He contended that the problem with the marshlands and mineral rights prevented him from obtaining proper financing. When the closing did not occur as scheduled, defendant Governor's Island filed an application with the bankruptcy court to order forfeiture of the security deposit. At a hearing on that application, the bankruptcy court concluded that plaintiff had breached his obligation to purchase the property, but nonetheless extended additional time to allow plaintiff to close. The additional deadline was missed as well, and the property was eventually sold at public

auction to another purchaser for $1,100,000.00, which is $860,000.00 less than the figure bid by plaintiff at the first auction.

Following the second sale, defendants Governor's Island and Allen Dukes-Jones Island instituted an adversary proceeding in the bankruptcy court seeking reimbursement of the $860,000.00 shortfall, plus costs. In response to defendants' complaint in this adversary proceeding, Mr. Eways filed an answer and counterclaim which alleged breach of contract for failure to convey marketable title and for fraud, the same allegations raised by Mr. Eways in the present state action. The bankruptcy court conducted a hearing on 16 March 1985 and entered judgment against plaintiff for $294,000.00, the amount of the 15% security deposit. Plaintiff and defendants both appealed to the United States District Court for the Eastern District of North Carolina, which is authorized under Chapter 11 to hear appeals of decisions from the bankruptcy court. The Honorable James C. Fox of the U.S. District Court elected to abstain from ruling on the appeal, preferring to allow the parties time to bring an action in state court. The federal district court reasoned that plaintiff raised tort, contract, and property law questions regarding the marketability of the title to the property which, in the interests of comity, should properly be decided in state court. In the abstention order, the federal district court judge reserved the right to resolve the issues upon petition of the parties in the event that relief could not be obtained in a state proceeding.

Pursuant to the district court's abstention order, plaintiff filed the present action in November of 1985 requesting a return of his escrow deposit on one of two grounds. He first contends that he is entitled to a return of the deposit because of the failure of defendants to convey good and marketable title as required under the contract of sale. His second contention is that defendants, by and through their agent, J. L. Todd Auction Company, fraudulently misrepresented their ownership interest of the island and failed to disclose defects in the title. On 5 February 1986, defendants moved for dismissal on the grounds of (1) lack of subject matter jurisdiction, (2) lack of personal jurisdiction, (3) failure to state a claim upon which relief could be granted, and (4) abatement due to the prior pending action. Defendants also filed an answer and counterclaim, alleging among other things the affirmative defenses of waiver, estoppel, contributory negligence, assumption of risk, and res judicata. They counterclaimed on charges of breach of contract for failure to properly close on the property and unfair

and deceptive trade practices concerning plaintiff's failure to properly deposit a full 15% of the sales price as earnest money. After examining the procedural history of the case, including the abstention order of the U.S. District Court and the memorandum opinion of the bankruptcy judge, the trial court on 28 June 1988 allowed defendants' motion to dismiss this action based on the court's conclusion that it lacked subject matter jurisdiction as a matter of law. This judgment was affirmed by the Court of Appeals, 95 N.C. App. 201, 382 S.E.2d 219 (1989). In so ruling, neither court addressed defendants' assertion set forth in their motion to dismiss that the prior pending action should abate the present suit.

Although plaintiff contends that the state trial court was free to hear this action once Judge Fox had exercised his statutory power to abstain, the Court of Appeals held that the rule set out by this Court in *Gilliam v. Sanders*, 198 N.C. 635, 152 S.E. 888, compels a contrary result. In that case, the plaintiff was a trustee in bankruptcy who filed suit in state court against the defendant who had failed to close on property despite the fact that he had offered the high bid at the public sale of the property. This Court held that the trial court was correct to dismiss plaintiff's suit on the grounds that the claim should have been brought in bankruptcy court where the underlying matter was still pending. The Court expressed the opinion that where the purchaser in a bankruptcy sale fails to comply with his bid, a claim for relief should be brought " 'by a motion in the cause to show cause and not by an independent action.' " *Id.* at 638, 152 S.E. at 890 (quoting *Marsh v. Nimocks*, 122 N.C. 478, 479, 29 S.E. 840, 840 (1898)). Moreover, " 'if this mode be not pursued, and a new action is brought, the court *ex mero motu* will dismiss it. This course is adopted to avoid multiplicity of suits, avoid delay and save costs.' " *Id.* (quoting *Marsh v. Nimocks*, 122 N.C. at 479, 29 S.E. at 840).

Plaintiff argues that *Gilliam* is no longer good law because it was decided prior to the passage of the abstention statutes which authorize federal judges to abstain from deciding matters relating to bankruptcy sales if in their discretion it is proper to do so. *See* 28 U.S.C. § 1334(c)(1) and its predecessor, 28 U.S.C. § 1471(d). The Court of Appeals, however, found that the fact that the federal judge abstains from hearing a case "cannot confer subject matter jurisdiction upon a state court where the highest court of this State has ruled that no such state court jurisdiction exists." *Eways v. Governor's Island*, 95 N.C. App. at 203, 382 S.E.2d at

220. Furthermore, turning to the rationale upon which the *Gilliam* decision is based, the Court of Appeals found that "[t]he policy expressed in *Gilliam* is that of keeping all proceedings related to the bankrupt's property within the equity jurisdiction of the District Court to avoid multiplicious suits, costs, and needless delay." *Id.* at 204, 382 S.E.2d at 220.

We agree with the Court of Appeals' analysis of the underlying rationale for the holding in *Gilliam* and find that the language and intent of that decision is consistent with the legal theory of abatement due to a prior action pending. Under the law of this state, where a prior action is pending between the same parties for the same subject matter in a court within the state having like jurisdiction, the prior action serves to abate the subsequent action. *McDowell v. Blythe Brothers Co.*, 236 N.C. 396, 72 S.E.2d 860 (1952); *Cameron v. Cameron*, 235 N.C. 82, 68 S.E.2d 796 (1952). Moreover, where the prior action has been adjudicated by the trial court but is pending appeal it will continue to abate a subsequent action between the parties on substantially identical subject matter and issues. *Clark v. Craven Regional Medical Authority*, 326 N.C. 15, 387 S.E.2d 168 (1990); *Shore v. Brown*, 324 N.C. 427, 378 S.E.2d 778.

[2] We find that the parties, legal issues, and subject matter in the case before us are substantially similar to those raised in the prior adversary proceeding still pending appeal in the U.S. District Court for the Eastern District of North Carolina. Examining the similarity of parties first, we note that in the Chapter 11 adversary proceeding, Governor's Island and Allen Dukes-Jones Island brought suit against Mr. Eways seeking damages for his failure to close on his contract to purchase the property in question. In his counterclaim, Mr. Eways alleged that he was not obligated to purchase the island because the sellers had breached their end of the bargain by failing to tender marketable title and by fraudulently misrepresenting the nature of the property prior to sale. The same parties are the adversaries in the present state action with Mr. Eways, who is the defendant in the prior action, in the role of plaintiff and Governor's Island and Allen Dukes-Jones Island, plaintiffs in the prior action, as the defendants in this action. On 26 January 1988, almost two years after defendants' motion to dismiss was filed, J. L. Todd Auction Co. was permitted to intervene as an additional defendant on the grounds that as the selling agent it may be entitled to some or all of the deposit money

in controversy. The intervention of the auction company after the motion to dismiss had been filed cannot defeat the plea of abatement on the theory that the parties are no longer the same. We find that the parties to the original suit are the same for purposes of abatement, but note that the J. L. Todd Auction Co. may move to intervene in the prior pending action.

Turning to the subject matter and legal issues involved, clearly both cases arise from the circumstances leading up to and including the sale of the island as ordered by the bankruptcy court and are based on substantially the same allegations and legal theories. We find that the basis of Mr. Eways' complaint in this state action is his assertion that he is entitled to a return of his deposit money because the defendants have failed to produce a marketable title and because they fraudulently misrepresented the property for sale. These are the same legal theories put forth by Mr. Eways in his counterclaim to the suit filed by the defendants in the original adversary proceeding. Thus, it can be seen that in both cases the nature of Mr. Eways' cause of action is avoidance of contract based on allegations of fraud, misrepresentation, and breach of contract.

[3] Because the parties and subject matter of the two suits are substantially similar, the first action will abate the subsequent action if the prior action is determined to be pending in a court within the state having like jurisdiction. Clearly, if these suits both had been filed in state court, the prior pending action would serve to abate the subsequent action. Therefore, the sole question remaining is whether a different result should be reached because the prior action in this case is pending in a federal district court within the state rather than in another court within our own state system.

We recognize that "[a]s a general rule, the pendency in a federal court of a personal or transitory action, although between the same parties and for the same cause of action or relief, is not ground for abating a subsequent action in a state court." 1 C.J.S. *Abatement and Revival* § 53 (1985). *See also* 1 Am. Jur. 2d *Abatement, Survival, and Revival* § 18 (1962) ("Generally speaking, the federal and state courts that have concurrent jurisdiction over civil actions may be considered as courts of separate jurisdictional sovereignties, and the pendency of a personal action in either a state or a federal court does not entitle the defendant to abatement of a like action in the other."). However, where the prior action is pending in

a federal court which is sitting in the same state where the subsequent state action has been filed, there is a conflict among the jurisdictions which have considered the question regarding whether the prior pending federal action will abate the subsequent state action under those circumstances. 1 C.J.S. *Abatement and Revival* § 53 (1985); Annotation, *Stay of Civil Proceedings Pending Determination of Action in Federal Court in Same State*, 56 A.L.R. 2d 335 (1957). The majority rule appears to be that the federal court constitutes a separate jurisdiction for purposes of abatement, *e.g., State ex rel. Dos Anigos, Inc. v. Lehman, et al.*, 100 Fla. 1313, 131 So. 533 (1930); *Inter-Southern Life Ins. Co. v. McQuarie*, 148 Ga. 233, 96 S.E. 424 (1918); *Wurtz, Austin & McVeigh v. Hart*, 13 Iowa 515 (1862); *State v. Jefferson Island Salt Mining Co.*, 183 La. 304, 163 So. 145, *cert. denied*, 297 U.S. 716, 80 L. Ed. 1001 (1935); *Streckfus Steamers, Inc. v. Kiersky*, 174 Miss. 125, 163 So. 830 (1935); *General Investment Co. v. Interborough R. T. Co.*, 200 A.D. 794, 193 N.Y.S. 903, *aff'd*, 235 N.Y. 133, 139 N.E. 216 (1922); *Hubbs v. Nichols*, 201 Tenn. 304, 298 S.W.2d 801 (1956); *I. & G. N. Ry. Co. v. Barton*, 24 Tex. Civ. App. 122, 57 S.W. 292 (1900); *Caine v. Seattle & Northern Ry. Co.*, 12 Wash. 596, 41 P. 904 (1895). However, a minority of courts maintain that where the prior pending action is in a federal court sitting in the same state as the subsequent state action, the second action is abated. *See, e.g., Interstate Chemical Corporation v. Home Guano Co.*, 199 Ala. 583, 75 So. 166 (1917); *Wilson v. Milliken*, 103 Ky. 165, 44 S.W. 660 (1898); *Smith v. Atlantic Mutual Fire Insurance Company*, 22 N.H. 21 (1850). We conclude that the minority rule is the better reasoned authority.

In *Sloan v. McDowell*, 75 N.C. 29 (1876), this Court held that where a prior action was pending in a federal court in the State of Georgia, a subsequent action raising the same issues between the same parties in the state courts of North Carolina was not abated by the prior action. By contrast, the question before the Court today is whether this state considers a prior action pending in a federal court located within this state to be grounds for abating a subsequent action between the same parties on the same grounds in a North Carolina state court. In examining this question, we find the reasoning in *Gilliam* persuasive. Where a prior action is pending in a federal court within the boundaries of North Carolina which raises substantially the same issues between substantially the same parties as a subsequent action within the state court

system having concurrent jurisdiction, the subsequent action is wholly unnecessary and, in the interests of judicial economy, should be subject to a plea in abatement. We cannot conceive of any rational reason why the rule should be different simply because the prior case is pending in a federal court in North Carolina rather than a state court. All of the reasons for abatement exist whether the prior action is pending in the state or federal court. Thus, we hold that a prior action pending in a federal court within the territorial limits of the state constitutes grounds for abatement of a subsequent state action on substantially similar grounds between the same parties.

In his brief to this Court, plaintiff also asks that we examine the propriety of the trial court's failure to grant partial summary judgment in his favor. Our decision today affirms the trial court's dismissal of plaintiff's case in the state court, and hence it is unnecessary to reach plaintiff's final contention regarding his summary judgment motion. The decision of the Court of Appeals is

Affirmed.

STATE OF NORTH CAROLINA v. CLAUDE E. HARTNESS

No. 258PA89

(Filed 10 May 1990)

1. Criminal Law § 904 (NCI4th); Rape and Allied Offenses § 19 (NCI3d)— indecent liberties—disjunctive instruction—unanimity of verdict

The trial court's instruction that an indecent liberty is an immoral, improper or indecent touching or act by defendant upon the child *or* an inducement by defendant of an immoral or indecent touching by the child did not violate defendant's right to a unanimous verdict since the crime of indecent liberties is a single offense which may be proved by evidence of the commission of any one of a number of acts, and the requirement of unanimity is met even if some jurors find that one type of sexual conduct occurred and others find that another transpired.

Am Jur 2d, Trial § 884.

2. Criminal Law § 1186 (NCI4th)— aggravating factors—prior convictions—nexus to present crime not required

The trial court did not err in utilizing defendant's prior unrelated convictions for the sale and delivery of drugs as aggravating factors for his current convictions for taking indecent liberties since the legislature has mandated in N.C.G.S. § 15A-1340.4(a)(1)o that prior convictions punishable by more than sixty days' confinement shall be treated as aggravating factors without regard to whether the prior crimes are related to the purposes of sentencing for the present crime.

Am Jur 2d, Criminal Law § 599.

ON discretionary review of an unpublished decision of the Court of Appeals, 94 N.C. App. 224, 381 S.E.2d 202 (1989), setting aside a judgment entered by *Burroughs, J.*, in the Superior Court, CHEROKEE County, on 9 May 1988 and awarding defendant a new trial. Heard in the Supreme Court 13 March 1990.

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

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

MEYER, Justice.

Defendant was indicted for one count of first-degree rape, two counts of first-degree sexual offense, two counts of felony child abuse, three counts of taking indecent liberties with a minor, and one count of incest. He was tried before a jury at the 9 May 1988 Session of Superior Court, Cherokee County, the Honorable Robert M. Burroughs presiding. Defendant was found guilty of two counts of felony child abuse and three counts of taking indecent liberties with a minor. He was sentenced to three consecutive five-year sentences for the indecent liberties convictions and consecutive sentences of two years for the two child abuse convictions. Defendant appealed to the Court of Appeals, which awarded defendant a new trial on the grounds that the trial court had committed reversible error in its instruction on indecent liberties. *State v. Hartness*, 94 N.C. App. 224, 381 S.E.2d 202. On 28 June 1989, this Court allowed the State's motion for temporary stay and petition for writ of supersedeas and, on 7 September 1989, allowed the State's petition for discretionary review.

For purposes of this appeal, we need only discuss the evidence relevant to the issue of whether the trial court's jury charge on indecent liberties was error. We accordingly limit our discussion to those facts which are relevant to this issue.

The State's evidence tended to show that defendant engaged in various forms of sexual relations with his daughter, who was seven years old at the time of trial, and his stepson, who was nine years old at the time of trial. The boy testified at trial that defendant touched the boy's "hotdog" with both his hands and his mouth. The boy identified his "hotdog" as his penis and additionally testified that defendant induced him to touch defendant's penis with his hands and mouth.

[1] The trial judge relied upon the pattern jury instructions in his charge to the jury on indecent liberties. He instructed the jury as to the first element of the offense as follows:

> Now, I charge that for you to find the defendant guilty of taking an indecent liberty with a child the State must prove three things beyond a reasonable doubt.
>
> 1. That the defendant wilfully took an indecent liberty with a child for the purpose of arousing or gratifying sexual desire.
>
> An indecent liberty is an immoral, improper or indecent touching or act by the defendant upon the child, or an inducement by the defendant of an immoral or indecent touching by the child.

On appeal to the Court of Appeals, defendant contended that the trial court committed plain error in using the above instruction because it improperly permitted his conviction by less than a unanimous verdict. The relevant constitutional provision is N.C. Const. art. I, § 24, which provides that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court." *See also* N.C.G.S. § 15A-1237(b) (1983). Defendant contends that the trial court's disjunctive phrasing as to the acts allegedly constituting indecent liberties in this case—defendant's touching of his stepson or the stepson's touching of defendant—rendered the verdict potentially nonunanimous. Defendant surmises that the jury could have split in its decision regarding which act constituted the offense, making it impossible for the court to determine whether the jury was unanimous in its verdict.

The Court of Appeals agreed with defendant and awarded him a new trial. In doing so, the court relied upon its recent decision in *State v. Britt*, 93 N.C. App. 126, 377 S.E.2d 79 (1989), in which an identical instruction was found to be reversible error.

In *Britt*, the defendant had been convicted of both first-degree sexual offense and indecent liberties and had challenged the trial court's instructions as to both offenses on grounds of lack of unanimity. The Court of Appeals concluded that the instruction on indecent liberties was susceptible to a unanimity challenge because it "point[ed] out three distinct types of acts which would constitute taking indecent liberties," *id.* at 133, 377 S.E.2d at 83, and reversed the trial court decision since it could not "determine which act or acts the jury found that defendant committed," *id.*

In arriving at its decision, the Court of Appeals applied reasoning set forth by this Court in a drug trafficking case, *State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986). Because we do not believe that the *Diaz* analysis should be extended to cover the pattern instructions typically given in cases involving indecent liberties, we reverse the Court of Appeals on this issue.

This Court in *Diaz* reversed a conviction for trafficking in marijuana on the grounds that it was obtained upon a fatally ambiguous disjunctive instruction. The jury had been instructed to return a guilty verdict if it found that defendant "knowingly possessed or knowingly transported marijuana." *Id.* at 553, 346 S.E.2d at 494. This Court noted that transportation and possession of marijuana "are separate trafficking offenses for which a defendant may be separately convicted and punished" and that by instructing the jury as he did, the trial judge "submitted two possible crimes to the jury." *Id.* at 554, 346 S.E.2d at 494. This Court found the instruction to be fatally ambiguous because it was impossible to determine whether all of the jurors found possession, all found transportation, or some found one and some the other.

The reasoning in *Diaz* is misapplied in the present context. The risk of a nonunanimous verdict does not arise in cases such as the one at bar because the statute proscribing indecent liberties does not list, as elements of the offense, discrete criminal activities in the disjunctive in the same manner as does the trafficking statute. The trafficking statute at issue in *Diaz*, N.C.G.S. § 90-95(h)(1) (1985), enumerates the following proscribed activities: sale, manufacturing, delivery, transportation, and possession. Each is a discrete criminal

offense. By contrast, N.C.G.S. § 14-202.1 proscribes simply "any immoral, improper, or indecent liberties." Even if we assume that some jurors found that one type of sexual conduct occurred and others found that another transpired, the fact remains that the jury as a whole would unanimously find that there occurred sexual conduct within the ambit of "any immoral, improper, or indecent liberties." Such a finding would be sufficient to establish the first element of the crime charged.

In our analysis of the indecent liberties statute, we find its structure and intent to be more similar to the statute relating to first-degree sexual offense, N.C.G.S. § 14-27.4 (1986), than to the trafficking statute discussed in *Diaz*. The sexual offense statute provides that a person is guilty of the first element of the offense if he engages in a "sexual act" with certain enumerated categories of individuals. N.C.G.S. § 14-27.4(a) (1986). We find our earlier analysis in *State v. Foust*, 311 N.C. 351, 317 S.E.2d 385 (1984), to be particularly instructive in our interpretation of both the sexual offense and the indecent liberties statutes.

In *Foust*, the indictment charged defendant with unlawfully engaging in a sexual act with the victim, but the indictment did not specify what act was performed. The State's evidence tended to show that defendant engaged in both fellatio and anal intercourse with the victim. The trial court instructed the jury that the State was required to prove four elements beyond a reasonable doubt, the first being that a sexual act occurred. A sexual act was explained as meaning "oral sex or anal sex." *Id.* at 359, 317 S.E.2d at 390. This Court found that the trial court clearly informed the jurors that they must agree on all the elements before a verdict of guilty could be reached, and further found that the jury was given instructions on the requirement of unanimity. This Court was therefore satisfied that these instructions, when read as a whole, required a verdict of not guilty if all twelve jurors were not satisfied beyond a reasonable doubt that the defendant engaged in an unlawful sexual act, and noted that nothing in the record indicated any confusion, misunderstanding, or disagreement among the members of the jury which would indicate a lack of unanimity.

The statutes proscribing indecent liberties and first-degree sexual offense are readily distinguishable from a statute such as the trafficking provision at issue in *Diaz*. Unfortunately, in *Diaz*, this Court overruled *Foust* without applying an appropriate analysis

of the distinctions between the two types of statutes. We now conclude that we erred in *Diaz* when we overruled *Foust*.

In arriving at our decision, we utilize, in addition to *Foust*, the cases of *Jones v. All American Life Ins. Co.*, 312 N.C. 725, 325 S.E.2d 237 (1985), and *State v. Creason*, 313 N.C. 122, 326 S.E.2d 24 (1985), to illustrate our rationale.

In *Jones*, a civil action brought by a beneficiary of a life insurance policy to recover the proceeds, the plaintiff contended that submission of a disjunctive issue of whether plaintiff killed or procured the killing of the insured was ambiguous and therefore prevented the jury from reaching a unanimous verdict. The instruction read, "Did . . . plaintiff[] willfully and unlawfully kill [the insured] or procure his killing?" 312 N.C. at 737, 325 S.E.2d at 243. This Court held that it was apparent that all twelve jurors needed to find the existence of plaintiff's participation in the death by one or the other alternative means, either of which would bar the plaintiff from recovery. Because plaintiff's participation in the killing by either of the two alternatives barred her from recovering the proceeds of the insurance policy, it was only necessary that the jury agree unanimously that she so participated.

In *Creason*, a criminal drug possession case, the defendant's indictment and verdict sheet also were styled in the disjunctive, alleging that he possessed LSD with the intent to sell or deliver it. The defendant contended that the indictment and verdict charged two separate crimes: (1) possession with intent to sell, and (2) possession with intent to deliver. This Court rejected the defendant's reasoning and held that the evil sought to be prevented by the legislature in enacting the relevant statute, N.C.G.S. § 90-95(a)(1) (1985), was possession of narcotics with the intent to transfer them. This Court held that the indictment charged only one offense and that possession with intent to place the drugs in commerce by transferring them was the gravamen of that offense. So long as the jury could find that the possession was with the intent to sell or deliver the LSD, the crime was proved and the requirement of unanimity satisfied. 313 N.C. at 129, 326 S.E.2d at 28.

The case *sub judice*, like *Jones* and *Creason*, involves a situation in which a single wrong is established by a finding of various alternative elements. *See also State v. Belton*, 318 N.C. 141, 347 S.E.2d 755 (1986) (court's instruction was proper where judge stated that defendants could be found guilty of rape and sex offense if

they employed a deadly weapon or were aided and abetted). In this case, the relevant statute provides, in part, that a person is guilty of taking indecent liberties with children if he

> [w]illfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of sixteen years for the purpose of arousing or gratifying sexual desire.

N.C.G.S. § 14-202.1 (1981).

As the statute indicates, the crime of indecent liberties is a single offense which may be proved by evidence of the commission of any one of a number of acts. The evil the legislature sought to prevent in this context was the defendant's performance of any immoral, improper, or indecent act in the presence of a child "for the purpose of arousing or gratifying sexual desire." Defendant's purpose for committing such act is the gravamen of this offense; the particular act performed is immaterial. It is important to note that the statute does not contain any language requiring a showing of intent to commit an unnatural sexual act. Nor is there any requirement that the State prove that a touching occurred. Rather, the State need only prove the taking of any of the described liberties for the purpose of arousing or gratifying sexual desire. *State v. Etheridge*, 319 N.C. 34, 352 S.E.2d 673 (1987). The trial judge's instruction regarding what constitutes an indecent liberty in this case was not derived from the statute, but was rather a clarification of the evidence presented for the jury's benefit. The boy described the acts, any one of which could have constituted indecent liberties, as parts of a single and continuous transaction. The psychologist corroborated the boy's testimony. The jury found defendant guilty of committing indecent liberties upon his stepson after the trial judge correctly instructed it that it could find the immoral, improper, or indecent liberty upon a finding that defendant either improperly touched the boy or induced the boy to touch him. In view of the evidence presented in this case, we find no error in the pattern jury instruction in question.

To the extent *State v. Britt*, 93 N.C. App. at 133, 377 S.E.2d at 83, misapplied *Diaz*, particularly in its failure to review the whole record to determine whether there was, in fact, a fatal ambiguity in the instructions, we overrule it.

[2] Because this holding has the effect of reinstating one of defendant's indecent liberties convictions, we now review defendant's cross-assignment of error to determine if it has any merit. Defendant assigns error to the trial court's aggravation of two of his present convictions by prior unrelated convictions. For defendant's conviction of two counts of indecent liberties, the trial court found as a single aggravating factor in each count that he had committed the prior crimes of sale and delivery of drugs, both of which are punishable by imprisonment for more than sixty days. Defendant contends that the trial court erred in utilizing these convictions as aggravating factors because in neither instance is the prior crime related to the purposes of sentencing in this case:

> In imposing a prison term, the judge . . . may consider any aggravating and mitigating factors that he finds are proved by the preponderance of the evidence, and that are reasonably related to the purposes of sentencing, whether or not such aggravating or mitigating factors are set forth herein . . . .

N.C.G.S. § 15A-1340.4(a) (1983).

The primary purposes of sentencing are set out in the preceding statute as follows:

> The primary purposes of sentencing a person convicted of a crime are to impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability; to protect the public by restraining offenders; to assist the offender toward rehabilitation and restoration to the community as a lawful citizen; and to provide a general deterrent to criminal behavior.

N.C.G.S. § 15A-1340.3 (1983).

Defendant contends that implicit within the statute is the requirement that there be some nexus between the aggravating factor and the purposes of *sentencing for the present crime* because, he argues, no factor is *per se* aggravating or mitigating. In the present case, there was no showing that the drug possession charges were related in any way to the offenses for which defendant was being sentenced.

The State counters, and we agree, that N.C.G.S. § 15A-1340.4(a)(1)(o) does not establish any distinctions between the

types of crimes which will serve to support the finding of a factor in aggravation, provided they are punishable by more than sixty days' confinement. *State v. Canty*, 321 N.C. 520, 364 S.E.2d 410 (1988). In *State v. Parker*, 319 N.C. 444, 355 S.E.2d 489 (1987), this Court rejected defendant's argument that it was unreasonable to enhance the sentence on his murder plea because of minor prior offenses, noting that the General Assembly had mandated that prior convictions punishable by more than sixty days' confinement, without regard to their weight, shall be treated as aggravating factors. This Court cannot substitute its judgment for that of the legislature regarding the significance to be accorded prior convictions. We conclude that the trial court did not err in utilizing defendant's prior drug offenses as aggravating factors for his current convictions for indecent liberties.

In summary, we reverse the decision of the Court of Appeals granting defendant a new trial because we find, for the reasons stated above, that the instruction given on indecent liberties was not fatally ambiguous and therefore did not deprive defendant of his constitutional right to a unanimous verdict. We hold that defendant received a fair trial free of prejudicial error. Accordingly, this case is remanded to the Court of Appeals for further remand to the Superior Court, Cherokee County, for reinstatement of the sentence imposed by the trial judge.

Reversed.

BARBARA S. BECKWITH, EXECUTRIX OF THE ESTATE OF PETER OBERDORF BECKWITH v. JAMES M. LLEWELLYN, WILLIAM P. THOMPSON, THOMPSON, PADDOCK & LLEWELLYN, P.A., RICHARD A. VINROOT, A. WARD McKEITHEN AND ROBINSON, BRADSHAW & HINSON, P.A.

No. 243A89

(Filed 10 May 1990)

Attorneys at Law § 55 (NCI4th); Judgments § 16 (NCI3d)— wrongful death action—attorney fees—collateral attack on judgment

The trial court erred by granting summary judgment for defendants on the grounds of collateral estoppel in an action

in which plaintiffs alleged breach of fiduciary duty, intentional disregard of duty, conspiracy and negligence by her attorneys in settling a wrongful death action but did not seek to set aside the order approving the settlement or a refund of the attorney fees paid pursuant thereto. Collateral estoppel does not apply because the focus in the prior case was not whether the attorneys had taken advantage of their client but whether the settlement reached was fair to the minors involved; this is not a proceeding to set aside or reopen the order approving the settlement but instead to recover damages based upon a breach of fiduciary duty on the part of her attorneys in obtaining it.

Am Jur 2d, Attorneys at Law § 206; Judgments § 572.

APPEAL by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 93 N.C. App. 674, 379 S.E.2d 74 (1989), affirming summary judgment for defendants entered 4 February 1988 by *Griffin, J.*, in the Superior Court, MECKLENBURG County. Heard in the Supreme Court 13 December 1989.

Browder, Russell, Morris and Butcher, by James W. Morris, III, and Ann Adams Webster; and James, McElroy & Diehl, P.A., by William K. Diehl, Jr., and John S. Arrowood, for plaintiff-appellant.

Jones, Hewson & Woolard, by Harry C. Hewson and Hunter M. Jones, for defendant-appellees.

FRYE, Justice.

This is a civil action for legal malpractice brought by plaintiff against her former attorneys. On appeal plaintiff seeks reversal of summary judgment entered in favor of defendants. The trial judge granted summary judgment in favor of defendants on the grounds that plaintiff's complaint only asserted claims that constituted an attack on the attorney fees which were approved by the court in an earlier order approving the settlement agreement between plaintiff and the original defendants in the underlying wrongful death action. The Court of Appeals affirmed, holding that notwithstanding that defendants here were not "parties" in the wrongful death suit, they were entitled to the benefit of the doctrine of collateral estoppel to defeat plaintiff's claims against them

because the settlement order constituted a valid final adjudication of the appropriate amount of attorney fees. *Beckwith v. Llewellyn*, 93 N.C. App. 674, 379 S.E.2d 74 (1989). Judge Becton concluded that plaintiff's complaint is grounded on allegations of breach of fiduciary obligation and negligence and therefore does not constitute a collateral attack by plaintiff upon the settlement. *Id.* at 681, 379 S.E.2d at 79 (Becton, J., dissenting). We agree with Judge Becton's dissenting opinion.

Viewed in the light most favorable to plaintiff, as we are required to do on a motion for summary judgment, plaintiff's complaint and supporting documents present the following:

Plaintiff's husband, Peter Oberdorf Beckwith, died as a result of an airplane crash. Plaintiff pursued a wrongful death action in her own behalf, as guardian of the minor children, and as executrix of her husband's estate. Prior to instituting the wrongful death action, plaintiff sought assistance from a North Carolina attorney and from defendant Llewellyn, an Arkansas attorney and family friend. The North Carolina attorney advised plaintiff that he would undertake the wrongful death litigation for a forty percent contingency fee. Defendant Llewellyn advised plaintiff that a forty percent contingency fee was too high, and that his firm would handle the case for a one-third contingency fee to be calculated after deduction of litigation expenses.

Plaintiff executed a written agreement authorizing defendant Llewellyn's firm to handle the case for the fee stipulated. Structured settlements were not discussed at the time this agreement was executed. In response to plaintiff's questions concerning a clause in the agreement on employing local counsel, defendant Llewellyn stated that it was necessary to have North Carolina attorneys for the North Carolina courts.

Sometime after execution of the agreement, defendant Llewellyn's firm employed defendants Vinroot and McKeithen, and their firm of Robinson, Bradshaw and Hinson, P.A., as local counsel, for a fee of twenty-five percent of one-third of the net recovery. Net recovery was defined as gross proceeds less payment of all costs.

The wrongful death action was instituted in December 1983 and pursued by plaintiff through 19 December 1984 in the United States District Court for the Western District of North Carolina. During the pendency of the action, settlement negotiations were

held. Some of the settlement offers were for structured settlements. The settlement offers eventually reached approximately $2.4 million net to the estate after attorney fees and costs, the goal previously set by plaintiff's attorneys. Defendant Llewellyn advised plaintiff that the settlement, although having a present value of $2.4 million, had a total value of approximately $4.2 million. Plaintiff accepted the proposal. Thereafter defendants employed another attorney, at plaintiff's expense, "to render an opinion concerning the settlement and to advise the other defendants regarding the procedure required by N.C.G.S. § 28A-13-3(a)(23)." Since the deceased was survived by minor children, court approval of the settlement was required under N.C.G.S. § 28A-13-3(a)(23). Defendants also employed, at plaintiff's expense, a tax lawyer to compute the value of the structured settlement.

Defendants discussed with plaintiff the proposed settlement, including its relation to attorney fees and how they would be calculated. Plaintiff indicated approval. Plaintiff contends, however, that none of the defendants advised her that the attorney fees were substantially in excess of the amount provided for in her previous written agreement or that defendants Vinroot and McKeithen were to be paid by plaintiff for services rendered as local counsel.

Plaintiff executed a second agreement because she was advised that the earlier agreement was inappropriate for a structured settlement. Plaintiff's second agreement dealt with payments under the structured settlement, monies received as a result of discovery abuse, litigation costs, how payments were to be made to extinguish subrogation rights, and fees as expenses incident to probate proceedings. Plaintiff was later advised that, due to an error in the tax lawyer's calculations, the present value of the settlement had been recalculated to be $3.99 million as opposed to the earlier estimate of $4.2 million. The attorney fees were then approximately 42.6% of the settlement amount rather than the approximately thirty-nine percent anticipated when the proposed settlement was approved by plaintiff. Plaintiff was not advised that the attorney fee arrangement in her initial agreement was substantially altered by her second agreement.

On 19 December 1984, the court entered an order approving the settlement of the wrongful death action which included approval of attorney fees.

Plaintiff instituted the present action against defendants, seeking both compensatory and punitive damages based on malpractice and breach of fiduciary duty, intentional disregard of duty, conspiracy and negligence. In the prayer for relief plaintiff did not seek to set aside the order approving the settlement or a refund of attorney fees paid pursuant thereto.

Defendants filed a motion for summary judgment. The trial court granted summary judgment for defendants, reasoning as follows:

> [T]he court is of the opinion that the motion for summary judgment should be allowed in that the complaint asserts only claims that constitute an attack on the attorney fees approved by the court in said order of December 19, 1984, and an attack on the said order and the jurisdiction of the court under N.C.G.S. 28A-13-3(a)(23) in File No. 82-E-2043 . . . captioned *In Re The Estate of Peter Oberdorf Beckwith*, of which the plaintiff Barbara S. Beckwith is Executrix and in which said order approving the settlement and the attorney fees on December 19, 1984, was made.

The Court of Appeals affirmed, one judge dissenting. On the basis of the dissenting opinion, plaintiff appealed to this Court, contending that settlement and approval of attorney fees in the previous action is not a bar to suit for attorney malpractice alleging negligence and breach of fiduciary duty. We agree. Summary judgment on this ground was improper.

Summary judgment is granted when, viewing the record in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Wilkes County Vocational Workshop, Inc. v. United Sleep Products, Inc.*, 321 N.C. 735, 365 S.E.2d 292 (1988); *see also Rosi v. McCoy*, 319 N.C. 589, 356 S.E.2d 568 (1987); *Caldwell v. Deese*, 288 N.C. 375, 218 S.E.2d 379 (1975); *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E.2d 897 (1972). Collateral estoppel can be a basis for summary judgment because it precludes relitigation of issues actually determined in a previous action. *Sky City Stores v. United Overton Corp.*, 90 N.C. App. 124, 367 S.E.2d 338 (1988); *see McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 349 S.E.2d 552 (1986); *King v. Grindstaff*, 284 N.C. 348, 200 S.E.2d 799 (1973).

Collateral estoppel applies when the following requirements are met:

> (1) The issues to be concluded must be the same as those involved in the prior action; (2) in the prior action, the issues must have been raised and actually litigated; (3) the issues must have been material and relevant to the disposition of the prior action; and (4) the determination made of those issues in the prior action must have been necessary and essential to the resulting judgment.

King, 284 N.C. at 358, 200 S.E.2d at 806. A "judgment in [a] prior action operates as an estoppel only as to those matters in issue or points controverted." *McInnis*, 318 N.C. at 427, 349 S.E.2d at 556 (quoting *Cromwell v. County of Sac*, 94 U.S. 351, 352-53, 24 L. Ed. 195, 197-98 (1877)). A very close examination of matters actually litigated must be made in order to determine if the underlying issues are in fact identical. If they are not identical, then the doctrine of collateral estoppel does not apply. The parties in *McInnis* and *Grindstaff* were prevented from bringing a second action because the second action would have involved a reopening of identical issues merely by switching adversaries.

In the present case, plaintiff attempts to show that her former attorneys took advantage of the attorney-client relationship to her detriment; her former attorneys are now her adversaries. In the prior case, she and her attorneys, as client and fiduciaries, attempted to show that they had reached a reasonable settlement with the original defendants which was fair to the minors involved and which should therefore have been approved by the court. The issues are not identical. The focus in the prior case was not whether the attorneys had taken advantage of their client but whether the settlement reached with the opposing party was fair to the minors involved. In the prior case, plaintiff and her attorneys were on the same side; in the present case they are adversaries.

While the court in the prior case could not approve the settlement without making a determination as to whether the attorney fees charged were reasonable in relation to the amount of the settlement and the services performed by the attorneys in reaching that settlement, no such determination is required in the present case. In the present case the issue to be determined is whether, notwithstanding the court's prior approval of the reasonableness of the fees in reference to the amount of the settlement and the

services performed by the attorneys, plaintiff has nevertheless been damaged because the attorneys breached a fiduciary duty to her in the handling of matters prior to and during the settlement process resulting in the court's approval.

Plaintiff does not seek to set aside the agreement with the original defendants settling the lawsuit; nor does she seek to set aside the court's approval of the settlement and the attorney fees paid pursuant thereto. This is not a proceeding to set aside or reopen the order approving the settlement but instead to recover damages based upon a breach of fiduciary duties on the part of her attorneys in obtaining it. Thus, the "issues to be concluded," *King v. Grindstaff*, 284 N.C. at 358, 200 S.E.2d at 806, are not the same as those involved in the prior action and the "issues in question" are not identical to the "issues . . . actually litigated," *id.*, in the prior action. The Court of Appeals thus erred in affirming the trial court's grant of summary judgment on the grounds of collateral estoppel.

It remains to be determined in further proceedings whether plaintiff can prove her allegations. We decide only the question raised by the appeal, that is, whether collateral estoppel was applicable so as to support summary judgment in favor of defendants. We express no opinion as to whether defendants may establish by appropriate affidavits or further discovery that they are entitled to summary judgment on other grounds.

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

Reversed and remanded.

STATE OF NORTH CAROLINA v. PETER JOSEPH SPECKMAN, JR.

No. 50PA89

(Filed 10 May 1990)

Indictment and Warrant § 8.4 (NCI3d)— embezzlement and false pretenses—failure to require election by State—new trial

Defendant was entitled to a new trial on charges of embezzlement and false pretenses where the trial court did not instruct the jury that it could convict defendant only of one offense or the other, but not of both. Although N.C.G.S. § 14-100 now clearly provides that a defendant may be convicted of embezzlement upon an indictment charging him with false pretenses, the legislature intended to give full effect to our original common law rule against requiring the State to elect between charges of embezzlement and false pretenses if the felonies charged arose from the same transaction. If the evidence at trial conflicts and some of it tends to show false pretenses but other evidence tends to show that the same transaction amounted to embezzlement, the trial court should submit both charges to the jury but must instruct the jury that it may convict defendant only of one offense or the other, but not of both. Even though the convictions here were consolidated for a single judgment, there was prejudice in that separate convictions for mutually exclusive offenses have potentially severe adverse collateral consequences. Furthermore, given the peculiar posture of this case, there was a reasonable possibility that a different result would have been reached at trial as to both charges had the trial court correctly instructed the jury.

Am Jur 2d, Embezzlement §§ 1, 6; False Pretenses § 5.

ON discretionary review of the decision of the Court of Appeals, 92 N.C. App. 265, 374 S.E.2d 419 (1988), affirming a judgment entered by *Griffin, J.*, in the Superior Court, MECKLENBURG County, on 13 August 1987. Heard in the Supreme Court on 16 November 1989.

Lacy H. Thornburg, Attorney General, by David F. Hoke, Associate Attorney General, for the State.

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

MITCHELL, Justice.

The defendant was indicted on 23 March 1987, in separate indictments, for one count of embezzlement and one count of obtaining property by false pretenses (hereafter, "false pretenses"). He was tried at the 10 August 1987 Session of Superior Court, Mecklenburg County, and was convicted of both charges. After consolidating the offenses for judgment, the trial court sentenced the defendant to imprisonment for one year and to a fine of $7,500. On appeal, the Court of Appeals found no error. Thereafter, this Court granted the defendant's petition for discretionary review. We now reverse the decision of the Court of Appeals.

The State's evidence at trial tended to show that the defendant was Floyd D. Young's attorney. In that capacity, the defendant advised Young on various investment opportunities. Sometime in 1984, the defendant informed Young that a 22.5 percent partnership interest in "Slide-a-Ride," a waterslide in Winston-Salem, North Carolina, was for sale. The defendant represented that "Slide-a-Ride" was a good investment.

The evidence tended to show that the defendant did not tell Young that the defendant owned the partnership interest that was for sale. The defendant had purchased the partnership interest from James Schwab for $6,500 in 1983, but the partnership records had not been changed to reflect the change of ownership.

The partnership records did reveal, however, that the waterslide operation had never operated at a profit. In addition, the partnership had never yielded any return on investment to the partners. Nevertheless, the defendant recommended the investment to his client Young and stated that the defendant could arrange the sale.

Relying upon the defendant's advice, Young agreed to purchase the partnership interest for $7,500 and gave that amount to the defendant. Even though the defendant had previously purchased the interest from James Schwab, the defendant informed Young that the money was used to purchase Schwab's interest (presumably from Schwab). Thereafter, the defendant deposited the money into his trust account.

At trial, the defendant testified on his own behalf. He denied withholding any material information from Young. The defendant admitted, however, that he purchased Schwab's interest before selling it for a profit to Young. He explained that the $1,000 profit

covered his expenses and that Young really did not care who owned the partnership interest. The defendant further conceded that he failed to inform the partnership of any of the transactions in question. Consequently, neither Young, Schwab nor the partnership received any documentation from the defendant concerning the transactions, and in 1984 the partnership records still listed Schwab as a partner.

The jury found the defendant guilty of both embezzlement and false pretenses. On appeal, the Court of Appeals concluded that the crimes of embezzlement and false pretenses are, by definition, mutually exclusive offenses and, therefore, that the trial court had erred in denying the defendant's motion at trial to require the State to elect to try him for one offense or the other, but not for both offenses. The Court of Appeals held, however, that the trial court's consolidation of the two offenses in a single judgment prevented any prejudice to the defendant.

This Court has held that to constitute embezzlement, the property in question initially must be acquired lawfully, pursuant to a trust relationship, and then wrongfully converted. *State v. Griffin*, 239 N.C. 41, 45, 79 S.E.2d 230, 233 (1953); N.C.G.S. § 14-90 (1986). On the other hand, to constitute false pretenses the property must be acquired unlawfully at the outset, pursuant to a false representation. *State v. Griffin*, 239 N.C. at 45, 79 S.E.2d at 232; N.C.G.S. § 14-90 (1986). This Court has previously held that, since property cannot be obtained simultaneously pursuant to both lawful and unlawful means, guilt of either embezzlement or false pretenses necessarily excludes guilt of the other. *State v. Griffin*, 239 N.C. at 45, 79 S.E.2d at 233. The Court of Appeals correctly concluded that, under our law, a defendant may not be convicted of both embezzlement and false pretenses arising from the same act or transaction, due to the mutually exclusive nature of those offenses. *State v. Griffin*, 239 N.C. 41, 79 S.E.2d 230.

However, while a defendant cannot be convicted of both embezzlement and false pretenses based upon a single transaction, the State may charge the defendant with both offenses. Separate offenses may be joined for trial when they are alleged to arise from the same act or transaction. N.C.G.S. § 15A-926(a) (1988). In the present case, the events giving rise to the embezzlement and the false pretenses charges against the defendant were clearly parts of the same act or transaction. Nevertheless, relying upon

State v. Griffin, 239 N.C. 41, 79 S.E.2d 230, the Court of Appeals held that "where the charges involved are mutually exclusive, as in the present case, we are persuaded that the State should be required to make an election between the charges." *State v. Speckman*, 92 N.C. App. 265, 269, 374 S.E.2d 419, 422 (1988). We do not agree.

The Court of Appeals' reliance on *Griffin* in this regard was misplaced. That case held that the State must elect prior to trial between the mutually exclusive charges of embezzlement and false pretenses and proceed against the defendant for only one of those charges. *State v. Griffin*, 239 N.C. at 45, 79 S.E.2d at 233. However, since the *Griffin* decision, the legislature has abrogated the election requirement as applied in that case. In 1975, the legislature rewrote N.C.G.S. § 14-100 to provide:

> that if, on the trial of anyone indicted for [false pretenses], it shall be proved that he obtained the property in such manner as to amount to larceny or *embezzlement*, the jury shall have submitted to them such other felony proved . . . .

1975 N.C. Sess. Laws ch. 783, § 1 (emphasis added).

This statute now clearly provides that a defendant may be convicted of embezzlement upon an indictment charging him with false pretenses. N.C.G.S. § 14-100 (1986). Further, we conclude that as to embezzlement and false pretenses charges, the legislature intended to give full effect to our original common law rule against requiring the State to elect between charges, if the felonies charged allegedly arose from the same transaction. *Cf. State v. Morrison*, 85 N.C. 561, 562 (1881) (stating the common law rules). Where, as here, there is substantial evidence tending to support both embezzlement and false pretenses arising from the same transaction, the State is not required to elect between the offenses. Indeed, if the evidence at trial conflicts, and some of it tends to show false pretenses but other evidence tends to show that the same transaction amounted to embezzlement, the trial court should submit both charges for the jury's consideration. In doing so, however, the trial court must instruct the jury that it may convict the defendant only of one of the offenses or the other, but not of both. If, on the other hand, the evidence at trial tends only to show embezzlement or tends only to show false pretenses, the trial court must submit only the charge supported by evidence for the jury's consideration. As the evidence in the present case would have

supported a verdict finding the defendant guilty of either offense, the trial court did not err either by submitting both charges for the jury's consideration or by denying the defendant's motion that the State be required to elect to try him for only one of the offenses. The Court of Appeals erred in its conclusion to the contrary.

Before this Court the defendant contends, nevertheless, that the trial court erred in allowing the jury to convict him of both embezzlement and false pretenses based upon a single transaction and that the error was prejudicial. We agree. The separate convictions for mutually exclusive offenses, even though consolidated for a single judgment, have potentially severe adverse collateral consequences. *Ball v. United States*, 470 U.S. 856, 865, 84 L. Ed. 2d 740, 748 (1985); *State v. Barnes*, 324 N.C. 539, 540, 380 S.E.2d 118, 119 (1989) (per curiam). Therefore, consolidating the two convictions and entering a single judgment did not reduce the trial court's error to harmless error. *Id.* To the extent that *State v. Meshaw*, 246 N.C. 205, 98 S.E.2d 13 (1957), conflicts with our decision on this point, that case is disapproved.

Further, given the peculiar posture in which this case comes before us, we conclude that there is a "reasonable possibility" that a different result would have been reached at trial as to both charges, had the trial court correctly instructed the jury that it could convict the defendant only of one offense or the other, but not of both. Therefore, the defendant is entitled to a new trial on both charges. N.C.G.S. § 15A-1443(a) (1988).

The decision of the Court of Appeals holding that there was no prejudicial error in the defendant's trial is reversed.

Reversed.

STATE OF NORTH CAROLINA v. FREDERICK A. NOBLE

No. 160PA89

(Filed 10 May 1990)

1. **Constitutional Law § 40 (NCI3d)— appointed attorney— appellate representation—compliance with Anders v. California**

Defendant's appointed counsel satisfied the requirements of *Anders v. California*, 386 U.S. 738, in an appeal from convictions for sexual offenses where he put six assignments of error in the record but did not argue any of them in the brief; he asked the Supreme Court to review the record on appeal to determine whether there was prejudicial error; he informed defendant that he could find no error in the trial or sentencing and would so indicate in his brief and that defendant could file a brief in his own behalf; and he appeared for oral argument of the case in the Supreme Court.

Am Jur 2d, Criminal Law § 807.

2. **Rape and Allied Offenses § 4 (NCI3d)— sexual offense victim— mental handicap—competency and relevancy of testimony**

An alleged sexual offense victim could properly testify that he was mentally handicapped because he was hit by a car and suffered a fractured skull. Furthermore, evidence of the victim's mental condition was relevant to prove an element of second degree sexual offense. N.C.G.S. § 14-27.5(a)(2).

Am Jur 2d, Evidence §§ 251-253, 259.

3. **Criminal Law § 95.1 (NCI3d)— corroborative evidence—failure to request limiting instruction**

The admission of corroborative evidence was not assignable as error where defendant failed to request a limiting instruction for such evidence.

Am Jur 2d, Evidence § 500.

4. **Criminal Law § 67 (NCI3d)— adequacy of voice identification**

A witness was properly permitted to testify that she heard defendant make a certain statement while he was in his house and she was in her yard where the witness had testified that she had heard defendant talk and could recognize his voice.

Am Jur 2d, Evidence §§ 368, 1143.

5. Criminal Law § 89.2 (NCI3d)— statement by a victim—admissibility for corroboration

Testimony by a witness that a sexual offense victim told him that defendant and another man had forced some kind of rod up his rectum was admissible to corroborate the victim's testimony.

Am Jur 2d, Evidence § 500.

6. Rape and Allied Offenses § 5 (NCI3d)— sexual offenses—sufficiency of evidence

The State's evidence was sufficient to support defendant's conviction of a first degree sexual offense and a second degree sexual offense where the victim testified that defendant held a knife to his throat and forced him to perform fellatio on defendant and that defendant and another person then removed his clothes and forced a curtain rod into his rectum.

Am Jur 2d, Assault and Battery § 27.

ON writ of certiorari to review the defendant's conviction and sentence of life imprisonment imposed by *Herring, J.*, at the 18 March 1982 Criminal Session of the Superior Court, CUMBERLAND County. Heard in the Supreme Court 15 March 1990.

The defendant was convicted of one charge of first degree sexual offense and one charge of second degree sexual offense. The charges were consolidated for sentencing and he received a sentence of life in prison. He appealed to this Court, which appeal was dismissed on 24 February 1983 for his failure to perfect it. On 15 August 1983 this Court denied the defendant's petition for certiorari. On 2 March 1989 the United States District Court for the Eastern District of North Carolina ordered that a writ of habeas corpus be issued unless the State of North Carolina afforded the defendant a belated direct appeal within sixty days or unless the State elected to retry the defendant within a reasonable time. On 19 April 1989 we allowed the defendant's petition for certiorari.

Mr. James M. Cooper, an attorney practicing in Fayetteville, North Carolina, was appointed to represent the defendant on this appeal and has filed a brief for him. He put six assignments of error in the record but did not argue any of them in the brief. In his brief he says he cannot find error in the case. He asks us to review the record on appeal to determine whether there

is prejudicial error. Mr. Cooper appeared in court when this case was called for argument. He stated that he had visited with the defendant three times at the prison in which the defendant was incarcerated. He told the defendant that he could find no error in the trial or sentencing and would so indicate in his brief. He informed the defendant he could file a pro se brief assigning whatever errors he felt were appropriate. The defendant has not filed a brief.

Lacy H. Thornburg, Attorney General, by Henry T. Rosser, Special Deputy Attorney General, for the State.

James M. Cooper for defendant appellant.

WEBB, Justice.

[1] The first question posed by this appeal is whether the defendant has been afforded an appeal that comports with the requirements of *Anders v. California*, 386 U.S. 738, 18 L.Ed.2d 493, *reh'g denied*, 388 U.S. 924, 18 L.Ed.2d 1377 (1967). In *Anders* the defendant's court appointed attorney advised the appellate court by letter that he felt there was no merit in the appeal and would not file a brief. He told the court his client would file a brief on his own behalf. The client filed a brief. The appellate court found no error. The United States Supreme Court held this was not sufficient appellate representation under the fourteenth amendment to the United States Constitution. The Supreme Court said an appellate attorney should act as an advocate. It is not enough that he finds no merit in the appeal. He must determine that an appeal would be frivolous before he is excused from filing a brief. If he determines that the appeal is frivolous he should so inform the court and even then he must refer to anything in the record that might arguably support the appeal. He must inform his client that he will not assign error and give the client an opportunity to file a brief in his own behalf. The court must then determine if the appeal is frivolous. If the court determines that any of the legal points are arguable on their merits, counsel must be appointed to brief these points.

We believe the defendant's attorney in this case has complied with *Anders*. By putting six assignments of error in the record he has called our attention to what he believes are issues that might arguably support an appeal. By not arguing the assignments of error in the brief he has let us know he feels an appeal based on these legal points would be frivolous. We can determine whether

such an appeal would be frivolous. He has notified his client that he can file a brief in his own behalf.

[2] We have examined the six assignments of error in the record and we agree with the defendant's attorney that an appeal based upon them would be frivolous. The first assignment of error dealt with the fact that the prosecuting witness was allowed to testify that he was mentally handicapped because he was hit by a car and suffered a fractured skull. The defendant said the witness was a lay person not qualified to give this expert testimony. In *State v. Nall*, 211 N.C. 61, 188 S.E. 637 (1936), we held it was error for the defendant not to be allowed to testify that he had been hit in the head with a baseball bat and an axe and that measles had settled in his head which had a bad effect on his mind. We believe, based on *Nall*, that the testimony by the prosecuting witness in this case was admissible. *See also State v. Taylor*, 290 N.C. 220, 226 S.E.2d 23 (1976), and *State v. Hammonds*, 290 N.C. 1, 224 S.E.2d 595 (1976). An appeal based on this assignment of error would have been frivolous.

The second assignment of error in the record contends that prejudice to the defendant from evidence that the victim was mentally handicapped greatly outweighed any probative value the evidence might have in violation of N.C.G.S. § 8C-1, Rule 403. Rule 403 did not become effective until 1 July 1984 and does not apply to this case. In any event this evidence of the victim's mental condition was relevant. Mental defectiveness of the victim is an element of second degree sexual offense. N.C.G.S. § 14-27.5(a)(2) (1979). We hold it would have been frivolous to have argued this assignment of error.

[3] In the next assignment of error in the record the defendant contends that hearsay testimony was improperly admitted. Shortly after the incident occurred for which the defendant was tried, the victim was taken to the emergency room at Cape Fear Valley Hospital where he was treated by Dr. James Bundy for a perforated rectum. The defendant contends Dr. Bundy should not have been allowed to testify that the victim told him that two men had forced an iron rod into his rectum. The trial of this case occurred before the adoption of N.C.G.S. § 8C-1, Rule 803(4) which provides for an exception to the hearsay exclusion for statements made for purposes of medical diagnosis or treatment. This testimony of Dr. Bundy corroborated the testimony of the prosecuting witness. The

defendant objected to it but he did not request a limiting instruction. When a party does not request a limiting instruction to corroborating evidence he cannot assign error to it. *State v. Bryant*, 282 N.C. 92, 191 S.E.2d 745 (1972). It would have been frivolous to have brought forward this assignment of error.

[4] The fourth assignment of error in the record deals with the testimony of Pamela Crawford, the victim's sister. She testified she was in her yard the day of the incident when she heard the defendant, who was in his house, say "blow hard, blow hard." She said before this time she had heard the defendant talk and could recognize his voice. It was not error to allow this testimony. *See State v. Williams*, 288 N.C. 680, 220 S.E.2d 558 (1975), and *State v. Poplin*, 56 N.C. App. 304, 289 S.E.2d 124, *cert. denied*, 305 N.C. 763, 292 S.E.2d 579 (1982), for the adequacy of voice identification to make such identification admissible.

[5] The fifth assignment of error deals with the testimony of Joseph Richardson who testified over objection that the victim told him the defendant and another man had raped him by forcing some kind of rod up his rectum. The judge instructed the jury to consider this testimony only in corroboration of the victim's testimony if they found it corroborated his testimony. The victim testified to the same thing. There was clearly no error in this testimony. *State v. Elkerson*, 304 N.C. 658, 285 S.E.2d 784 (1982).

[6] The last assignment of error in the record deals with the overruling of the defendant's motion to dismiss at the close of the evidence. The prosecuting witness testified that the defendant was his neighbor and that he was in the home of defendant when the defendant accused him of telling people the defendant was a "faggot." The prosecuting witness testified further that the defendant, with the aid of another person, forced him to perform fellatio on the defendant. He testified that the defendant held a knife at his throat while he performed the fellatio. The prosecuting witness testified further that after he had been forced to perform fellatio the defendant and the other person removed his clothes and forced a curtain rod into his rectum. This testimony was sufficient for the jury to convict the defendant of a first degree sexual offense and a second degree sexual offense. *State v. DeLeonardo*, 315 N.C. 762, 340 S.E.2d 350 (1986); *State v. Locklear*, 304 N.C. 534, 284 S.E.2d 500 (1981). It would have been frivolous to bring forward this assignment of error.

We have examined the record for other possible error and have found none.

No error.

ELVERA A. COFFEY v. MICHAEL COFFEY

No. 359PA89

(Filed 10 May 1990)

ON plaintiff's petition for discretionary review pursuant to N.C.G.S. § 7A-31 of the decision of the Court of Appeals, 94 N.C. App. 717, 381 S.E.2d 467 (1989), affirming summary judgment for defendant entered by *Collier, J.*, at the 12 July 1988 Regular Civil Session of Superior Court, ALEXANDER County. Heard in the Supreme Court 10 April 1990.

Joel C. Harbinson for plaintiff-appellant.

Patrick, Harper & Dixon, by James T. Patrick, for defendant-appellee.

PER CURIAM.

This is an action by a parent against her child for personal injuries received while she was a passenger in an automobile operated by the child. At the time of the accident the child was an unemancipated minor, but at the time of suit he had reached his majority. The Court of Appeals in a reasoned opinion by Judge Greene, concurred in by Judges Arnold and Lewis, concluded that the doctrine of parent-child immunity barred the suit and affirmed summary judgment entered for defendant in the Superior Court.[1]

After carefully considering the briefs and arguments of counsel, we have determined that we improvidently allowed plaintiff's petition for further review.

Discretionary review improvidently allowed.

---

1. Judge John B. Lewis, Jr., dissented from the majority's decision that the Superior Court (Judge Robert D. Lewis presiding at the 13 June 1988 Mixed Civil Session) erred in denying plaintiff's motion to amend her complaint to add the child's father as a party defendant. There was no appeal from this decision, and this aspect of the case is not before us.

MICHAEL W. AMICK, JUDY J. AMICK, ROBERT V. ARONE, MARIAN B. ARONE, ROY E. BENNETT, PEGGY B. BENNETT, RALPH M. BOUNDS, CONSTANCE W. BOUNDS, BILLY D. BOWERS, CAROL L. BOWERS, ROLLA G. BRYANT, CAROL J. BRYANT, YUNG KI CHANG, SOON SUN CHANG, THOMAS EVANS, BRENDA H. EVANS, HENRY E. FERGUSON, SR., ENRICO GALLINARO, DONALD E. GOESSEL, KATHLEEN F. GOESSEL, G. TED HADDEN, ROBIN C. HADDEN, FREDRICK D. JUDSON, STEPHANIE JUDSON, DAVID C. KNOX, MARIE K. KNOX, RONALD MENICHELLI, DEBORAH L. MENICHELLI, JAMES F. NICHOLS, ELAINE NICHOLS, JEAN A. ROGERS, RANDY S. SINKOE, MARCI A. SINKOE, SIDNEY F. SOOUDI, KAZUYO K. SOOUDI, NORMAN F. STAMBAUGH, III, WILLIAM H. THURSTON, FAYE C. THURSTON, CRAWFORD B. WATSON, HAZEL J. WATSON, ROY ALLEN WILEY, KIM W. WILEY, BRUCE JOHNSON, NANCY JOHNSON, CARY LAWRENCE, GWEN LAWRENCE, FRANK FLOYD, PATRICIA FLOYD, GAILE GORDON, JOANNE GORDON, IRA BOSTIC, HELEN BOSTIC, JACKIE E. PURSER, JR., ZONE C. PURSER, EDWARD SMITH, GIRTHEL SMITH, JAMES K. BOSSBACH, SHIRLEY C. BOSSBACH, JOHN E. ARANT, AND DELORES D. ARANT v. TOWN OF STALLINGS

No. 396PA89

(Filed 10 May 1990)

ON respondent Town of Stallings' petition for discretionary review of the decision of the Court of Appeals, 95 N.C. App. 64, 382 S.E.2d 221 (1989), affirming an order of *Albright, J.*, entered out of session on 16 June 1988 by consent of the parties after hearing at the 23 May 1988 Civil Session of Superior Court, UNION County, remanding an annexation ordinance to the Town pursuant to N.C.G.S. § 160A-38(g)(2). Heard in the Supreme Court 9 April 1990.

Thomas, Harrington & Biedler, by Larry E. Harrington, and Smith, Helms, Mulliss & Moore, by Larry B. Sitton, for petitioner-appellees.

Griffin, Caldwell, Helder & Lee, P.A., by W. David Lee, for respondent-appellant Town of Stallings.

North Carolina League of Municipalities, by S. Ellis Hankins, General Counsel, and Kimberly L. Smith, Assistant General Counsel, amicus curiae.

PER CURIAM.

Discretionary review improvidently allowed.

STATE OF NORTH CAROLINA v. STERLING PAYTON HARRIS ALIAS DAVY RAY BOLDER

No. 483A89

(Filed 10 May 1990)

APPEAL of right by defendant pursuant to N.C.G.S. § 7A-30(1) (1989) from a unanimous decision of the Court of Appeals reported at 95 N.C. App. 691, 384 S.E.2d 50 (1989), affirming a judgment of imprisonment entered by *Helms, J.*, on 7 July 1988 in Superior Court, GUILFORD County, upon defendant's plea of guilty to the felony of possession of a firearm by a felon, entered after the denial of his motion to suppress evidence. Defendant preserved his right to appeal from the denial of his motion to suppress pursuant to N.C.G.S. § 15A-979(b) (1988). Heard in the Supreme Court 11 April 1990.

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

Frederick G. Lind, Assistant Public Defender, for defendant-appellant.

PER CURIAM.

Affirmed.

WILLIAM L. BAMBERGER, JR. v. ROGER B. BERNHOLZ AND COLEMAN, BERNHOLZ, DICKERSON, BERNHOLZ, GLEDHILL, AND HARGRAVE, A NORTH CAROLINA GENERAL PARTNERSHIP

No. 1A90

(Filed 10 May 1990)

APPEAL by defendants pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 96 N.C. App. 555, 386 S.E.2d 450 (1989), reversing summary judgment for defendants entered 19 August 1988 by *Farmer, J.*, in the Superior Court, ORANGE County. Heard in the Supreme Court 11 April 1990.

Elliot & Pishko, P.A., by David C. Pishko, for plaintiff-appellee.

Young, Moore, Henderson & Alvis, P.A., by M. Lee Cheney and Jerry S. Alvis, for defendant-appellants.

PER CURIAM.

The decision of the Court of Appeals is reversed for the reasons stated in Judge Lewis' dissenting opinion.

Reversed.

FREDDA DIANE BAYNOR TALBOT v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DIVISION OF MOTOR VEHICLES

No. 435PA89

(Filed 10 May 1990)

ON discretionary review, pursuant to N.C.G.S. § 7A-31, of a decision of the Court of Appeals, 95 N.C. App. 446, 382 S.E.2d 447 (1989), affirming the Decision and Order of the North Carolina Industrial Commission entered 7 June 1988. Heard in the Supreme Court 10 April 1990.

Carter, Archie & Hassell, by Sid Hassell, Jr., for the plaintiff-appellee.

Lacy H. Thornburg, Attorney General, by Victor H. E. Morgan, Jr., Assistant Attorney General, for the defendant-appellant.

PER CURIAM.

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

Discretionary review improvidently allowed.

PARKS CHEVROLET, INC. v. JUREL BLACKBURN GWYN

No. 439PA89

(Filed 10 May 1990)

ON plaintiff's petition for discretionary review of the decision of the Court of Appeals, in an unpublished opinion, which found no error in the judgment entered by *Biggs, J.*, at the 27 June 1988 session of District Court, FORSYTH County. Heard in the Supreme Court 12 April 1990.

David F. Tamer for plaintiff-appellant.

Legal Aid Society of Northwest North Carolina, Inc., by Susan Gottsegen and Ellen W. Gerber, for defendant-appellee.

PER CURIAM.

Discretionary review improvidently allowed.

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
DOCK McKOY	)	

No. 585A85

(Filed 3 April 1990)

ON remand from the Supreme Court of the United States, and upon consideration of the motion to remand the case to the Superior Court, STANLY County, filed by defendant in this matter, the following order is entered and is hereby certified to the Superior Court of that County:

Within 14 days after certification of this order, all parties shall file with this Court supplemental briefs, limited to the issues presented by the opinion of the Supreme Court of the United States remanding the case to this Court, and the issue of whether this Court can engage in a harmless error analysis on the issues presented and, if so, whether the error in this case, if any, was harmless. See *Clemons v. Mississippi* (88-6873, U.S. Supreme Court, decided 28 March 1990).

The parties may reply to opposing briefs so long as any such reply is filed in this Court on or before 30 April 1990.

The case will be set for argument during the week of 14 May 1990.

By order of the Court in conference, this 3rd day of April, 1990.

WHICHARD, J.
For the Court

STATE v. McNEIL

[326 N.C. 593 (1990)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
LEROY McNEIL	)	

No. 37A87

(Filed 3 April 1990)

ON remand from the Supreme Court of the United States, and upon consideration of the motion to remand the case to the Superior Court, Stanly County, filed by defendant in this matter, the following order is entered and is hereby certified to the Superior Court of that County:

Within 14 days after certification of this order, all parties shall file with this Court supplemental briefs, limited to the issues presented by the order of the Supreme Court of the United States remanding the case to this Court.

The parties may reply to opposing briefs so long as any such reply is filed in this Court on or before 30 April 1990.

This case will be set for argument during the week of 14 May 1990.

By order of the Court in conference, this the 3rd day of April, 1990.

WHICHARD, J.
For the Court

BARE v. BARRINGTON

No. 94P90

Case below: 97 N.C.App. 282

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 10 May 1990.

BOUTWELL v. BOUTWELL

No. 142P90

Case below: 97 N.C.App. 332

Petition by defendant for temporary stay denied 4 April 1990.

CARROLL v. DANIELS CONSTRUCTION CO.

No. 55PA90

Case below: 96 N.C.App. 649

Petition by defendant (Insurance Company) for discretionary review pursuant to G.S. 7A-31 allowed 10 May 1990.

CASEY v. FREDERICKSON MOTOR EXPRESS CORP.

No. 78P90

Case below: 97 N.C.App. 49

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 May 1990.

CHEROKEE INS. CO. v. R/I, INC.

No. 75P90

Case below: 97 N.C.App. 295

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 10 May 1990.

CORUM v. UNIVERSITY OF NORTH CAROLINA

No. 163P90

Case below: 97 N.C.App. 527

Petition by defendants for temporary stay allowed 30 April 1990 pending a receipt of response to the petition for discretionary review and determination of the petition.

COVINGTON v. COVINGTON

No. 60P90

Case below: 97 N.C.App. 142

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 10 May 1990.

DENTON v. PEACOCK

No. 67P90

Case below: 97 N.C.App. 97

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 May 1990.

DUKE UNIVERSITY v. ST. PAUL FIRE AND MARINE INS. CO.

No. 54P90

Case below: 96 N.C.App. 635

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 May 1990.

ELECTRIC SOUTH, INC. v. LEWIS

No. 547P89

Case below: 96 N.C.App. 160

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 10 May 1990.

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

GUMMELS v. N. C. DEPT. OF HUMAN RESOURCES

No. 9AP90

Case below: 97 N.C.App. 245

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 10 May 1990.

IN RE MORRIS v. DUKE POWER CO.

No. 562P89

Case below: 96 N.C.App. 510

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 10 May 1990.

INMAN v. LEISURE

No. 101P90

Case below: 97 N.C.App. 332

Petition by defendant (North American Van Lines) for discretionary review pursuant to G.S. 7A-31 denied 10 May 1990.

JACKSON v. N. C. DEPT. OF CRIME CONTROL AND PUBLIC SAFETY

No. 123P90

Case below: 97 N.C.App. 425

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 May 1990.

JOHNSON v. SMITH

No. 137P90

Case below: 97 N.C.App. 451

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 10 May 1990.

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

KNOTE v. NIFONG

No. 68P90

Case below: 97 N.C.App. 105

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 May 1990.

McCABE v. DAWKINS

No. 127P90

Case below: 97 N.C.App. 447

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 10 May 1990.

MATTHEWS v. N.C. DEPT. OF CORRECTION

No. 81P90

Case below: 97 N.C.App. 142; 326 N.C. 483

Motion by plaintiff for reconsideration of the petition for discretionary review denied 10 May 1990.

MILLS v. CHARLOTTE MEMORIAL HOSPITAL

No. 129P90

Case below: 97 N.C.App. 507

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 10 May 1990.

QUALITY WATER SUPPLY, INC. v. CITY OF WILMINGTON

No. 85P90

Case below: 97 N.C.App. 400

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 10 May 1990. Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 10 May 1990.

SCREAMING EAGLE AIR, LTD. v.
AIRPORT COMM. OF FORSYTH COUNTY

No. 61P90

Case below: 97 N.C.App. 30

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 May 1990.

SELLERS v. HIGH POINT MEM. HOSP.

No. 104P90

Case below: 97 N.C.App. 299

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 10 May 1990.

SHREVE v. DUKE POWER CO.

No. 162P90

Case below: 97 N.C.App. 648

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 10 May 1990. Petition by defendant (Lewis Stultz) for discretionary review pursuant to G.S. 7A-31 denied 10 May 1990.

SMITH v. SELCO PRODUCTS, INC.

No. 570P89

Case below: 96 N.C.App. 151

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 May 1990.

STATE v. BROWN

No. 91P90

Case below: 97 N.C.App. 333

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 May 1990.

STATE v. BUMGARNER

No. 152P90

Case below: 97 N.C.App. 567

Petition by defendant for writ of supersedeas and temporary stay denied 24 April 1990. Notice of appeal by defendant pursuant to G.S. 7A-30 dismissed 24 April 1990. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 24 April 1990.

STATE v. EVERETT

No. 157A90

Case below: 98 N.C.App. 23

Petition by Attorney General for writ of supersedeas and temporary stay denied 23 April 1990. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 May 1990.

STATE v. GANDY

No. 144P90

Case below: 98 N.C.App. 155

Petition by defendant for temporary stay allowed 20 April 1990 conditioned upon secured appearance bond remaining in full force and effect.

STATE v. HAMILTON

No. 56P90

Case below: 97 N.C.App. 143

Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 10 May 1990. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 May 1990.

STATE v. HOPE

No. 12P90

Case below: 96 N.C.App. 498

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 May 1990.

STATE v. INMAN

No. 140P90

Case below: 97 N.C.App. 507

Petition by defendant (Sizemore) for writ of certiorari to the North Carolina Court of Appeals denied 10 May 1990.

STATE v. McCOMBS

No. 107P90

Case below: 97 N.C.App. 510

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 May 1990.

STATE v. RICHARDSON

No. 17P90

Case below: 96 N.C.App. 515

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 May 1990. Motion by defendant to amend petition allowed 10 May 1990.

STATE v. RIGGS

No. 30PA90

Case below: 96 N.C.App. 595

Motion by defendants to dismiss appeal by the Attorney General for lack of substantial constitutional question denied 10 May 1990. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 10 May 1990.

STEWART OFFICE SUPPLIERS, INC. v.
FIRST UNION NAT. BANK

No. 128A90

Case below: 97 N.C.App. 353

Petition by defendant (Southern National Bank) for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues denied 10 May 1990. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 10 May 1990.

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

WEEKS v. N. C. DEPT. OF NAT. RESOURCES AND COMM. DEVELOPMENT

No. 87P90

Case below: 97 N.C.App. 215

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 10 May 1990.

WHITE v. HUGH CHATHAM MEMORIAL HOSPITAL

No. 71P90

Case below: 97 N.C.App. 130

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 May 1990.

WHITE v. N. C. BD. OF PRACTICING PSYCHOLOGISTS

No. 109P90

Case below: 97 N.C.App. 144

Motion by defendant to dismiss appeal by plaintiff for lack of substantial constitutional question allowed 10 May 1990. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 10 May 1990. Motion by plaintiff to dismiss appeal by defendant for lack of substantial constitutional question allowed 10 May 1990. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 May 1990.

YORK v. NORTHERN HOSPITAL DISTRICT

No. 18P90

Case below: 96 N.C.App. 456

Petition by defendants (Guidetti and Anesthesia Associates) for discretionary review pursuant to G.S. 7A-31 denied 10 May 1990.

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

PETITION TO REHEAR

IN RE ESTATE OF TUCCI

No. 294A89

Case below: 326 N.C. 359

Petition by dissenter to rehear denied 10 May 1990.

EDDIE RAY CRUMP v. BOARD OF EDUCATION OF THE HICKORY ADMINISTRATIVE SCHOOL UNIT, WILLIAM PITTS, LOIS YOUNG, BARBARA A. GARLITZ, RUEBELLE A. NEWTON, C. JOHN WATTS III, AND LARRY O. ISENHOUR

No. 171A89

(Filed 13 June 1990)

1. Schools § 13.2 (NCI3d)— teacher dismissal—bias by single school board member—violation of due process

A single school board member's bias against the teacher at a teacher dismissal hearing taints the entire board's decision-making process and denies the teacher due process regardless of whether the bias affected the correctness of the board's decision.

Am Jur 2d, Schools §§ 192, 193.

2. Appeal and Error § 566 (NCI4th)— teacher dismissal—direct review proceeding—law of the case—issue preclusion—inapplicability to bias claim

Plaintiff teacher's civil rights claim for damages based on alleged bias of the board of education which dismissed him was not finally decided against him in the direct judicial review of the board's decision to terminate him and the subsequent appeal of that judicial review to the Court of Appeals and was thus not barred by either the law of the case or the doctrine of issue preclusion where the trial court, upon motion by the board, severed plaintiff's two separate claims and conducted its direct judicial review of the board's dismissal decision separately from the trial of the civil rights action; although an assignment of error by plaintiff in the Court of Appeals recited language in the superior court judgment finding that the board's decision was not biased, plaintiff did not raise or argue that specific point before the Court of Appeals; in the direct review proceeding, the parties, superior court and Court of Appeals all focused on the question of whether the board's findings and conclusions in its dismissal decision were supported by substantial evidence in the whole record; no evidence of the type of "concealed" bias, the type of bias leading to the civil rights claim, was in the record made by the board, and plaintiff was given no opportunity to present such evidence on direct judicial review; and the bias claim

thus could not have been reached by the superior court in its direct judicial review of the board's action dismissing plaintiff.

Am Jur 2d, Schools §§ 192, 193.

3. **Schools § 13.2 (NCI3d)— teacher dismissal hearing—property and liberty interests—right to due process**

A career teacher charged with immorality and insubordination was entitled to a dismissal hearing which complied with principles of due process since the teacher had a cognizable property interest in his continued employment and a constitutionally protected liberty interest was implicated.

Am Jur 2d, Schools §§ 192, 193.

4. **Constitutional Law § 17 (NCI3d)— civil rights action—concurrent jurisdiction of state and federal courts**

State courts have concurrent jurisdiction with federal courts over civil rights actions brought under 42 U.S.C. § 1983.

Am Jur 2d, Civil Rights §§ 99, 263-269.

5. **Schools § 13.2 (NCI3d)— teacher dismissal—bias by one board member—denial of due process**

If a school board member had made a fixed decision prior to a teacher dismissal hearing to vote against the teacher based on factual information obtained outside the hearing process, that board member was biased against the teacher, and such member's participation in the teacher's dismissal hearing would deny the teacher procedural due process no matter what outcome the board reached at the hearing.

Am Jur 2d, Schools §§ 192, 193.

6. **Schools § 13.2 (NCI3d)— teacher dismissal—pre-hearing knowledge of allegations not biased**

School board members with pre-hearing knowledge regarding the allegations against a teacher would neither necessarily nor presumptively be biased against him. However, when performing their quasi-judicial function during a board hearing and any resulting deliberations, school board members must be able to set aside their prior knowledge and preconceptions concerning the matter at issue, and base their considerations solely upon the evidence adduced at the hearing.

Am Jur 2d, Schools §§ 192, 193.

7. **Constitutional Law § 17 (NCI3d); Schools § 13.2 (NCI3d)— teacher dismissal—civil rights action—bias of school board member—sufficient evidence for jury**

The trial court properly submitted a dismissed teacher's 42 U.S.C. § 1983 claim for damages to the jury for its determination as to whether a school board member had in fact been biased against the teacher in the dismissal proceeding where there was substantial evidence that, at the board's hearing, one or more board members consciously concealed both prior knowledge of the allegations against the teacher and a fixed predisposition against him.

Am Jur 2d, Schools §§ 192, 193.

8. **Schools § 13.2 (NCI3d)— teacher dismissal hearing—requirement of due process**

Whether a school board's decision-making process in a teacher dismissal hearing should be termed administrative or quasi-judicial, the board's action involving resolution of disputed facts and selection among alternate sanctions was required to afford the teacher, at a minimum, an unbiased hearing in accord with principles of due process.

Am Jur 2d, Schools §§ 192, 193.

9. **Schools § 13.2 (NCI3d)— teacher dismissal—bias of school board member—hearing result and spread of bias irrelevant to due process question**

Neither the result reached at a teacher dismissal hearing nor the spread of one school board member's bias to a sufficient number of other members to have determined the result is determinative on the question of whether the school board's procedure was fundamentally unfair and thus denied the teacher due process, since one board member's fixed bias is sufficient to cause the hearing process to deny due process even though the hearing result itself can be justified.

Am Jur 2d, Schools §§ 192, 193.

10. **Constitutional Law § 17 (NCI3d); Schools § 13.2 (NCI3d)— civil rights action—teacher dismissal—bias by school board member—due process violation—compensatory damages**

Where the jury in a § 1983 civil rights action determined from the evidence at trial that one or more school board

members were biased against plaintiff teacher at a dismissal hearing, the jury was justified in returning a verdict finding that the school board's hearing denied plaintiff due process and awarding plaintiff $78,000 in compensatory damages for the due process violation.

Am Jur 2d, Schools §§ 192, 193.

11. Constitutional Law § 17 (NCI3d); Schools § 13.2 (NCI3d)— dismissed schoolteacher—injury from due process violation—damages

In order for a dismissed schoolteacher to recover more than nominal damages on his § 1983 due process claim, the teacher must have been injured by the due process violation itself, and not merely by distress caused by a deprivation of his constitutionally protected interest in his job.

Am Jur 2d, Schools §§ 192, 193.

12. Judgments § 3 (NCI3d)— conformity to pleadings and verdict

Where plaintiff sought compensatory damages only from defendant board of education and only punitive damages from the individual defendants, and the jury returned its verdict awarding only compensatory damages, the trial court's judgment should have ordered that the damages and costs be recovered from defendant board and not from the other defendants individually.

Am Jur 2d, Pleadings §§ 382, 383; Schools § 211.

Justice MEYER dissenting.

Justice MARTIN dissenting.

Justice WHICHARD dissenting.

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, 93 N.C. App. 168, 378 S.E.2d 32 (1989), affirming a judgment entered by *Sitton, J.*, on 19 November 1987 in Superior Court, CATAWBA County. Heard in the Supreme Court on 11 December 1989.

Ferguson, Stein, Watt, Wallas, Adkins & Gresham, P.A., by John W. Gresham, for the plaintiff-appellee.

Mitchell, Blackwell, Mitchell & Smith, P.A., by Thomas G. Smith, and Sigmon, Clark and Mackie, P.A., by E. Fielding Clark II, for the defendant-appellants.

George T. Rogister, Jr. and Jonathan A. Blumberg for the North Carolina School Boards Association, amicus curiae.

MITCHELL, Justice.

[1] The issue before us is whether, at a teacher dismissal hearing, a single school board member's bias against the teacher taints the entire board's decision-making process, denying the teacher due process and entitling him to compensatory damages, regardless of whether the bias affected the correctness of the board's decision. We conclude that such bias makes the decision-making process inherently unfair and violates due process.

The facts relevant to the issue presented include the following: On 7 June 1984, the defendant-appellants, the Hickory Board of Education and its individual members, dismissed the plaintiff-appellee, Eddie Ray Crump, from his teaching position at Hickory High School based on findings of immorality and insubordination. Following his dismissal, Crump filed a joint petition and complaint with the Superior Court. His petition pursuant to N.C.G.S. § 115C-325 for direct judicial review of the Board's action dismissing him alleged that the evidence introduced at the Board's hearing was insufficient to support its findings. His complaint initiating this separate civil action under 42 U.S.C. § 1983 alleged that the defendants had acted with bias against him, in violation of his due process rights under the state and federal constitutions, as well as in violation of the statutory protections codified at N.C.G.S. § 115C-325. Crump sought damages in this civil action under 42 U.S.C. § 1983, including compensatory damages from the Board and punitive damages from its individual members.

Upon the defendants' motion, the trial court severed the two separate claims brought by Crump, and conducted its direct judicial review of the Board's decision to dismiss him separately from the trial of this civil action. Thereafter, on direct review of the Board's action, the superior court upheld the Board's decision to dismiss Crump. Crump appealed that decision to the Court of Appeals,

which affirmed the superior court in *Crump v. Board of Education*, 79 N.C. App. 372, 339 S.E.2d 483, *disc. rev. denied*, 317 N.C. 333, 346 S.E.2d 137 (1986). Thus, the Board's decision to dismiss Crump has been made final and is not before us on this appeal. This appeal only presents questions of procedural fairness during the School Board's hearing, which were raised by Crump in this separate civil action seeking damages as a result of the Board's alleged bias and the resulting denial of due process at the Board's hearing. In support of his § 1983 action, Crump alleged this denial of due process by the Board caused him injury separate and distinct from his mere dismissal.

The separate civil action presenting Crump's due process claim, the sole subject of this appeal, was tried before a jury at the 16 November 1987 session of Superior Court, Catawba County. Crump based his claim of bias and resulting denial of due process on evidence at trial tending to show disparities between the actual pre-hearing knowledge of and involvement with Crump's situation by certain Board members, and their disavowals of knowledge of the matter when asked about it at the Board's hearing.

At the Board's dismissal hearing, Crump's attorney, James Fuller, questioned Board members about their ability to be fair and impartial:

> Mr. Fuller: . . . I want to be perfectly blunt about it and ask the Board . . . the extent to which any of you have been personally involved, have discussed with people who have knowledge and whether any of you have formed any kind of preconceived notions. I don't mean that in a pejorative sense but just as matter of being brutally candid. Has anybody on the Board either because of the publicity, because of what you have heard from [the] administration, from friends, neighbors, from anyone else, whether you have any problem at all being completely fair to Mr. Crump? And again, I don't mean fair in the sense of you will try to be fair, but can you honestly say the scales are even now . . . .
>
> Mr. Pitts: That's a fair question. I am glad you addressed that right up front because several months ago the Board was aware that some form of hearing was coming down the pike. The administration, the attorney, has not ever revealed anything until we received this letter in the mail yesterday hand delivered of any charges or any statements. Now I can

speak for myself. But the attorney has asked all members of the Board not to discuss any aspect of anything that they may hear. If someone calls them on the phone, they are not to respond in any way. I can speak for myself to say that for me at this point in time the slate is clear.

Ms. Newton: The same thing. In fact we have not even been given a name whenever we were told a hearing was coming up. And I have not been approached by anybody. And if mention was made of it, I just said I know nothing. And whatever judgment would be made has to be done on what we hear tonight.

Mr. Isenhour: The same.

Ms. Garlitz: The same. I have had people that made statements to me, and I have not responded in any way. And I did not know until the letter came yesterday what this was about.

Mr. Watts: Frankly, I feel that I can be as objective as anybody on this Board. Obviously when a newspaper that is published on a county-wide basis comes out and indicates that a teacher is being brought up for charges, I read the article because I'm on the School Board and the teacher happens to be in my system. Other than that, there has been no preliminary information except for this notice we got yesterday afternoon late in the afternoon with the charges. I think I have a fairly good grasp of what we're here for and hopefully will be able to give every bit of the evidence full weight.

Ms. Young: I had one call, and I said, "I have no comments." And I have not said one word anywhere. And when I go, I listen and I vote my convictions.

Subsequent evidence suggested, however, that not all of the Board members had been entirely candid in their answers. During Principal Williamson's testimony at the Board's hearing, Board member Isenhour asked him, "[a]re you aware of the fact that we had parents who will not let their daughters take driver's education because of this situation, that they're sending their daughters to the private school?" At the later trial of this civil action, however, Isenhour acknowledged that no evidence before the Board during its hearing tended to show that female students at Hickory High School were taking driver's education elsewhere for any reason.

Hal Bolick, a teacher at Hickory High School, testified at trial that several months before the Board's hearing, Board Chairman

Pitts told him that the Board could not "overlook" the "letters about [Crump's conduct with] the little girls." Bolick further testified regarding conversations with Board member John Watts prior to the Board's dismissal hearing. Bolick testified that he had "advised" Watts of pre-hearing conversations regarding Crump between Bolick and one of the students who later testified against Crump at the hearing. Bolick also testified that, after the hearing, Watts told Bolick "that things that had gone on in the [hearing] room itself didn't seem like the Board members were listening, that they seemed to have made up their minds before they went in." Board member Watts testified at trial, however, that he did not recall making such a statement to Bolick.

Roger Henry, a former teacher, testified that in March 1984, prior to the Board's hearing, Board member Watts told him that the charges against Crump "didn't look good, that they were concerned, and mentioned [Board member] Garlitz and [Chairman] Pitts and [that Crump] . . . needed to resign [and would Henry] do anything about it." When asked at trial whether he denied that the conversation with Henry had occurred, Watts answered, "I won't deny it or confirm it, sir."

Bruce Crump (no relation to the plaintiff-appellee), another former teacher, testified that in the spring of 1984, prior to the Board's hearing, he witnessed Board member Lois Young tell Principal Williamson, "We're all together on this Crump thing." Bruce Crump also testified that no matters involving him were pending with the Board at the time he heard Young make the statement about the "Crump thing." Neither Young nor Williamson testified at trial.

The plaintiff-appellee Eddie Crump testified that he had a conversation with Board member Young after his dismissal. Crump testified that during their conversation, Young told him that prior to the Board's hearing Principal Williamson had promised the Board members that Crump would resign rather than endure a dismissal hearing and thus bring embarrassment upon his wife.

The jury found that the Board had failed to "provide [Crump] a fair hearing before an unbiased hearing body," and that Crump had suffered resulting actual damages of $78,000, but awarded no punitive damages. The trial court entered judgment accordingly. A divided panel of the Court of Appeals affirmed the trial court's judgment.

I.

[2] As a preliminary matter, we address one point raised by the dissents in this case. Although using differing terminology, the dissents argue that Crump's bias claim was previously and finally decided against him in the direct judicial review of the Board's decision to terminate him and the subsequent appeal of that judicial review to the Court of Appeals. *See Crump v. Board of Education*, 79 N.C. App. 372, 339 S.E.2d 483, *disc. rev. denied*, 317 N.C. 333, 346 S.E.2d 137. Thus, the dissents argue that Crump's bias claim in this case is barred by either the law of the case or the doctrine of issue preclusion. We disagree.

In response to Crump's amended complaint, the Board moved to separate the superior court's proceeding on direct judicial review of the Board's decision from Crump's 42 U.S.C. § 1983 civil claim. Alternately, the Board moved under N.C.G.S. § 1A-1, Rule 12(c) to dismiss the § 1983 suit, arguing that all claims raised in Crump's amended complaint were within the scope of the direct judicial review of the Board's decision. Although the records in these cases are not clear regarding when the motion to sever was granted, the Board, in its brief to the Court of Appeals during the appeal of the superior court's direct judicial review of the Board's decision, argued that "[t]he two claims are clearly divisible and defendants in this [direct review] action have moved to sever these actions. The trial court has not ruled on the motion to sever, *but the case has proceeded as if the matters involved were in separate lawsuits*." (Emphasis added.)

In Judge Sitton's judgment in the direct judicial review proceeding, he plainly stated that

> *The court has reviewed the entire record made before the Board* and has applied the 'whole record test' in reviewing the evidence to determine whether the Board's decision is supported by substantial, material, and competent evidence. . . .
>
> After a thorough and careful review of the transcript, exhibits, briefs, and arguments of counsel, the court finds and concludes that the Board's findings, inferences, and conclusions; underlying its decision to dismiss Mr. Crump, and the Board's decision to terminate and dismiss Eddie Ray Crump, are supported by competent, material, and substantial evidence in *view of the entire record as submitted* . . . .

> The court further finds and concludes that the action [of] the Board to dismiss Crump was not biased, arbitrary or capricious; . . . but instead was based on substantial evidence *viewing the record as a whole.*

(Emphasis added.)

Crump appealed that judgment to the Court of Appeals, assigning as error that the superior court's findings and conclusions were not supported by substantial evidence in the whole record. Although Crump's recitation of the judgment's wording in his first assignment of error in that appeal included the superior court's finding that the Board's decision was not biased, Crump did not seek to raise or argue that specific point before the Court of Appeals. Instead, the parties and the Court of Appeals all focused on the same question which had been before the superior court in the direct review proceeding, after that proceeding had been separated from the § 1983 action: whether the Board's decision to dismiss Crump was "supported by competent, material, and substantial evidence *in view of the entire record as submitted.*" (Emphasis added.) Evidence of one or more Board members' bias during the Board's hearing was *not* evident in the record made before the Board, because the Board members had concealed such bias when questioned by Crump's attorney. Further, Crump was afforded no opportunity during the direct judicial review proceeding to present evidence of bias. Thus, the superior court could not have evaluated, "in view of the entire record made before the Board," any Board member's *concealed* bias.

The only "bias" the superior court could have searched for during its direct review of the Board's action was that which might have facially appeared in the record if the evidence before the Board had not supported its findings of improper conduct by Crump. No evidence of the type of bias leading to Crump's § 1983 action was in the record made by the Board, and Crump was given no opportunity to present such evidence on direct judicial review. Thus, his § 1983 bias claim could not have been reached by the superior court on its direct judicial review of the Board's action dismissing him. Our conclusion is buttressed by the fact that the same superior court judge who conducted the direct judicial review of the Board's decision to dismiss Crump *also* presided over the trial of this separate action arising from Crump's § 1983 claim. Judge Sitton obviously knew that, due to his severance of the

plaintiff's claims at the defendants' request, the allegations of bias supporting the § 1983 claim had not been before him or decided by him when he had conducted the prior direct judicial review proceeding.

As a final point on this topic, we do agree with Justice Martin, to the extent that he says in his dissent that "[i]n any event where justice and right are concerned, this Court has never allowed manifest injustice to prevail based upon some procedural technicality in a trial or appeal." (Citation omitted.) We will not allow any such result in this case. The Board argued in the appeal of the superior court's direct judicial review proceeding that the direct review proceeding and Crump's § 1983 civil claim were "clearly divisible" and that all concerned had treated them separately. Yet, in its argument to the Court of Appeals in this case, the Board argued, as the dissents now contend, that the direct judicial review proceeding resolved the sole issue underlying this § 1983 action. What the Board used as a sword to sever the two actions cannot now be used by it as a procedural shield from potential liability. Crump's separate civil action under § 1983 is not barred by either the law of the case or the doctrine of issue preclusion.

II.

The Court of Appeals concluded that in this separate civil action under § 1983, the trial court "correctly instructed the jury that the bias of *one* member of the Board was sufficient for the jury to find that Mr. Crump had been deprived of a fair hearing." *Crump v. Board of Education*, 93 N.C. App. 168, 185, 378 S.E.2d 32, 34 (1989) (emphasis added). For the reasons discussed below, we too find no error in the trial court's instructions and affirm the decision of the Court of Appeals. We begin our analysis with some foundational concepts concerning due process, bias, and school boards.

A. *Due Process*

[3] Whenever a government tribunal, be it a court of law or a school board, considers a case in which it may deprive a person of life, liberty or property, it is fundamental to the concept of due process that the deliberative body give that person's case fair and open-minded consideration. "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchinson*, 349 U.S. 133, 136, 99 L. Ed. 942, 946 (1955). As a career teacher under

N.C.G.S. § 115C-325, Crump had a cognizable property interest in his continued employment. *See, e.g., Board of Regents v. Roth*, 408 U.S. 564, 576-78, 33 L. Ed. 2d 548, 560-61 (1972). Further, Crump's constitutionally-protected liberty interest was implicated, since the

> charge impair[ed] his reputation for honesty or morality. The procedural protections of due process apply if the accuracy of the charge is contested, there is some public disclosure of the charge, and it is made in connection with the termination of employment or the alteration of some right or status recognized by state law.

Vanelli v. Reynolds School Dist. No. 7, 667 F.2d 773, 777-78 (9th Cir. 1982) (Kennedy, J.) (footnotes omitted); *see Board of Regents v. Roth*, 408 U.S. at 572, 33 L. Ed. 2d at 558. With his fundamental rights so implicated, Crump was entitled to a hearing according with principles of due process. "[A] Board of Education conducting a [dismissal] hearing under G.S. 115-142 [now § 115C-325] must provide all essential elements of due process." *Baxter v. Poe*, 42 N.C. App. 404, 409, 257 S.E.2d 71, 74, *disc. rev. denied*, 298 N.C. 293, 259 S.E.2d 298 (1979).

[4] Crump brought his due process claim under 42 U.S.C. § 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

While this statute has been the subject of many federal opinions and scholarly articles, North Carolina appellate courts have addressed the statute only infrequently. It is clear, however, that § 1983 works to create " 'a species of tort liability' in favor of persons who are deprived of 'rights, privileges, or immunities secured' to them by the Constitution." *Carey v. Piphus*, 435 U.S. 247, 253, 55 L. Ed. 2d 252, 258 (1978) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 417, 47 L. Ed. 2d 128, 136 (1976), and 42 U.S.C. § 1983 (1982)). State courts have concurrent jurisdiction with federal courts over § 1983 actions. *See Williams v. Greene*, 36 N.C. App. 80,

243 S.E.2d 156, *disc. rev. denied and appeal dismissed*, 295 N.C. 471, 246 S.E.2d 12 (1978).

We recognize that due process is a somewhat fluid concept, and that determining what process is "due" at a school board hearing is very different from evaluating the procedural protections required in a court of law. "Determining what process is due in a given setting requires the Court to take into account the individual's stake in the decision at issue as well as the State's interest in a particular procedure for making it." *Hortonville Dist. v. Hortonville Ed. Assn.*, 426 U.S. 482, 494, 49 L. Ed. 2d 1, 10 (1976) (citing cases).

B. *Bias*

An unbiased, impartial decision-maker is essential to due process. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254, 271, 25 L. Ed. 2d 287, 301 (1970) (citing cases); *Vanelli v. Reynolds School Dist. No. 7*, 667 F.2d 773, 779 (9th Cir. 1982); *Leiphart v. N.C. School of the Arts*, 80 N.C. App. 339, 354, 342 S.E.2d 914, 924, *cert. denied*, 318 N.C. 507, 349 S.E.2d 862 (1986). As discussed below, this case turns on the question of what evidence will suffice to support a jury's determination, as here, that a decision-maker is biased, when the decision-maker is a group of persons.

While the word "bias" has many connotations in general usage, the word has few specific denotations in legal terminology. Bias has been defined as "a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction," Black's Law Dictionary 147 (5th ed. 1979), or as "a sort of emotion constituting untrustworthy partiality," 10 C.J.S. *Bias* (1955 & Supp. 1989) (footnote omitted). "Some sort of commitment is necessary for disqualification [due to bias], even though it is less than an irrevocable one." 3 Davis, *Administrative Law Treatise 2d* § 19:4 at 385 (1980). Bias can refer to preconceptions about facts, policy or law; a person, group or object; or a personal interest in the outcome of some determination. *See id.* ch. 19. Crump's complaint commencing the civil action now before us on appeal alleged that one or more Board members came into his hearing having already decided to vote against him, based on "factual" information obtained outside the hearing process. This type bias can be labeled a "prejudgment of adjudicative facts." *Id.* § 19:4.

The trial court in this case gave the jury a lengthy explanation of the heavy burden a plaintiff must bear to succeed in proving

that a school board acted towards him or her with bias. The trial court began by explaining the presumption of correctness afforded school board actions, then instructed the jury that:

> To prove impermissible bias of the hearing body the plaintiff must show or prove by its greater weight more than the fact that a board member or members had some knowledge of some fact or facts concerning a charge or charges against a teacher. Mere familiarity with a fact or facts or charge or charges does not automatically disqualify a board member as a decision maker.
>
> . . . .
>
> I instruct you that a board member's obligation is to be able to put aside anything read or heard prior to a hearing and base a decision solely upon the sworn testimony and evidence during a hearing.
>
> To find impermissible bias you, the jury, must find by the greater weight of the evidence that the mind of a board member was predetermined and was fixed and not susceptible to change prior to the deliberating process of the hearing board, and that the decision was not based solely upon evidence during the hearing.

[5] The quoted instructions given by the trial court concerning decision-maker bias were free of error. If a Board member had made a fixed decision, prior to the Board's hearing, to vote against Crump, that member was biased against him. One such Board member's participation in Crump's dismissal hearing would cause that hearing to deny Crump procedural due process, no matter what outcome the Board reached at the hearing.

C. *School Boards*

[6] Distinguishing a Board member's disqualifying *bias* against Crump from permissible pre-hearing *knowledge* about Crump's case is essential to our analysis. Members of a school board are expected to be knowledgeable about school-related activities in their district. Board members will sometimes have discussed certain issues that later become the subject of board deliberations; such knowledge and discussions are inevitable aspects of their multi-faceted roles as administrators, investigators and adjudicators. However, when performing their quasi-judicial function during a board hearing and

any resulting deliberations, members must be able to set aside their prior knowledge and preconceptions concerning the matter at issue, and base their considerations solely upon the evidence adduced at the hearing. In an analogous case before the United States Court of Appeals for the Ninth Circuit, Judge (now Justice) Anthony Kennedy wrote:

> The key component of due process, when a decisionmaker is acquainted with the facts, is the assurance of a central fairness at the hearing. . . .
>
> . . . .
>
> . . . Members of a school board in smaller communities may well have some knowledge of the facts and individuals involved in incidents which they must evaluate. Their obligation is to act impartially and in a fair manner.

Vanelli v. Reynolds School Dist. No. 7, 667 F.2d 773, 779-80 (9th Cir. 1982) (citations omitted).

In the present case, a Board member with pre-hearing knowledge regarding the allegations against Crump would neither necessarily nor presumptively be biased against him. "The mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the Board members at a later adversary hearing." *Withrow v. Larkin*, 421 U.S. 35, 55, 43 L. Ed. 2d 712, 728 (1975), *quoted in* 3 Davis, *Administrative Law Treatise 2d* § 19:4 at 384 (1980). Indeed, because of their multi-faceted roles as administrators, investigators and adjudicators, school boards are vested with a presumption that their actions are correct, and the burden is on a contestant to prove otherwise. N.C.G.S. § 115C-44 (1987); *see Hortonville Dist. v. Hortonville Ed. Assn.*, 426 U.S. 482, 497, 49 L. Ed. 2d 1, 11-12 (1976). The trial court correctly informed the jury of these concepts by instructing that:

> The North Carolina legislature has empowered local school boards to hear and decide teacher dismissal cases in this state. There is no other hearing panel designated in the law of North Carolina to hear teacher dismissal cases. The court instructs you that the law presumes that the school board members act with honesty and integrity. The law further presumes that actions taken by a school board of education [are] legally correct and that a board acts fairly, impartially and in good faith.

The burden is on the plaintiff to overcome this presumption by proving by the greater weight of the evidence that the board was impermissibly biased in dismissing the plaintiff.

III.

[7] If the Board in this case was biased, it was unable to provide Crump with the fair and open-minded consideration that due process demanded his case receive. "A public employee facing an administrative hearing is entitled to an impartial decision maker. . . . To make out a due process claim based on this theory, an employee must show that the decision-making board or individual possesses a disqualifying personal bias." *Leiphart v. N.C. School of the Arts*, 80 N.C. App. 339, 354, 342 S.E.2d 914, 924 (citing *Hortonville Dist. v. Hortonville Ed. Assn.*, 426 U.S. 482, 49 L. Ed. 2d 1 (1976), and *Salisbury v. Housing Authority of City of Newport*, 615 F.Supp. 1433, 1439-41 (E.D. Ky. 1985)), *cert. denied*, 318 N.C. 507, 349 S.E.2d 862 (1986). Here, there was substantial evidence that, at the Board's hearing, one or more Board members consciously concealed both prior knowledge of the allegations against Crump and a fixed predisposition against him. Such evidence having been presented, the trial court properly submitted this case to the jury for its determination as to whether a Board member had in fact been biased against Crump.

A. *One Member Bias*

The decision of our Court of Appeals is in accord with the view of the United States Court of Appeals for the Third Circuit, which has stated that "[l]itigants are entitled to an impartial tribunal whether it consists of one [person] or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured." *Berkshire Employees Ass'n, Etc. v. National Labor R. Bd.*, 121 F.2d 235, 239 (3d Cir. 1941), *quoted in Crump v. Board of Education*, 93 N.C. App. 168, 185, 378 S.E.2d 32, 42 (1989). *Berkshire* involved an allegation by a knitting mill's employees' association that one member of the National Labor Relations Board had "endeavor[ed] to assist in a boycott on Berkshire's goods. This was at a time before he was called upon, in his capacity as a Board member, to pass upon the questions concerning unfair labor practices by Berkshire." *Berkshire*, 121 F.2d at 238-39. The court in *Berkshire* was addressing a situation analogous to the case at bar. We agree with that court's observations that:

It is perfectly clear that the exercise of its duties by an administrative body must necessarily proceed in a different fashion from the orthodox method of administering justice in courts. This administrative body must at times be successively or simultaneously investigator, complainant, prosecutor, trier of facts, declarer of law and administrator, all in the same matter. . . . The [courts] must be exceedingly careful not to jump to hasty conclusions that because the administrative process differs in many ways from the judicial process it lacks due process of law.

Nevertheless, if the administration of public affairs by administrative tribunals is to find its place within the present framework of our government it is essential that it proceed, on what may be termed its judicial side, without too violent a departure from what many generations of English-speaking people have come to regard as essential to fair play. One of these essentials is the resolution of contested questions by an impartial and disinterested tribunal. These adjectives are not absolute but relative as every thoughtful person knows. Decisions affecting human beings, made by human beings, necessarily are colored by the sum total of the thoughts and emotions of those responsible for the decision. The judicial process, or any other human process, cannot operate in a vacuum. The most we can hope for is that persons charged with responsibility for decisions affecting other people's lives and property will be as objective as humanly possible. . . . If the circumstances alleged are proved [then the plaintiff] did not have a hearing before an impartial tribunal, but one in which one member of the body which made exceedingly important findings of fact had already thrown his weight on the other side. . . .

The Board argues that at worst the evidence only shows that one member of the body making the adjudication was not in a position to judge impartially. We deem this answer insufficient. Litigants are entitled to an impartial tribunal whether it consists of one [person] or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured.

Id.

A critical component of any quasi-judicial hearing and decision-making by a deliberative body is the give and take which occurs

when group members share their observations and opinions. There is a fundamental notion that each member will enter the hearing with an open mind, listen to and view the evidence, share his or her observations, analyses and opinions with the other board members, listen to the other members' comments, and *only then* finally commit to a vote. One biased member can skew the entire process by what he or she does, or does not do, during the hearing and deliberations. Since the Board's deliberations giving rise to this case were closed and unrecorded, there is no meaningful way to accurately review the process to determine the impact of any bias by one or more members during the hearing and deliberations.

B. *The Accardi Decisions*

One author has suggested that in its *Accardi* decisions, the Supreme Court of the United States has implicitly rejected a "one member bias" rule. 3 Davis, *Administrative Law Treatise 2d* § 19:4 at 387-88 (1980) (citing *Accardi v. Shaughnessy*, 347 U.S. 260, 98 L. Ed. 2d 681 (1954) (*Accardi I*), and its appeal on remand, *Shaughnessy v. Accardi*, 349 U.S. 280, 99 L. Ed. 2d 1074 (1955) (*Accardi II*)). We disagree with this interpretation of the *Accardi* decisions.

In *Accardi II*, an immigrant facing deportation alleged that the Board of Immigration Appeals had refused to suspend his deportation because the Board's decision was controlled by the Attorney General. *Accardi II*, 349 U.S at 281, 99 L. Ed. at 1076. The members of the Board were appointed by the Attorney General and served at his pleasure. *Accardi I*, 347 U.S. at 266, 98 L. Ed. at 686. Accardi claimed that the Attorney General had provided Board members with a list naming him as among several "unsavory characters" whom the Attorney General sought to deport. *Accardi II*, 349 U.S. at 281, 99 L. Ed. at 1076.

The Supreme Court, reversing a divided United States Court of Appeals for the Second Circuit, upheld the Board's decision. Noting that Accardi *was* a target of the Attorney General's deportation program—but that there was no such list of unsavory characters—the Supreme Court concluded that the evidence only showed that, at most, two members of the five-member Board knew that the Attorney General was targeting Accardi for deportation. *Id.* at 283, 99 L. Ed. at 1077. Although not discussed by the Supreme Court, we note that one or more Board member's mere *knowledge* that Accardi was being targeted for deportation would not rise

to the level of *bias* depriving Accardi of a fair hearing, as we have discussed previously. In *Accardi II* the Supreme Court noted, in reviewing the Second Circuit's decision, that "[t]he opinion of the [Court of Appeals] recognized that, before Accardi was entitled to another Board hearing, he had to prove that a majority of the Board not only knew of the 'list' but were affected by it." *Id.* at 282, 99 L. Ed. at 1077. The Supreme Court then went on to point out an unrelated error in the lower court's ruling, without either analyzing or approving the quoted language. We do not infer disapproval of the "one member bias" rule, which we conclude was properly applied in this case, based on that one sentence quotation from the Supreme Court's opinion. Since the evidence in *Accardi II* only tended to show mere knowledge on the part of one or more Board members, there was no evidence of actual bias by any Board member, and the Supreme Court was not called upon to evaluate a "one member bias" rule.

C. *Administrative and Judicial Distinctions*

There is some disagreement as to whether a school board's decision-making process in dismissing a teacher should be considered an "administrative" or a "judicial" function. Several courts, including the Supreme Court of the United States and our own Court of Appeals, have tended to indicate that school board decisions dismissing teachers for various actions may be administrative rather than judicial in nature. Our Court of Appeals has stated that:

> The procedures prescribed by G.S. 115-142 [now § 115C-325] for the dismissal of a career teacher are essentially administrative rather than judicial. . . . [T]he Board is not bound by the formal rules of evidence which would ordinarily obtain in a proceeding in a trial court. Nor are the Rules of Civil Procedure applicable. G.S. 1A-1. While a Board of Education conducting a hearing under G.S. 115-142 [now § 115C-325] must provide all essential elements of due process, it is permitted to operate under a more relaxed set of rules than is a court of law. Boards of Education, normally composed in large part of non-lawyers, are vested with "general control and supervision of all matters pertaining to the public schools in their respective administrative units," G.S. 115-35(b) [now § 115C-36], a responsibility differing greatly from that of a court. The carrying out of such a responsibility requires a wider latitude

> in procedure and in the reception of evidence than is allowed a court.

Baxter v. Poe, 42 N.C. App. 404, 409, 257 S.E.2d 71, 74-75, *disc. rev. denied*, 298 N.C. 293, 259 S.E.2d 298 (1979); *see Hortonville Dist. v. Hortonville Ed. Assn.*, 426 U.S. 482, 495, 49 L. Ed. 2d 1, 11 (1976). We note, however, that the language quoted from our Court of Appeals in its *Baxter* decision addressed due process considerations relating to evidentiary issues not present in this case but, nevertheless, recognized that board of education hearings concerning dismissal of career teachers must meet the fundamental requirement of due process. *Baxter*, 42 N.C. App. at 409-410, 257 S.E.2d at 74-75.

On the other hand, there are decisions imposing *greater* judicial scrutiny upon administrative or quasi-judicial deliberative bodies.

> [A] fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge. Indeed, if there is any difference, the rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the safeguards which have been thrown around court proceedings have, in the interest of expedition and a supposed administrative efficiency been relaxed.

National Labor Relations Board v. Phelps, 136 F.2d 562, 563 (5th Cir. 1943) (footnote omitted), *cited in Hummel v. Heckler*, 736 F.2d 91, 93 (3d Cir. 1984).

[8] We conclude that, whether termed administrative or quasi-judicial, the Board action in this case, involving resolution of disputed facts and selection among alternate sanctions, was required to afford Crump, at a minimum, an unbiased hearing in accord with principles of due process.

IV.

This case on appeal is made more difficult because the *outcome* of the Board's hearing—Crump's dismissal—was upheld in a separate proceeding before the superior court and Court of Appeals in which Crump challenged the Board's action on the ground that the evidence at the Board's hearing did not support its findings. *Crump v. Board*

of Education, 79 N.C. App. 372, 339 S.E.2d 483, *disc. rev. denied*, 317 N.C. 333, 346 S.E.2d 137 (1986). Therefore, the issue of whether the Board's findings and conclusions supported its decision to dismiss Crump is not before us; his dismissal is final, and may not be reviewed as a part of this appeal. Instead, we review in this appeal only Crump's separate civil action seeking money damages under 42 U.S.C. § 1983 for injury arising from a violation of his due process rights, resulting from his being forced to endure an unfair hearing *process*, no matter what the outcome of the Board's hearing.

A. *The Outcome of the Board Hearing*

[9] The appellants, the amicus, and one dissent in this Court each make the fundamental error of assuming that the finality of the Board's decision to dismiss Crump is determinative on the question of whether the hearing *process* itself was fundamentally unfair and resulted in injury to him. The appellants argue that the trial court's instructions in this separate § 1983 civil action, affirmed by the Court of Appeals, created a conclusive presumption that one Board member's bias spread to a sufficient number of other members to have determined the result against Crump. That characterization is incorrect in that it focuses on the *result* reached at the hearing, which is not determinative on the question of whether the Board's *procedure* was unfair and, thus, denied Crump due process. Likewise, whether one member's bias *spread* is not determinative; one Board member's fixed bias is sufficient to cause the hearing *process* to deny due process, even though the hearing result itself can be justified.

[10] Here, damages were assessed solely for the due process violation and resulting injury arising from Crump being forced to endure a hearing before a deliberative body which a Catawba County jury found had contained one or more members who had already decided the case against him. Damages were *not* assessed for the removal of Crump from his job. The purpose of 42 U.S.C. § 1983 would be defeated if a defendant could raise as a bar to recovery the fact that, regardless of a due process deprivation, the outcome of the process in which the due process deprivation occurred was nonetheless justifiable. Such reasoning smacks of the end justifying the means. No matter how many valid reasons the Board may have uncovered for dismissing Crump, the Board was obligated to provide him a fair hearing. A Catawba County jury determined from the evidence at trial that one or more Board members were

biased against Crump at the hearing. The jury was thus justified in returning the verdict it in fact returned, finding that the Board's hearing denied Crump due process and awarding damages accordingly.

B. *The Remedy Now Sought*

The defendants also argue that Crump's relief, if any, must be limited to a remand of this case for a determination of whether a member of the Board was disqualified because of bias, and, if so, for a new hearing by Board members not so disqualified. The defendants and one dissent in this Court seem to think that an incorrect dismissal of Crump was the only possible harm that could have flowed to him from the due process violation found by the jury to have occurred. That view ignores the very real injury to both Crump and our society from allowing him to be forced to defend himself in a hearing which denied him due process, whether he was guilty of the allegations against him or not. "It is fundamental that both unfairness and the appearance of unfairness should be avoided." *American Cyanamid Company v. F.T.C.*, 363 F.2d 757, 767 (6th Cir. 1966); *see State v. Mettrick*, 305 N.C. 383, 385, 289 S.E.2d 354, 356 (1982). Damages awardable under a 42 U.S.C. § 1983 action include mental and emotional distress caused by *the due process violation itself. Carey v. Piphus*, 435 U.S. 247, 262-64, 55 L. Ed. 2d 252, 264-65 (1978), *cited in Vanelli v. Reynolds School Dist. No. 7*, 667 F.2d 773, 781 (9th Cir. 1982).

[11] The defendants and amicus correctly note that in order to recover more than nominal damages on his § 1983 due process claim, Crump must have been injured by the due process violation itself, and not merely by distress caused by a deprivation of his constitutionally-protected interest in his job. *See, e.g., Carey v. Piphus*, 435 U.S. at 263-64, 55 L. Ed. 2d at 264-65; *Leiphart v. N.C. School of the Arts*, 80 N.C. App. 339, 353, 342 S.E.2d 914, 924, *cert. denied*, 318 N.C. 507, 349 S.E.2d 862 (1986). Crump's complaint in this § 1983 civil action—heard separately from the direct review of his dismissal, as a result of *the defendants'* successful effort to separate the two actions—alleged injury *only* from the Board's action subjecting him to a hearing where he was denied due process; he did not seek damages for the Board's action in dismissing him. The evidence of damages in this case was correctly limited by the trial court to evidence tending to show the suffering Crump sustained as a result of the denial of due process *at the*

hearing. The jury was not allowed to consider whether the Board was justified in dismissing Crump; *the defendants'* earlier successful effort to sever had removed that issue from this case. The jury did know, at the defendant Board's request, that Crump had been dismissed and that the dismissal had been upheld. Having established injury arising from the due process violation itself to a Catawba County jury's satisfaction, Crump was entitled to a verdict in his favor.

V.

Bias is hard to prove. Given the level of pre-commitment by a board member that must be shown to make out a case of bias and a resulting denial of due process, we doubt that our decision in this case will open any floodgates of litigation or unduly prevent boards of education from dismissing bad teachers. Determining what procedure is required by principles of due process in a given situation requires that the cost of the procedure be evaluated in light of the potential harm flowing from that procedure. In this case, the cost of the procedure which we conclude due process required was whatever it would have taken for one or more Board members to candidly answer Crump's questions about their pre-hearing knowledge. The injury to Crump from being forced to participate in a hearing that the jury in this case determined was unfair, on the other hand, was valued by the Catawba County jury at $78,000. It should not cost that much to be candid; talk is cheap.

[12] The Court of Appeals affirmed the judgment of the trial court awarding Crump $78,000 in compensatory damages. We note, however, that the trial court's judgment in this case indicated that those damages were to be recovered from the "defendants," but indicated that the "defendant" was to pay the costs. By his complaint, the plaintiff sought compensatory damages only from the defendant Board, and not from the individual defendants. The plaintiff sought only punitive damages from the individual defendants. The jury having returned its verdict awarding only compensatory damages, but no punitive damages, the trial court's judgment should have ordered that the damages and costs be recovered only from the defendant Board and not from the other defendants individually. This case is remanded to the Court of Appeals for its further remand to the Superior Court, Catawba County, with instructions that the judgment be modified and amended

accordingly. Except as modified in this regard, the decision of the Court of Appeals affirming the judgment of the trial court is affirmed.

Modified and affirmed; remanded with instructions.

Justice MEYER dissenting.

The majority finds it perfectly logical that a teacher rightfully discharged for molesting high school girls who were his students should recover $78,000 from the school board for a lack of due process in the hearing that resulted in his rightful discharge. I do not. First, because the issue—bias of a member of the board that discharged him—was not properly before this Court, it having been disposed of in the discharge case; and, second, because the new rule adopted here by the majority—"one member biased"—is fundamentally unsound. This new rule produces a bizarre result in this case, and it will continue to produce bizarre results in the future.

The findings of fact of the school board in this matter included the following:

> 4. By letter dated June 4, 1984, the Superintendent submitted to the Board his recommendation for the dismissal of Eddie Ray Crump as a teacher in the Hickory Administrative School Unit on the following grounds: immorality, neglect of duty, failure to fulfill the duties and responsibilities imposed upon teachers by the General Statutes of North Carolina, and insubordination.
>
> 5. On or about April 6, 1981, while instructing Elizabeth Davis, a female high school student over whom he had authority for the purpose of driver education instruction, Eddie Ray Crump asked her questions, to wit: Do you play the field? Are you getting a new bathingsuit [sic] this summer or are you going to go skinny dipping? On the same occasion, Eddie Ray Crump used the word "crotch" and pointed to her private parts and touched her unnecessarily and intentionally on the top of her thigh and played with her hair. As a result of these actions, the student became scared of the teacher, Eddie Ray Crump.
>
> 6. As a result of the incident on April 6, 1981, a complaint was filed with the Principal of the High School, and Elizabeth

Davis was removed from Eddie Ray Crump's instruction and placed with another driver education instructor.

7. On April 9, 1981, as a result of the incident with Elizabeth Davis on April 6, 1981, Eddie Ray Crump was instructed in writing by the Principal of the High School that "there shall be a third person in the car during the road work phase of the driver education of female students" and the "failure to cooperate with these instructions could be interpreted as insubordination."

8. On April 2, 1982, the suggestion was made to Eddie Ray Crump by the Principal of the High School on his 1981-82 Teacher's Performance Appraisal Instrument that he "must make an effort to follow established rules and guidelines."

9. During the summer of 1982, while instructing Ursula "Hope" Bolick, a female high school student in driver education, the teacher, Eddie Ray Crump, grabbed her leg unnecessarily. The incident occurred while the two were in the driver education vehicle alone, in contravention of the Principal's instructions to the teacher. The teacher also drove with Ursula Bolick alone during driver training on two other occasions.

10. In the fall of 1983, while instructing Donna Bumgardner Yoder, who was a female student at Hickory High School, the teacher, Eddie Ray Crump, on two occasions reached across the seat to adjust a yellow cushion behind her back and accidentally touched her neck. The teacher also, during driver training, called her "Honey," although the Board found this not offensive under the circumstances.

11. During the fall of 1983, while instructing Nina Winkler, a female high school student in driver education, Eddie Ray Crump intentionally and unnecessarily put his hand under her right breast two or three times, touching her breast. As a result of this action on the part of the teacher, the student became scared to go back in the car with Mr. Crump and has not returned to driver education since the occurrence. The teacher, Eddie Ray Crump, also used the words "Goddamn" and "damn" during the instruction of the student.

12. On one or more occasions, Eddie Ray Crump instructed the following female students during the times specified, in the road work phase of their driver education while no third

person was in the vehicle. These acts were in disobedience of the Principal's instructions, were knowingly and wilfully done and were admitted by the teacher, Eddie Ray Crump.

a. Ursula "Hope" Bolick in the summer of 1982,

b. Sheree Raker in the fall of 1983.

Based on these findings, the school board made, *inter alia*, the following pertinent conclusions of law:

7. The behavior of the teacher, Eddie Ray Crump, in touching Nina Winkler's breast on two or three occasions; in unnecessarily and intentionally grabbing Ursula Bolick's leg; in asking Elizabeth Davis personal questions which had sexual overtones or innuendoes, referring to her "crotch," touching the top of her thigh and playing with her hair, are offensive to the morals of the community, a bad example to the youth whose ideals a teacher is supposed to foster and elevate, and constitute immorality under the provisions of N. C. Gen. Stat. § 115C-325(e)(1)(b).

8. The actions of Eddie Ray Crump in providing instruction to two female students in the road work phase of their driver education vehicle while no third person was in the vehicle has been admitted by the teacher and was done in disregard of the express written directions of his Principal. This was a wilful refusal by the teacher, Eddie Ray Crump, to obey the reasonable directions of his Principal and constitute insubordination under the provisions of N. C. Gen. Stat. § 115C-325(e)(1)(c).

Based, *inter alia*, upon these findings and conclusions, the school board discharged Mr. Crump as a high school teacher.

As the majority recognizes, the complaint filed in this action by Mr. Crump was such that alleged within one pleading were two actions. The two causes of action were pending simultaneously, the first being an appeal of an administrative hearing which resulted in his discharge from employment, and the other being a section 1983 civil rights action for compensatory monetary damages against the school board and punitive damages against its members individually. The cases were severed, and as the majority has indicated, the judicial review of the board's decision to discharge

Mr. Crump on the basis of immorality and insubordination proceeded separately.

Mr. Crump argued in the prior discharge case that the school board was biased. In his petition for judicial review of his discharge, he alleged, *inter alia*, "that the action of the Board of Education in dismissing the plaintiff was biased." Judge Claude Sitton directly addressed that issue in his judgment in the discharge case. The order states: "The court further finds and concludes that the action of the Board to dismiss Crump was not biased . . . but instead was based on substantial evidence viewing the record as a whole." Thus, Judge Sitton's order directly addressed and disposed of Mr. Crump's allegation of bias.

Mr. Crump excepted to this particular finding and conclusion. In his entry of appeal filed with the Court of Appeals, Mr. Crump assigned as the first error that there was not substantial evidence in the whole record to support "the Superior Court's Findings and Conclusions that the findings, inferences and conclusions of the Board of Education . . . are not biased." Thus, this issue was before the Court of Appeals in *Crump I*.

As it turned out, the plaintiff neglected to brief this assignment. Assignments of error not briefed are deemed abandoned on appeal. N.C.R. App. P. 28 (1990).

The Court of Appeals affirmed the judgment of the trial court, and we denied a petition for a writ of certiorari to review that decision. Thus, the courts of North Carolina have determined, with finality, as the majority concedes, that the plaintiff was rightly discharged. It is also apparent that the issue of school board bias has been decided and disposed of conclusively.

In the section 1983 action now before us, the school board contended that the plaintiff's due process claim was precluded by Judge Sitton's disposition of the previous case. Judge Robert Gaines denied the defendants' summary judgment motion on the basis that the plaintiff's due process claim was not foreclosed by the resolution of the other case. It is inescapable that Judge Gaines erred in this regard. The bias issue had indeed been precluded by the order of Judge Sitton resolving the other case, which order was affirmed by the Court of Appeals and on which this Court denied discretionary review. It is my view, therefore, that the issue of bias by one or more members of the school board is not

properly before this Court. It was precluded by the determination of that very issue between these very same parties, on these very same pleadings, in the case in which plaintiff's discharge was judicially reviewed and upheld. The proper forum to have addressed any unfairness in the hearing was in the action in which it was raised, litigated, and decided—the discharge action—not in this action for an after-the-fact award of money damages.

The failure to recognize the procedural bar has led the majority to the strange position of allowing Mr. Crump to recover $78,000 in damages for a due process violation occurring in the hearing that it acknowledges resulted in his rightful discharge, uninfluenced by board member bias. A teacher who has been found to be guilty of the charges made against him, which charges were serious enough to justify dismissal, and whose discharge has been judicially affirmed on appeal, now reaps the benefits of a $78,000 jury verdict.

How the majority can conclude that there have been damages to Mr. Crump sufficient to support a $78,000 jury verdict mystifies me. Deprivation of Mr. Crump's interest in his continued employment, and such reputation as was inseparably intertwined with his interest in continued employment, formed the sole basis for his allegations of a due process violation. But there is no dispute that the board properly discharged Mr. Crump upon substantial evidence in the record and without bias. Where the deprivation of an interest is proper, there can be no allowable damages arising from that deprivation, for no damages in fact can be caused by a proper deprivation. *See, e.g., Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 286, 50 L. Ed. 2d 471, 483 (1977) ("it [is] necessary to . . . distinguish[] between a result caused by a constitutional violation and one not so caused").

Without doubt, if the procedure used to discharge a career teacher violates due process, then a discharge decision caused by the invalid procedure would itself be invalid. Conversely, if a discharge is finally determined on appeal to be valid, then it must follow that the process underlying that decision caused no harm. The majority opinion today stands for the deviate proposition that a procedure impermissibly deprived plaintiff of protected interests valued at $78,000 but that ultimate deprivation of those same interests by that same invalid procedure was proper, as finally determined on appeal. This position violates all standards of legal reason.

The majority recognizes that the plaintiff in this action did not seek compensatory damages from the individual members of the board, and its decision limits recovery of compensatory damages to the school board as an entity. Since the jury returned no punitive damages against the individuals, the individuals suffer no pecuniary liability in this case. I am concerned, however, that the majority opinion presumably would allow recovery of compensatory damages against all individual board members when properly pled and when the bias of any single member is proven. Like Judge Wells below, I find this "one-member bias" rule creates bizarre results.

In a situation where only one board member is biased and does not reveal his bias to plaintiff at the hearing, the other board members may be as ignorant of that member's bias as is plaintiff. It is not fair to subject these innocent board members to individual liability on a monetary judgment, much less the damage to their individual reputations, based upon the unrevealed, personal opinions of a fellow member. In a due process case such as the case before us, where the controlling principle is fundamental fairness, it is ironic that innocent, volunteer, uncompensated public servants performing a civic duty can be subjected to group liability and public embarrassment or humiliation for the bias of one of their number. Under the majority opinion, this financial obligation may be to a teacher who was guilty of the serious charges made against him and who would have been dismissed even without the participation of the biased member in the decision-making process. Thus, under the trial court's interpretation of the law, the individual members of the board may be exposed to joint and several liability without total, or even majority, guilt. That concept is fundamentally unfair and could have a marked chilling effect on the participation of citizens on these elected, uncompensated boards.

The "one-member bias" rule of the majority could, and no doubt will, adversely affect the willingness of boards of education to dismiss bad teachers. Every citizen who serves on a local board of education faces a dilemma. Every board member doing his or her job will surely know about teacher misconduct, particularly in the especially egregious cases. He or she knows that he will be called upon to decide dismissal cases, as he is a member of the only entity empowered to dismiss teachers. Yet, by doing his or her duty, the board member becomes subject to the threat of lawsuits and individual liability for monetary awards.

Moreover, a board member may want to recuse himself or herself simply out of fear that someone else on the board has formed a bias and has not disclosed it. Though he may feel comfortable hearing the case himself, the member risks the public humiliation of being found to have deprived someone of his civil rights if even one of his fellow board members is biased. Board members will be disinclined to continue their services.

Furthermore, the majority rule creates a disincentive to board action against a bad teacher. A teacher whose conduct is unquestionably harmful to children may escape discharge or even discipline for his misconduct out of fear of subsequent bias claims. No school board member can take comfort in the fact that a jury might agree with him that he made the right decision when he chose to fire the teacher. The majority rule prevents the board from presenting the evidence that the board member heard to the jury. At the very best, the majority's open invitation for rightfully discharged teachers to bring bias claims against school boards will place a financial burden on school boards, consuming significant public resources in defending such cases even when the school boards prevail.

In adopting the one-member bias rule, the majority relies upon the United States Third Circuit Court case of *Berkshire Employees Ass'n v. NLRB*, 121 F.2d 3235 (3rd Cir. 1941). Assuming, without conceding, that *Berkshire* was correctly decided, it is easily distinguishable from the case at bar. The relief afforded in *Berkshire* was simply a new hearing. Ironically, this hearing was to be conducted by the remaining commission members who had previously heard the case and were theoretically subject to the tainting influence of the biased board member. The same is true of each of the three cases relied upon by the majority panel of the Court of Appeals in reaching its decision on this same issue.

In a case such as *Berkshire* where plaintiff is only seeking the remedy of a new hearing, a one-member bias rule might be appropriate. In such an instance, the finding of guilt or innocence of the underlying charges is irrelevant—the new hearing will determine that issue. Where, as here, monetary damage is the subject of the action brought by a rightfully discharged teacher, a more restrictive rule is called for. The permanent relief of money damages should be determined only after resolving the difficult issue of whether there was bias and, if so, determining whether that bias

affected the result—that is, whether the plaintiff would not have been dismissed absent that bias. Under the majority opinion, a jury may find liability against the board and its members individually if only a single member was biased; if that bias was unknown to the other members; and without regard to the impact, if any, of that bias on the board's final decision.

The commonly held notion that juries will generally reach a proper result cannot be relied upon in this type of case. The jury is not allowed to hear the evidence considered by the board against the person charged, it may not consider whether the dismissal was justified, nor may it even hear the board's findings of fact and conclusions to aid it in determining whether the discharge was based upon adequate findings or upon the board's bias.

I cannot presume that the members of a school board were incapable of fairly deciding this solely by virtue of their association with a board member who was allegedly biased. It is completely unnecessary to do so in order to assure that justice is done. We do not even *presume* bias on the part of jurors in serious criminal cases. The United States Supreme Court has held that, when the facts of a particular case give rise to a risk of juror bias, the juror is not presumed to be biased, and the defendant is given an opportunity at a hearing to establish actual bias of the juror. *Smith v. Phillips*, 455 U.S. 209, 71 L. Ed. 2d 78 (1982).

Solid authority from a number of other states holds that the presence and vote of a biased member does not invalidate a result if the required majority exists without reference to the disqualified vote. The general rule applied in these cases has been stated as follows:

> It has generally been held that the vote of a council or board member who is disqualified because of interest or bias in regard to the subject matter being considered may not be counted in determining the necessary majority for valid action. . . . It is also the rule that where the required majority exists without the vote of the disqualified member, his presence and vote will not invalidate the result . . . .

Anderson v. City of Parsons, 209 Kan. 337, 342, 496 P.2d 1333, 1337 (1972); *accord Vanelli v. Reynolds School Dist.*, 667 F.2d 773, 780 n.13 (9th Cir. 1982); *Murach v. Planning & Zoning Com'n*, 196 Conn. 192, 203, 491 A.2d 1058, 1065-66 (1985) (quoting 56 Am.

Jur. 2d *Municipal Corporations* § 172, at 225 (1971)); *Board of Comrs. v. Thompson*, 216 Ga. 348, 349, 116 S.E.2d 737, 738 (1960); *see also* Annot., "What constitutes requisite majority of members of municipal council voting on issue," 43 A.L.R.2d 698, 751 § 27[b] (1955) ("[g]enerally, . . . where the required majority exists without the vote of a disqualified member, his presence and vote will not invalidate the result"). Admittedly, these cases do not deal with the dismissals of teachers specifically, but then, neither does the *Berkshire* line of cases relied on by the majority. These authorities do, however, stand for the proposition that if the biased member's presence is not required for a quorum and if his vote was not necessary to form a majority, the board action remains valid and damages should not be awarded.

I believe that the court should utilize a sequence of shifting burdens to govern bias suits. Through this process, the judicial review of the party's discharge and his section 1983 claim for damages could be disposed of in a single action. The process begins with the presumption that the action of the board is correct. N.C.G.S. § 115C-44(b) (1987). The initial burden is on the plaintiff (the party charging bias) to demonstrate that one or more members of the board possessed a disqualifying personal bias. Upon a presentation of specific facts demonstrating a disqualifying personal bias, the presumption is rebutted, and the burden shifts to the board to demonstrate that the bias did not affect the outcome. The board discharges this burden by demonstrating either that no board member was actually biased or that, after eliminating the votes of the biased board members as well as the votes of the board members whose votes were influenced by the biased members, there remains a sufficient number of untainted, affirmative votes to sustain the action. If the board discharges this burden, the due process claim fails, and the party would not be entitled to a new hearing and may not collect damages from the board.

Under this sequence of shifting burdens, the court should direct a verdict dismissing the due process claim if (1) the party, as a matter of law, fails to discharge its initial burden of rebutting the board member's presumption of honesty and integrity; or (2) the board, as a matter of law, discharges its burden of demonstrating that the bias did not affect the outcome. If the claim survives the directed verdict stage, then the court should instruct the jury in accordance with the above-described sequence of shifting burdens.

The United States Supreme Court has endorsed this sequence of shifting burdens to resolve claimed constitutional violations. In *Mt. Healthy City Bd. of Educ. v. Doyle*, a teacher contended that his nonrenewal was in retaliation for the exercise of his first amendment rights to free speech. The Court delineated the following procedure for resolving the case:

> Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was . . . a "motivating factor" in the Board's decision not to rehire him. Respondent having carried that burden, however, the district court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.

Mt. Healthy, 429 U.S. at 287, 50 L. Ed. 2d at 484. The Court ultimately remanded the case to the trial court to determine if the board satisfied its burden.

Relying on *Mt. Healthy*, a federal claims court in *Salisbury v. Housing Authority of Newport*, 615 F. Supp. 1433, 1444 (E.D. Ky. 1985), applied the sequence of shifting burdens to a due process claim of bias. *See Kendall v. Board of Education of Memphis City*, 627 F.2d 1, 6, n.6 (6th Cir. 1980) (shifting burdens applicable to due process claim). The court in *Salisbury* held that, despite the dismissed employee's showing that the tribunal was biased, her due process claim would fail if the housing authority demonstrated that "she would have been terminated if the hearing had been held before an impartial decisionmaker." *Salisbury v. Housing Authority of Newport*, 615 F. Supp. at 1444. The court ultimately referred the case to a United States magistrate to act as special master to determine whether the employee was entitled to recover damages.

Mt. Healthy delineated the general rule in favor of such a sequence of shifting burdens, and *Salisbury* applied the sequence to due process claims of bias. This Court has employed a sequence of shifting burdens in both criminal and civil matters. *See State v. Cofield*, 324 N.C. 452, 379 S.E.2d 834 (1989); *Pickerell v. Trucking Co.*, 322 N.C. 363, 370, 368 S.E.2d 582, 586 (1988).

I vote to reverse the Court of Appeals.

Justice MARTIN dissenting.

I respectfully dissent from the majority opinion for the reason that the issue of bias upon which the jury verdict in the section 1983 claim was bottomed had previously been resolved against the plaintiff in the trial and appeal of the administrative review claim reported in 79 N.C. App. 372, 339 S.E.2d 483, *disc. rev. denied* (1986). This prior determination of the issue of the bias of the Board became the law of the case and is conclusive on the bias issue raised in the section 1983 claim for damages. Therefore, the section 1983 claim should have been disposed of by summary judgment in favor of the defendants.

Plaintiff, in his complaint, alleged:

> 9. Plaintiff complains of and excepts to the order of the Board of Education dismissing him as a teacher and makes the following allegations and assignments of error:
>
> a. That the action of the Board of Education in dismissing plaintiff was biased, arbitrary and capricious, lacking substantial basis in fact and being substantially disproportionate to the offense, thus denying to plaintiff both the protections of the Tenure Act and of the Due Process provision of the US and NC Constitutions.
>
> . . . .
>
> g. That members of the Board of Education were biased on their consideration of the issues, had determined beforehand what action they would take at the hearing, and did not afford plaintiff-petitioner the fair and non-prejudicial hearing to which he was entitled.

The bias issue was clearly presented at the hearing before the Board of Education. The transcript of that hearing discloses:

> MR. FULLER: I would appreciate that. Secondly, I was going to say this anyway, but certainly in light of the fact that there has been some, I want to be perfectly blunt about it and ask the board to the extent of which any of you have been personally involved, have discussed with people who have knowledge and whether any of you have formed any kind of preconceived notions. I don't mean that in a pejorative sense but just as a matter of being brutally candid. Has anybody on the board either because of the publicity because of what

you have heard from administration, from friends, neighbors, from anyone else, whether you have any problem at all being completely fair to Mr. Crump? And again I don't mean fair in the sense of you will try to be fair, but can you honestly say the scales are even now? I follow that a half step by adding particularly when you consider that you have got the individual teacher on the one hand and the chief personnel officer on the other, and yet the constitution requires that he have a fair and impartial tribunal or hearing body. And so I don't want to offend anybody—

MR. PITTS: That's a fair question. I am glad you addressed that right up front because several months ago the board was aware that some form of hearing was coming down the pike. The administration, the attorney, has not ever revealed anything until we received this letter in the mail yesterday hand delivered of any charges or any statements. Now, I can speak for myself. But the attorney has asked all members of the board not to discuss any aspect of anything that they may hear.

If someone calls them on the phone, they are not to respond in any way. I can speak for myself to say that for me at this point in time the slate is clear. And I will ask Mrs. Newton the same question.

MRS. NEWTON: The same thing. In fact we have not even been given a name whenever we were told a hearing was coming up. And I have not been approached by anybody. And if mention was made of it, I just said I know nothing. And whatever judgment would be made has to be done on what we hear tonight.

MR. ISENHOUR: The same.

MR. PITTS: Mrs. Garlitz.

MRS. GARLITZ: The same. I have had people that made statements to me, and I have not responded in any way. And I did not know until the letter came yesterday what this was about.

MR. PITTS: Mr. Watts.

MR. WATTS: Frankly I feel that I can be as objective as anybody on this board. Obviously when a newspaper that

is published on a county-wide basis comes out and indicates that a teacher is being brought up for charges, I read the article because I'm on the school board and the teacher happens to be in my system.

Other than that, there has been no preliminary information except for this notice we got yesterday afternoon late in the afternoon with the charges. I think I have a fairly good grasp of what we're here for and hopefully will be able to give every bit of the evidence full weight.

MR. PITTS: Mrs. Young.

MRS. YOUNG: I had one call, and I said, "I have no comments." And I have not said one word anywhere. And when I go, I listen and I vote my convictions.

The decision of the Board of Education contained the following conclusion:

6. All procedural steps required under NC Gen Stat § 115C-325 have been properly followed, and all due process rights required thereunder have been accorded to Eddie Ray Crump.

The defendants in their answer and motion for judgment on the pleadings make the following allegation:

2. The issues raised by the Plaintiff involve alleged bias or prejudgment of the issues involved by the Board and its members.

Upon the hearing in the superior court in November 1984, judgment was entered containing the following:

The court further finds and concludes that the action or [sic] the Board to dismiss Crump was not biased, arbitrary or capricious; was not substantially disproportionate to the offenses proved; but instead was based on substantial evidence viewing the record as a whole.

To this judgment the plaintiff made two assignments of error. The first assignment contained two arguments: that the court erred in concluding that the Board's findings were supported by substantial evidence and, secondly, that the court erred in concluding that the Board's order was not biased and capricious.

In the plaintiff's brief filed with the Court of Appeals on 3 June 1985, the plaintiff only argued that the decision of the Board of Education to terminate Mr. Crump was not supported by substantial evidence in the light of the whole record. Plaintiff did not argue before the Court of Appeals that the Board of Education was biased and had prejudged his case and that the decision by the Board was biased and arbitrary and capricious.

The opinion of the Court of Appeals, 18 February 1986, only discusses the plaintiff's contention that the Board's findings and conclusions were not supported by substantial evidence in the whole record. The Court of Appeals made no decision with respect to the plaintiff's other contention that the Board of Education was biased. This Court denied plaintiff's petition for discretionary review of the Court of Appeals' decision.

Plaintiff, by his failure to bring forward in his brief before the Court of Appeals the issue of bias on the part of the Board, has abandoned this issue, and the same has been determined against him by the judgment of the superior court. "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." Rule 28(a), Rules of Appellate Procedure; *State v. Wilson*, 289 N.C. 531, 223 S.E.2d 311 (1976). Thus, it was judicially determined in this proceeding that the Board of Education was not biased and that its decision was not based upon bias nor was it capricious. This became the law of the case in this lawsuit and was binding upon the parties in the trial of the section 1983 issues arising on plaintiff's complaint. It is to be remembered that plaintiff's complaint raised both issues—the propriety of his dismissal in the administrative hearing and the action for damages under section 1983. The trial of the issues was separated by the trial judge upon motion of the defendant and no objection or issue to that discretionary decision of the trial court has been raised by the plaintiff. Therefore, the prior decision in the administrative hearing aspect of this case and the appeal therefrom became the law of the case with respect to the question of whether the Board was biased in deciding plaintiff's claim and whether its decision was based upon bias or was capricious. This prior determination as to the bias issue was binding and conclusive upon the parties and the court in the section 1983 aspect of this case. *Transportation, Inc. v. Strick Corp.*, 286 N.C. 235, 210 S.E.2d 181 (1974); *Bank v. Barbee*, 260 N.C. 106, 131 S.E.2d 666 (1963); *Furniture Co. v.*

Herman, 258 N.C. 733, 129 S.E.2d 471 (1963); *Duffer v. Dodge, Inc.*, 51 N.C. App. 129, 275 S.E.2d 206 (1981); *Carpenter v. Carpenter*, 25 N.C. App. 235, 212 S.E.2d 911 (1975).

Turning now to the case before us, the Court of Appeals in its opinion apparently overlooked the fact that the plaintiff had brought forward an assignment of error in the previous appeal on this case on the issue of bias on the part of the Board, but abandoned that issue by failing to bring the issue forward and argue it in his brief before the Court of Appeals. I find that the question of whether the issue of bias should have been submitted to the jury is well within the issue raised by the dissent in the Court of Appeals. The whole question before that court was the appropriateness of the submission of that issue and the correctness of the trial judge's instructions thereto. In any event where justice and right are concerned, this Court has never allowed manifest injustice to prevail based upon some procedural technicality in a trial or appeal. *See State v. Black*, 308 N.C. 736, 744, 303 S.E.2d 804, 809 (1983) (Martin, J. concurring). It is clear in this case, in my opinion, that the issue of bias has been resolved on the merits against the plaintiff and that this decision is the law of this case and is binding upon this Court in the subsequent appeal of the same issue in plaintiff's section 1983 claim. Plaintiff had a remedy to review the trial court's ruling against him in the bias issue. He could have raised it in his first appeal to the Court of Appeals in this case. Plaintiff's failure to preserve the bias issue cannot thereafter be transformed into a sword to visit manifest injustice upon these defendants in the section 1983 claim. Once the bias issue was fairly and finally decided between these parties, this Court should not allow plaintiff to relitigate the issue in another prong of the identical lawsuit and thereby frustrate the due administration of justice.

Upon this theory, I conclude that it is inappropriate for this Court to decide the substantive legal issue that it has undertaken to do in the majority opinion. I would reverse the decision of the Court of Appeals upon the basis that the bias issue has already been determined on the merits against the plaintiff in this case and that he may not relitigate the same in this section 1983 aspect of his lawsuit.

Justice WHICHARD dissenting.

I concur, essentially, in Justice Martin's dissenting opinion and in the "issue preclusion" portion of Justice Meyer's dissenting opinion. I write separately because I would rely upon somewhat different reasoning and authorities.

A single, identical issue arising from the same circumstances has been decided twice—once by a judge, and once by a jury—contradictorily. As both dissents and the majority recognize, plaintiff twice alleged in his 9 July 1984 complaint and petition for judicial review of the Board hearing that the Board's consideration of his case and its action dismissing him were affected by bias:

> [T]he action of the Board of Education in dismissing plaintiff was biased, arbitrary and capricious, lacking substantial basis in fact and being substantially disproportionate to the offense, thus denying to plaintiff both the protections of the Tenure Act and of the Due Process provision of the U.S. and N.C. Constitutions. . . .
>
> [M]embers of the Board of Education were biased on their consideration of the issues, had determined beforehand what action they would take at the hearing, and did not afford plaintiff-petitioner the fair and non-prejudicial hearing to which he was entitled.

An amended complaint and petition for judicial review, filed 14 August 1984, reiterated these allegations.

The record includes defendants' 4 September 1984 motion to separate plaintiff's appeal of the Board's administrative action from his complaint alleging violations of his constitutional rights. Among the reasons cited by defendants in support of separation was that proceeding with both actions concurrently "would be . . . prejudicial in that a determination of the appeal will decide the issues raised in the civil action. A prior determination of the appeal is necessary to a proper disposition of the civil action." There is no indication in the record of the trial court's ruling on this motion, but the Court of Appeals, the majority, and one dissent all note a subsequent, *de facto* severance. *See Crump v. Board of Education*, 93 N.C. App. 168, 177, 378 S.E.2d 32, 37 (1989).

The only trial court ruling of record is a judgment filed 29 November 1984 in which the trial court indicated that it had applied

the "whole record test" and had considered "all matters submitted by both sides." The trial court found and concluded not only that the Board's decision had been "supported by competent, material, and substantial evidence in view of the entire record as submitted" and had "a rational basis in the evidence," but also that "the action of the Board to dismiss Mr. Crump was not biased, arbitrary or capricious."

Plaintiff excepted separately to each of these findings and conclusions. His first assignment of error cited these two exceptions and stated:

> The Superior Court's Findings and Conclusions that the findings, inferences and conclusions of the Board of Education are supported by substantial evidence and are not *biased* and capricious or substantially disproportionate to the offenses proved on the grounds that there is not substantial evidence in the whole record to support these Findings and Conclusions. (Emphasis added.)

Despite the opacity of its syntax, this assignment of error clearly includes the issue of bias within its statement of the issue whether substantial evidence underlay the Board's action. Nevertheless, in his brief to the Court of Appeals plaintiff did not mention bias at all, but rested his argument chiefly upon the trial court's failure to apply the proper standard of review to the evidence. Defendants' brief denied the inference that plaintiff had been "railroaded," but made no other allusion to the issue of bias. Accordingly, the opinion of the Court of Appeals did not address the issue of Board bias. *See Crump v. Board of Education*, 79 N.C. App. 372, 339 S.E.2d 483, *disc. rev. denied*, 317 N.C. 333, 346 S.E.2d 137 (1986).

Plaintiff's § 1983 action proceeded to trial in 1987 and culminated in a jury's verdict that defendants had failed to provide plaintiff a fair hearing before an unbiased hearing body and in an award of compensatory damages. This action is now before us on appeal.

Of the two issues addressed by the majority, in my opinion only one is necessary to the disposition of this case: whether plaintiff's separate § 1983 action was precluded by the "companion principle" of *res judicata*, collateral estoppel by judgment. *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E.2d 799, 805 (1973). This principle bars parties from retrying fully litigated issues that were necessary to and have been decided in any prior determination. *Id.*

Res judicata, or "claim preclusion," bars absolutely subsequent action upon the same "claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 427, 349 S.E.2d 552, 556 (1986) (quoting *Cromwell v. County of Sac*, 94 U.S. 351, 352, 24 L. Ed. 195, 197 (1877)). *See also State v. Lewis*, 63 N.C. App. 98, 102, 303 S.E.2d 627, 630 (1983), *aff'd*, 311 N.C. 727, 319 S.E.2d 145 (1984). In collateral estoppel by judgment, or "issue preclusion," "the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. at 427, 349 S.E.2d at 556 (quoting *Cromwell v. County of Sac*, 94 U.S. at 353, 24 L. Ed. at 198). Collateral estoppel applies only where the parties are identical or in privity in the former and the latter actions and where the issues are the same. Although in this case the first requisite is plainly met, the second requisite requires a scrutiny of the record to determine not only that the issues are identical, but also that the issues were actually raised and litigated in the prior action, that they were material and relevant to the disposition of the prior action, and that the determination of those issues in the prior action was necessary and essential to the resulting judgment. *King v. Grindstaff*, 284 N.C. at 358, 200 S.E.2d at 805-06.

The issue of Board bias was clearly raised by allegations in plaintiff's original and amended complaints and denied in defendants' answer concurrent with their motion to separate plaintiff's civil action from his administrative appeal. The issue of bias was also one basis articulated in the trial court's finding and conclusion that the Board's action had been based on substantial evidence, viewing the record as a whole. The record included a *voir dire* of the Board members at the hearing, in which plaintiff's attorney specifically examined each member for foreknowledge of the charges brought against plaintiff and for any resulting bias. This evidence indicates the issue of bias was indeed pleaded, debated and determined, or "litigated." *See* Black's Law Dictionary 841 (5th ed. 1979).

The issue of bias was not merely material and relevant to the trial court's disposition of the action, but it was essential to that disposition insofar as the issue was inseparable from the court's

assessment of the substantiality of the evidence. This is apparent in the specific words of the judgment itself that the Board's action "was not *biased*, arbitrary, or capricious; . . . but . . . was based on substantial evidence viewing the record as a whole." (Emphasis added.)

The plain words of the judgment aside, it is unimaginable that the trial court, knowing from plaintiff's complaint that the Board may have been biased against him, could have considered such bias so separable from the Board's assessment of the evidence before it as to have had no effect upon that assessment. The court had no choice but to consider the question of bias as integral to its appraisal of the substantiality of the evidence in the whole record. Despite the fact that the same trial judge presided over plaintiff's administrative appeal, apparently allowed separation of his actions, and presided over plaintiff's § 1983 action, the judgment in the administrative appeal necessarily incorporated the pervasive issue of bias. To know that bias had been alleged and to consider *voir dire* testimony addressing that very question, yet not to consider the effect of bias on the Board's conclusions, would have been to affirm Board findings, inferences, and conclusions that were fundamentally suspect. The essential character of the bias issue in plaintiff's first action is thus manifest.

In addressing the question whether "the issue of bias was *res judicata* at the time of trial," the Court of Appeals concluded that there was no such bar because of the separation of plaintiff's actions: "None of the evidence . . . presented at trial to support his charge of bias existed in the record reviewed by the courts." *Crump*, 93 N.C. App. at 177-78, 378 S.E.2d at 37. This may have been true, but it is not the appropriate test of whether a party is estopped from relitigating an issue that has already been adjudicated. It is incumbent upon a plaintiff to proffer some evidence in support of his case; the judgment will properly go against him if he has failed, by the greater weight of the evidence, to persuade the fact finder that facts supporting bias are more likely than not to exist. *See* 2 Brandis on North Carolina Evidence §§ 203, 212 (1988).

Moreover, if plaintiff, anticipating the issue of bias to figure only in his § 1983 action, deliberately withheld evidence that the Board had been less than candid on *voir dire*, he made not just a tactical error, but one that threatened to vitiate the integrity of the proceedings. This is particularly so in this case, where

withholding such evidence supporting proof of bias resulted not only in a failure to persuade the trial court, but also in a record that the verdict in plaintiff's § 1983 action suggests was a mere charade, superficially sound but actually riddled with the effects of prejudice.

If, given separation of plaintiff's actions, the trial court erroneously addressed plaintiff's allegations of Board bias, then plaintiff failed to alert the appellate court to such error. Plaintiff did in fact except to the trial court's specific findings and conclusions that the Board's decision had a rational basis in the evidence and that its action was not biased, arbitrary or capricious. These two exceptions were grouped as plaintiff's first assignment of error in his first appeal to the Court of Appeals. As that assignment is phrased, however, the issue of bias is confounded with the question of the substantiality of the evidence. Plaintiff must except and assign error *separately* to *each* finding or conclusion that he contends is not supported by the evidence, or he waives his right to challenge the issue on those grounds. *Concrete Service Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 684, 340 S.E.2d 755, 759-60 (1986). In not assigning error to the trial court's consideration of bias and caprice *separate* from the court's finding substantial evidence to support the Board's conclusions, plaintiff waived his opportunity to challenge the trial court's conclusions regarding Board bias.

In addition, plaintiff dropped any reference to bias in his brief before the Court of Appeals and stated the issue concerning this first assignment of error incompletely, if more succinctly: "Whether there is substantial evidence in the whole record which would support the termination of career teacher Eddie Ray Crump." The body of plaintiff's brief likewise fails to mention bias, arguing only the question of the substantiality of the evidence, as if bias, had it existed, could have had no effect upon that evidence. As Justice Martin notes in his dissent, the Rules of Appellate Procedure plainly state that "[q]uestions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned." Rule 28(a), Rules of Appellate Procedure. The trial court implicitly recognized in its judgment that the question of bias was inseparable from the issue of the substantiality of the evidence before the Board. In failing to flag on appeal arguable trial court error in basing judgment in part upon that issue, plaintiff abandoned the issue, and, as Justice

Martin accurately observes, the trial court's determination that the Board's action was not biased but based on substantial evidence became the law of the case.

Given that adjudication of the issue of bias in plaintiff's § 1983 action was foreclosed by its prior determination in his appeal of the Board's administrative action, severance and separate determination of defendants' § 1983 claim was inappropriate, and this appeal, including its focus on the applicability to these facts of the "one person bias rule," is not properly before us.

STATE OF NORTH CAROLINA v. ALLEN RAY HARDISON

No. 377A88

(Filed 13 June 1990)

1. **Homicide § 30.3 (NCI3d)— murder—refusal to submit involuntary manslaughter—no error**

The trial court committed harmless error in a murder prosecution by denying defendant's request for jury instructions on involuntary manslaughter. The jury was instructed on first and second degree murder and voluntary manslaughter, and obviously rejected the theory of an unintentional killing because it found defendant guilty of first degree murder on the theory of premeditation and deliberation. To reach that verdict, the jury was required to find a specific intent to kill with premeditation and deliberation, which would preclude a finding that the killing occurred as a result of criminal negligence or accident.

Am Jur 2d, Homicide §§ 498, 530, 531.

2. **Criminal Law § 490 (NCI4th)— murder—publicity during trial—no mistrial**

The trial court did not err in a murder prosecution in its questioning of jurors who had been exposed to a newspaper headline or in failing to declare a mistrial because of that exposure where, after determining that four jurors had seen the headline and none had read the article, the trial judge asked the jurors whether seeing the headline had influenced or prejudiced them or would have any effect on them; their

unanimous answer was no; the judge instructed the jurors that the headline was not evidence in the case, had nothing to do with the case, and was of a prejudicial nature; the court again asked the jurors if they felt that what they happened to see would influence them in any way; the unanimous response was again no; and defendant made no motion for a mistrial.

Am Jur 2d, Criminal Law § 690.

3. Criminal Law § 498 (NCI4th) — murder — juror's notes — motion that notes not be allowed in jury room — denied — no error

The trial court did not err during a murder prosecution by overruling defendant's objection and request that a particular juror not be allowed to take into the jury room written notes that the juror had taken during the trial. N.C.G.S. § 15A-1228 specifically authorizes jurors to make notes and to take them into the jury room for use during their deliberations, except that upon objection of any party the judge must instruct the jurors that notes may not be taken. The statute does not purport to govern the use of the notes after they have been taken.

Am Jur 2d, Trial § 934.

4. Criminal Law § 50 (NCI3d) — murder — testimony of SBI agent as to statement to defendant — not opinion testimony

The trial court did not err in a murder prosecution by allowing an SBI agent to testify that he had told defendant that he did not believe defendant had been truthful in his first statement. The challenged testimony was in direct response to a question which did not call for an opinion and no opinion was given, so there was no question of admissibility under N.C.G.S. § 8C-1, Rule 701. Even if such evidence was inadmissible under Rule 701, defendant cannot demonstrate prejudice.

Am Jur 2d, Expert and Opinion Evidence §§ 5-10.

5. Constitutional Law § 48 (NCI3d) — murder — effective assistance of counsel

Defendant in a murder prosecution was not denied the effective assistance of counsel under the United States or the North Carolina Constitutions because his trial counsel did not request recordation of jury selection, the bench conferences, and the opening and closing arguments of counsel. N.C.G.S.

§ 15A-1241(a) did not require that the selection of the jury in this noncapital case be recorded and defendant does not assign any error regarding the selection of the jury in this case; the same is true of the opening statements and closing arguments of counsel; and defendant has made no attempt to reconstruct the record of any particular bench conference and makes no specific allegations as to a particular conference.

Am Jur 2d, Criminal Law §§ 752, 753, 984, 985.

APPEAL as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment of *Griffin (William C.), J.*, sentencing defendant to life imprisonment upon his conviction of first-degree murder by a jury at the 31 May 1988 Criminal Session of Superior Court, BEAUFORT County. Heard in the Supreme Court 16 November 1989.

Lacy H. Thornburg, Attorney General, by Jane P. Gray, Special Deputy Attorney General, for the State.

Thomas C. Manning for defendant-appellant.

MEYER, Justice.

In a noncapital trial, defendant was convicted of first-degree murder in the shooting death of his father-in-law, Frederick W. Sheppard, and was sentenced to life imprisonment. We conclude that defendant received a fair trial free of prejudicial error and affirm his conviction and sentence.

The evidence presented at trial by the State tended to show that on 24 September 1987 at approximately 7:22 p.m., Deputy Sheriff Jerry Langley of the Beaufort County Sheriff's Department responded to a radio report of a shooting and went to the farm of Frederick Sheppard. When he got to the farm, defendant was standing with his brother-in-law at the end of a road to the farm, waving his arms to get the attention of the rescue squad immediately behind Deputy Langley. When defendant and his brother-in-law got into the deputy's car, defendant stated that he was the one who had called and that he was the one who had done the shooting. As defendant directed the deputy to the scene, he told the deputy that he had shot his father-in-law, Sheppard, and warned the deputy that Sheppard had a gun.

Upon arriving at the scene of the shooting, they found the victim lying next to his van in a prone position, with his legs slightly turned under him. A .45 automatic pistol with the slide pulled back and an empty clip in it was found under the victim's right arm. On his arm was a holster with a belt attached. A knife case containing a knife was found below his left elbow. An ammunition pouch containing two clips was found under the victim's right hand, and a set of keys was in his left hand. A .30-caliber carbine was found in Sheppard's van. Three spent shells from the .45 were found at the scene. Defendant's .357 Ruger magnum revolver, which contained four live rounds and two spent cartridges, was later retrieved from defendant's car.

Deputy Langley testified that defendant first stated to him that at about 7:00 p.m., after unsuccessfully attempting to locate and talk to Elwood Cherry, a neighbor, about some farm equipment that was for sale in the area, he arrived at his Beaufort County home, which was approximately nine-tenths of a mile from the scene of the shooting. Upon arriving home, defendant related that he heard some shooting; got his .357 magnum, which was already loaded; told his wife he would be back in a little while; and went to find Sheppard, who had stopped by his house before going to the field to do some farm work. Defendant stated to Deputy Langley that he went to talk to Sheppard about the farm equipment that was for sale. He heard Sheppard at the back side of the field, and since it appeared that he was going to be there for a while, defendant left to try to locate Cherry and check on the farm equipment. Defendant then went to the field where Sheppard was working.

Defendant told Deputy Langley that when he returned to the field, Sheppard was still cutting land with his tractor. After parking his car, defendant waved to Sheppard, who began driving the tractor from the field onto the path. Defendant got back in his car and moved it so that Sheppard could have room to park the tractor near his van for refueling. Defendant told Sheppard that he was doing a good job of cutting the field, and Sheppard responded that if it did not rain, he would get the entire field cut. Defendant stated that he made other comments but that Sheppard did not respond. When defendant and Sheppard reached the van, Sheppard said, "I'll show you." Defendant related that Sheppard pushed the door of his van open with his left arm; brought around his right hand, in which he wielded a gun; and began accusing defendant

of cutting his tires and stealing fuel from him. Sheppard was shaking with anger and threatened to kill defendant.

Defendant stated that he grabbed Sheppard's hand and that the gun discharged, the projectile passing by defendant's head and shattering the glass in the passenger door of the van. The two men struggled while Sheppard again threatened to kill defendant. Defendant then pulled his own gun and shot the victim in the shoulder to stop him but not to kill him. When Sheppard fell to the ground, defendant reached for him to keep him from falling. The victim's hand with the gun in it then came around, and defendant fired his own gun at the same time that Sheppard's gun discharged. Defendant told Deputy Langley that the second shot hit Sheppard "where [defendant] was looking which was his face." Defendant then left and called the rescue squad and the Sheriff's Department.

This first statement was made to Deputy Langley orally after he arrived at the scene on 24 September and again at the Sheriff's Department to Deputy Langley and Investigator Donald Deese. It was reduced to writing by Deputy Langley at the Sheriff's Department and was read to defendant to assure that he agreed with it, but it was not signed by defendant. On 9 October 1987, defendant gave in substance the same statement to SBI Agent Bill Thompson at the SBI office in Greenville. Defendant indicated at that time that the second time his gun discharged, he had tensed up in response to the victim's gun discharging and that he had neither aimed his own gun nor realized it had discharged.

Agent Thompson told defendant that he did not think he was telling the truth. At that time, defendant became upset and asked that Deputy Langley be brought into the room. Defendant then, in yet another statement, related to both Agent Thompson and Deputy Langley that when he first went to the field, Sheppard got off his tractor, pulled his gun, began cursing at him and accusing him of stealing fuel and cutting his tires, and while brandishing a .45-caliber pistol, threatened to kill him. Sheppard accused defendant and his family of being a burden and said he was going to kill defendant and the entire family. Defendant turned and began to run. When he looked back, Sheppard was pulling the trigger, but the gun did not go off. He then saw Sheppard with both hands on the gun, as if trying to reload it. When defendant got into his car to leave, Sheppard was shooting a gun at him. Defendant

drove home, fearing that Sheppard would follow him and kill his family. When defendant arrived at his home, Elwood Cherry drove by. Defendant thought it was Sheppard, so he threw up his hands to stop him. After Cherry waved and drove past, defendant got his own gun and returned to the field to stop Sheppard from coming to his house to kill his family. Defendant stated that the actual shooting then occurred as he had previously related.

The State also offered the testimony of Jorj Robert Head, a twenty-two-year-old student at East Carolina University who, on the day of the shooting, was hunting deer on a nearby farm. Head testified that he had heard some farm machinery running, and at about 7:00 he heard loud voices which he thought were two men arguing. He then heard five consecutive, identical shots. Head testified that a couple of minutes later, he heard two additional shots, followed by a pause, and then two more shots. He could not tell what kind of weapon fired the shots, but he said they did not sound like they came from a rifle or a shotgun. It was later determined that the deer stand where Head was located when he heard the arguing and shots was approximately three hundred yards from where Sheppard was shot.

SBI Special Agent Ronald Marrs, a firearms and tool mark examiner, testified that the three .45-caliber cartridge cases found at the scene of the shooting had been fired from the .45-caliber automatic pistol found in the victim's hand and that the gun had a trigger pull of between five and one-half to six pounds. The .45 had a clip that holds seven rounds, and when the last round is fired, the slide automatically locks in the open position. It was stipulated by the parties that the two .357 cartridges retrieved from defendant's gun had been fired from that gun, and the agent testified that that gun had a trigger pull of four to four and three-fourths pounds. Agent Marrs further testified that due to the condition of the victim's clothing, in his opinion, the shot to Sheppard's body had been a contact or near-contact gunshot.

Dr. Stan Harris, a forensic pathologist and teacher of clinical pathology at the East Carolina University School of Medicine, performed an autopsy on the deceased. Dr. Harris described finding a wound to the right of the victim's mouth and a wound to the upper left wall of the chest near the shoulder. He indicated that the bullet which produced the wound to the mouth deviated only slightly from a horizontal plane, went through the brain stem,

and exited the back of the head. In his opinion, this bullet was fired from at least a foot away. Dr. Harris stated that the bullet wound to the brain would have been immediately fatal and was the cause of death. Dr. Harris stated that the wound to the chest was the first to be inflicted, and the wound to the face was the second. Dr. Harris testified on cross-examination that the injury to the chest near the shoulder could possibly have resulted in involuntary actions causing a gun to be fired in a reflexive action.

Defendant testified in his own defense, essentially repeating the statement he gave to SBI Agent Thompson and Deputy Langley on 9 October 1987. Defendant testified that his father-in-law had an extremely violent temper and that he exhibited uncontrollable anger towards his immediate family. He said that on the day of the shooting, he arrived home from work at approximately 4:00 to 4:30 p.m. Sheppard had come by defendant's house about 5:15 to 5:30 p.m., but defendant and Sheppard did not speak. Sheppard left defendant's home and went down to the field. Shortly after 6:30 p.m., defendant's wife came home, and he left to attempt to find Elwood Cherry to go look at a truck and a combine that were for sale. When he could not find Cherry, defendant went to the field where Sheppard had been cutting his land. Sheppard was sitting in the corner of the field, behind his tractor, and appeared to be having "problems," so defendant began walking toward him. When Sheppard saw defendant, he threw up a hand, and defendant waved at him. Sheppard then drove his tractor toward his van, and defendant returned to his car and moved it out of the way.

Defendant testified that Sheppard got out of the tractor, immediately pushed the gun in defendant's face, and started cursing him and accusing him of stealing fuel and cutting his tires. Defendant denied the accusations, but Sheppard got madder and stated that he was going to kill defendant and the whole family. Defendant ran to his car and drove home, during which time Sheppard was shooting at him.

At his home, defendant heard an automobile coming down the road at a fast pace. Thinking it was Sheppard, he turned and threw up his hands to stop Sheppard. However, the vehicle approaching was a truck being driven by Elwood Cherry. Defendant testified that Cherry apparently thought defendant was waving and waved in return as he passed defendant.

Defendant testified that he got his gun and holster from his mobile home, strapped it on his belt, and told his wife that he was going back down to the field. He was afraid his father-in-law would come to his house and carry out his threat, and defendant wanted to reason with him. When defendant arrived at the field and got out of his car, Sheppard was standing by his van. Sheppard immediately began cursing as defendant approached him. Sheppard turned his back to defendant and was handling something on the front seat of his van. Defendant told Sheppard that they had to talk about things. Sheppard and defendant argued, and Sheppard pointed a gun at defendant, stating that he was going to kill him. Defendant grabbed Sheppard's hand which held the gun, and Sheppard fired the gun, missing defendant. The two men struggled, and defendant pulled his own gun and shot Sheppard in the shoulder.

Defendant testified that Sheppard then fell to the ground on his back, and as defendant bent down to help him up, Sheppard's right arm came up. Defendant tensed and, without aiming, discharged his gun, the bullet striking Sheppard in the face. Defendant then returned home and called the Sheriff's Department and the rescue squad. At his brother-in-law's urging, while the two waited for the authorities to arrive, defendant put the pistol in the car at his home. Defendant further testified about prior threats he had received from the deceased and prior acts of violence on the deceased's part.

On both direct and cross-examination, defendant testified that, in his first statement, he did not tell Deputy Langley about going back for the gun or about Sheppard shooting at him a number of times as he was fleeing the scene after the first confrontation. Defendant testified on cross-examination that he did not tell Agent Thompson that he went back for the gun. Defendant stated that what he told them was basically what he could "put together" and that when he calmed down and put everything together, "[i]t was just tearing [him] apart inside" knowing he had not told Deputy Langley about going to the house to get the gun. After being told by Agent Thompson that he did not believe defendant was telling the whole truth, defendant testified that he became upset and wanted them to know all the details and that that was why he told them a different story.

Defendant further offered the testimony of family members and neighbors as to the violent reputation of the deceased and as to his own good character.

Defendant was convicted of first-degree murder on the theory of premeditation and deliberation and was sentenced to life imprisonment.

[1] Defendant first contends that the trial judge erred in denying his request for a jury instruction on involuntary manslaughter. The trial court submitted for the jury's consideration verdicts of first-degree murder based upon premeditation and deliberation, of second-degree murder, of voluntary manslaughter, and of not guilty. The trial court further charged on the theory of self-defense. The State contends that even if defendant's evidence would support an instruction on involuntary manslaughter, any error in failing to give such an instruction was harmless in view of defendant's conviction of first-degree murder based on premeditation and deliberation. We agree. Our recent decision in *State v. Young*, 324 N.C. 489, 380 S.E.2d 94 (1989), is dispositive of this assignment of error. In *Young*, we held that where, as here, a jury is properly instructed on the elements of first- and second-degree murder and thereafter returns a verdict of guilty of first-degree murder based on premeditation and deliberation, it is harmless error not to have instructed on the issue of involuntary manslaughter even where the evidence would have supported such an instruction. The defendant in *Young* was charged with the first-degree murder of his wife. He contended the shooting was an accident. The jury was given instructions on possible verdicts of first-degree murder, second-degree murder, or not guilty. The defendant requested and was denied instructions on voluntary and involuntary manslaughter. He was found guilty of first-degree murder on the theory of premeditation and deliberation. On appeal, he conceded there was no evidence to support a charge on voluntary manslaughter but contended he was entitled to an instruction on involuntary manslaughter. This Court found that even if it were error to have failed to charge on involuntary manslaughter, the error was harmless because the jury was given correct instructions on first- and second-degree murder, and the jury found him guilty of first-degree murder based on the theory of premeditation and deliberation. *Id.* at 492, 380 S.E.2d at 96. *See also State v. Vaughn*, 324 N.C. 301, 309, 377 S.E.2d 738, 742 (1989). This Court expressly overruled prior decisions that stated or implied that in such situations the failure to charge on involuntary manslaughter was not harmless. Our rationale was that the jury was instructed that it could not find the defendant guilty of first-degree murder unless it found beyond

a reasonable doubt that he formed the specific intent 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. In finding the defendant guilty of first-degree murder, the jury necessarily rejected the theory of an unintentional killing. Therefore, had an instruction on the lesser charge been given, there is no possibility the jurors would have considered it since they found him guilty of the greater offense. *State v. Young*, 324 N.C. at 494, 380 S.E.2d at 97. In the case *sub judice*, the jury was similarly instructed on first- and second-degree murder and also voluntary manslaughter. This jury obviously rejected the theory of an unintentional killing because it found defendant guilty of the first-degree murder of Fred Sheppard on the theory of premeditation and deliberation.

In his reply brief, defense counsel, with admirable candor, concedes that *Young* does indeed stand for this proposition but urges us to reconsider our holding in that case or to limit that holding to the circumstance where the defense is "accident." Defendant contends that, in the present case, the evidence is susceptible of a finding by the jury that the conduct of the defendant was criminally negligent, that is, wanton and reckless negligence, which would serve as the basis for a verdict of involuntary manslaughter. We disagree. To reach its verdict of first-degree murder on the theory of premeditation and deliberation, the jury was required to find a specific intent to kill, formed with premeditation and deliberation, which would preclude a finding that the killing occurred as a result of criminal negligence, just as it would preclude a finding that it occurred by accident. We reaffirm our holding in *Young*. As in *State v. Young*, 324 N.C. 489, 380 S.E.2d 94, assuming error in not giving a charge on involuntary manslaughter, it was harmless in view of the verdict of first-degree murder on the theory of premeditation and deliberation. Our recent case of *State v. Thomas*, 325 N.C. 583, 386 S.E.2d 555 (1989), in which we held that it was reversible error to fail to submit the alternative verdict of involuntary manslaughter in a first-degree murder prosecution submitted only on the theory of *felony murder*, is inapposite. This assignment of error is overruled.

[2] Defendant next contends that the trial judge committed plain error in failing to adequately question four jurors who had been exposed to a newspaper headline and in failing to declare a mistrial because of that exposure. The headline in question was "*After*

Polygraph Test: AGENT: HARDISON ALTERED STORY." Beneath the headline was an article of three columns in width, which was continued in two column widths on another page. The article reported that defendant had changed his account of the events after being administered a polygraph examination and contained a summary of the trial proceedings up to the time the story was written. The newspaper publicity of the trial was brought to the attention of the trial judge the morning after the article appeared, following an overnight recess after all the evidence had been presented and just prior to counsel's closing arguments to the jury and the jury charge. The matter is reported in the trial transcript as follows:

> THE COURT: . . . . There is something that was brought to my attention this morning, I made [sic] need to speak to the jury about that. Let me inquire of you first. (All counsel approached the bench and conferred with the court out of the hearing of the jury.)
>
> THE COURT: Members of the jury, it has been brought to my attention this morning that apparently there was some media attention in the local press to this matter last evening and I would like to make an inquiry of you right now if anybody happened to see that? Apparently, from what I have been told it was arranged in such a fashion that if you picked up the paper, you couldn't hardly help but see it.
>
> I would like to make an inquiry, again, this isn't a criticism of anybody. It is the sort of thing that happens and I would like to ask anybody if they happened to see that particular headline in the paper last night.
>
> It appeared to be rather, there were several of them.
>
> JUROR: I saw the headline but I just chose not to read the article.
>
> THE COURT: Let me ask, anybody read that article[?] As it has been told to me that it appeared that you couldn't hardly help but see. Anybody happen to read the article?
>
> JURY IN UNISON: No.
>
> THE COURT: Let me make a further inquiry. Anybody prejudiced or influenced or had any—those of you who happened to see it, I believe there were four of you. Do you

feel like what you saw will have any effect whatsoever in this case?

JURY IN UNISON: No.

THE COURT: I'll specifically instruct you that that is not evidence in this case. Has nothing to do with this case. As a matter of fact, the way it was characterized to me was clearly a bias type, prejudicial type. I think that would be the only way to characterize it.

I would make a further observation—well, let me ask you this question, is anybody with the press in the courtroom?

MR. NORTON: Yes, sir, there is.

THE COURT: Of course, we live in a free society. All I can do is ask you not to read those. I appreciate the fact that you all didn't read it.

I'm sorry it was arranged in such a fashion that you couldn't help but see it if you picked up the paper.

Any of you that happened to see it feel like that what you saw would, in any way, influence you whatsoever?

JURY IN UNISON: No.

It thus appears that four jurors saw the headline; that, in accordance with the judge's prior admonishments, none of them read the article; and that seeing the headline did not influence any of the four jurors in any way. Defendant made no motion for a mistrial but now contends that the exposure of the four jurors to the headline was so prejudicial that the trial judge should have declared a mistrial *ex mero motu*. He further contends that the trial judge's failure to make a more detailed inquiry resulted in the denial of a fair trial. We disagree. Assuming, without deciding, that the issue is properly before us in spite of defendant's failure to preserve it for appellate review by moving for a mistrial in accordance with Rule 10(b) of the North Carolina Rules of Appellate Procedure, we find no error.

Whether a motion for mistrial should be granted is a matter which lies within the sound discretion of the trial judge. "[A] mistrial is appropriate only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict under the law." *State v. Calloway*, 305 N.C. 747, 754, 291 S.E.2d

622, 627 (1982) (citing *State v. Chapman*, 294 N.C. 407, 241 S.E.2d 667 (1978)). Pursuant to N.C.G.S. § 15A-1061, upon motion of defendant, or with his concurrence, a trial judge *may* declare a mistrial at any time during trial. He *must* do so upon proper motion only "if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C.G.S. § 15A-1061 (1988). Such was not the case here. After determining that four jurors had seen the headline and that none had read the article, the trial judge asked the jurors whether seeing the headline had influenced or prejudiced them or would have any effect on them whatsoever. Their unanimous answer was "no." The trial judge then instructed the jurors that the headline was not evidence in the case, had nothing to do with the case, and characterized it as being of a prejudicial nature. He then again asked the jurors if they felt that what they happened to see would influence them in any way, and again their unanimous response was "no." We conclude that this was an adequate and sufficiently detailed inquiry and did not deny defendant a fair trial. Nor do we find any abuse of discretion in failing to declare a mistrial.

[3] Defendant next argues that the trial judge erred in overruling his objection and request that a particular juror not be allowed to take into the jury room written notes that the juror had taken during the trial. The objection was made after the jury instructions were completed and after the jury was already in the jury room with the notes but before the jury began its deliberations. The record does not reveal any objection to any juror taking notes at any time prior thereto. N.C.G.S. § 15A-1228 provides as follows:

> Jurors may make notes and take them into the jury room during their deliberations. Upon objection of any party, the judge must instruct the jurors that notes may not be taken.

N.C.G.S. § 15A-1228 (1988). This legislation specifically authorized jurors to make notes and to take them into the jury room for use during their deliberations *unless* there is an objection by a party, in which event the judge must instruct the jurors that they may not take notes. We note that a party, by proper objection made in apt time, may require an instruction that notes may not be taken; it does not purport to govern the use of the notes after they have been taken. Had the legislature desired to do so, it could easily have provided that, upon objection, such notes could

not be taken into the jury room. That the legislature knew how to formulate the proper language to do just that is obvious from the first sentence of the statute in that it specifically authorized jurors' notes to be taken "into the jury room during their deliberations." While an objection in apt time to the taking of the notes could have prevented them from being taken, an objection coming after they had already been taken and after the jury had left the courtroom came too late.

Defendant also contends in the caption to one of his questions presented for review that the overruling of his objection as to the juror's notes denied him his constitutional rights under both the federal and state Constitutions "to a fair trial and due process of law." He does not, however, brief any constitutional issue in that regard. He, likewise, does not contend or argue in any way that the statute, N.C.G.S. § 15A-1228 (1988), is unconstitutional. Had defendant contested the constitutionality of the statute at trial and briefed the issue before this Court on his appeal, we would have been presented with a more serious problem. *See, e.g., State v. Stocks*, 319 N.C. 437, 443, 355 S.E.2d 492, 495 (1987) (Martin, J., concurring opinion).

[4] Defendant next contends that the trial court erred in allowing SBI Agent Thompson to testify that he (Thompson) told defendant that he did not believe defendant had been truthful in his first statement to Thompson. Defendant argues that, although it was not elicited as opinion evidence, Thompson's testimony constituted improper and incompetent opinion testimony. We disagree. The testimony in question occurred during the questioning of Agent Thompson by the prosecutor:

> Q. Now after Mr. Hardison gave you that statement . . . , what, if anything, did you say to Mr. Hardison at that time?
>
> A. I told Mr. Hardison that I didn't think he was telling me the complete truth.
>
> MR. VOSBURGH: Object, move to strike.
>
> THE COURT: Objection overruled. Motion denied.
>
> Q. What did he say to you at that time?
>
> A. At that time, he didn't really reply in any way to that directly . . . .
>
> . . . .

Q. Did you take a further statement from Mr. Hardison at that time?

A. Yes, sir.

Q. What did he tell you had occurred the second time after you told him he hadn't told you the complete truth?

Agent Thompson then related the contents of defendant's second statement.

It is clear that the challenged testimony was in direct response to the question, "[W]hat, if anything, did you say to Mr. Hardison at that time?" The response was a statement: "I told Mr. Hardison that I didn't think he was telling me the complete truth." The question did not call for an opinion, and none was given. No question of admissibility of opinion testimony under Rule 701 of our Rules of Evidence arises. Even if such evidence was inadmissible under Rule 701, however, defendant cannot demonstrate prejudice by its admission. It was defendant himself who, much earlier in the trial, first elicited from Deputy Langley during cross-examination the fact that the defendant's first and second statements were inconsistent:

Q. And did he give you a second statement which in any way conflicted with the first one that was given?

A. Yes, he did.

Q. What was the statement that he gave you the second time?

Deputy Langley was thereafter allowed to relate the contents of the second statement. Later, as indicated above, Agent Thompson testified as to the contents of the second statement. Even the defendant himself testified that he gave two statements and gave an explanation as to the inconsistencies in the two. Defendant cannot meet the burden of showing that, absent the contested testimony by Agent Thompson, there is a reasonable possibility that the jury would have reached a different result. N.C.G.S. § 15A-1443(a) (1988).

[5] Finally, defendant contends that he was denied the effective assistance of counsel under both the United States and the North Carolina Constitutions because his trial counsel did not request recordation, stenographically or otherwise, of the jury selection,

the bench conferences, and the opening and closing arguments of counsel.

The test for determining whether the defendant has received effective assistance in a criminal case is set forth in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984), and adopted by this Court in *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985), as the uniform standard to be applied under the North Carolina Constitution:

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, *a trial whose result is reliable.* (Emphasis added.)"

State v. Braswell, 312 N.C. at 562, 324 S.E.2d at 248 (quoting *Strickland v. Washington*, 466 U.S. at 687, 80 L. Ed. 2d at 693).

The defendant attempts to meet the first test by showing that his counsel failed to request a transcript of all proceedings. He relies on N.C.G.S. § 15A-1241(a), which provides:

> (a) The trial judge must require that the reporter make a true, complete, and accurate record of all statements from the bench and all other proceedings except:
>
> (1) Selection of the jury in noncapital cases;
>
> (2) Opening statements and final arguments of counsel to the jury; and
>
> (3) Arguments of counsel on questions of law.

N.C.G.S. § 15A-1241(a) (1988).

In the plain words of the statute, it is not required that the selection of the jury in this noncapital case be recorded, and defendant does not assign any error regarding the selection of the jury in this case. The same is true of the opening statements and closing arguments of counsel. As to the "bench conferences," the record in this case reflects a number of bench conferences between judge and counsel. Defendant has made no attempt to reconstruct the record of any particular bench conference and indeed makes no

specific allegations as to a particular conference. Rather, he argues that several of the bench conferences reflected in the transcript of the trial "may have been critical to the Defendant's rights" and that, without a transcript of every aspect of the trial, "it is impossible to effectively evaluate what possible appellate issues might be advanced." Defendant's arguments in this regard fall far short of satisfying the burden set forth in *Strickland*, 466 U.S. 668, 80 L. Ed. 2d 674, and *Braswell*, 312 N.C. 553, 324 S.E.2d 241.

Defendant received a fair trial free of error.

No error.

STATE OF NORTH CAROLINA v. JERRY LYNN KING

No. 533A89

(Filed 13 June 1990)

1. Criminal Law § 78 (NCI4th)— murder—pretrial publicity—change of venue denied

The trial court did not abuse its discretion in a prosecution for murder, robbery and burglary by denying defendant's motion for change of venue for pretrial publicity where the evidence presented was not sufficient to establish pervasive word-of-mouth publicity, the media coverage was extensive but not excessive, and the articles were factual accounts of what took place. Furthermore, defendant did not request that jury selection be transcribed in order to be included in the record, the record does not reflect how many peremptory challenges defendant used, defendant did not make any showing that there were any problems in jury selection involving pretrial publicity, defendant therefore failed to carry his burden of establishing prejudice, and the trial judge satisfied himself that excessive publicity was not a problem before he impaneled the jury. N.C.G.S. § 15A-957.

Am Jur. 2d, Criminal Law §§ 378, 688.

2. Criminal Law § 186 (NCI4th)— motion to prohibit jury dispersal—nothing in record to indicate hearing—presumed denied

A motion to prohibit jury dispersal in a prosecution for murder, robbery, and burglary was in effect denied where nothing in the record indicates that the motion was ever heard. Absent evidence of waiver or withdrawal, proceeding with a trial without hearing a pretrial motion is in effect a denial of that motion. Assuming that the motion was in fact heard and denied, defendant failed to show actual prejudice.

Am Jur 2d, Trial §§ 949-955.

3. Criminal Law § 98.2 (NCI3d)— murder—motion to sequester and segregate State's witnesses—not ruled upon

There was no abuse of discretion in a prosecution for murder, robbery and burglary from the trial judge's failure to rule upon defendant's motion for sequestration and segregation of the State's witnesses where defendant contended that the motion was heard and denied by the trial judge, the record does not confirm that assertion, and defendant failed to demonstrate how the denial of the motion, if in fact it was heard and denied, actually and substantially prejudiced him.

Am Jur 2d, Trial § 61.

4. Criminal Law § 169 (NCI3d)— murder—objection to defense questions sustained—no offer of proof

The trial court did not err in a prosecution for murder, robbery, and burglary by sustaining the prosecutor's objection to a defense question concerning an offense the witness's cousin had allegedly been charged with where there was no offer of proof. The Court could only speculate as to what the witness's answer would have been and defendant failed to demonstrate how the trial court's ruling prejudiced his case.

Am Jur 2d, Trial §§ 128-130.

5. Homicide § 21.5 (NCI3d)— first degree murder—motion to dismiss denied—no error

The trial court did not err in a prosecution for first degree burglary, robbery with a deadly weapon, and first degree murder by denying defendant's motion to dismiss where defendant's admissions to his cell mates in conjunction with

physical evidence at the crime scene were sufficient to establish each element of the crimes charged. This Court has upheld numerous convictions obtained primarily on the basis of admissions made to prison cell mates and the argument that the cell mates were not reliable witnesses goes to the weight of the testimony, not to its sufficiency.

Am Jur 2d, Evidence § 572.

6. Criminal Law § 420 (NCI4th)— prosecutor's closing argument —no objection—within permitted latitude

The trial court in a prosecution for murder, robbery, and burglary did not err by failing to intervene *ex mero motu* in the prosecutor's closing argument where defendant failed to object to any portion of the argument and the argument was well within the wide latitude permitted in hotly contested cases.

Am Jur 2d, Trial § 218.

APPEAL as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by *Burroughs, J.*, at the 29 May 1989 Criminal Session of Superior Court, CATAWBA County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals on accompanying convictions was allowed on 5 December 1989. Heard in the Supreme Court 14 May 1990.

Lacy H. Thornburg, Attorney General, by G. Patrick Murphy and John H. Watters, Assistant Attorneys General, for the State.

Randy Meares for defendant-appellant.

MEYER, Justice.

On 9 May 1988, defendant was indicted for first-degree burglary, robbery with a deadly weapon, and first-degree murder in the stabbing death of Nancy Brown Covington on 18 August 1986. The offenses were joined for trial on 28 April 1989, and the case was tried before a jury at the 29 May 1989 Criminal Session of Superior Court, Catawba County, Judge Robert M. Burroughs presiding. The jury found defendant guilty of first-degree murder on theories of premeditation and deliberation and of felony murder, guilty of first-degree burglary, and guilty of armed robbery. During

the sentencing phase, the jury found that the mitigating circumstances found were sufficient to outweigh the aggravating circumstances found and accordingly recommended a sentence of life imprisonment. The trial judge, following the jury's recommendation, sentenced defendant to life imprisonment for the murder and additionally sentenced defendant to life imprisonment for the burglary and forty years for the robbery, each sentence to run consecutively. On appeal, defendant brings forward six assignments of error. After a thorough review of the transcript, record, briefs, and oral arguments we conclude that defendant received a fair trial free of prejudicial error.

The State's evidence tended to show that the victim, Nancy Brown Covington, was a sixty-six-year-old black woman who lived in a mobile home in Hickory, North Carolina. Mrs. Covington lived alone, but every day her niece visited her to make sure she was all right. On Sunday, 17 August 1986, Mrs. Covington's niece checked on her around 7:00 p.m. The next morning, at approximately 6:15 a.m., she again stopped by the house, accompanied by Mrs. Covington's sister. The front door was locked, and the two were unable to get any response from inside; so they crawled into the house through a window next to the front door. They found Mrs. Covington's body lying on the floor of the master bedroom.

Robert Melton, a special agent of the State Bureau of Investigation, processed the crime scene. On the exterior of the residence, he noted an L-shaped cut in the south bedroom window screen. The sharp edges of the cut suggested that it had been done recently. A fifty-five-gallon barrel under the window appeared to have been moved recently. Upon examination of the window from the inside, Agent Melton noted that there was undisturbed dust and dirt on the bottom of the window frame; however, there was an area on the top of the frame where the dust and dirt had been wiped away. The agent observed pry marks on the rear door of the home and noted that the door's interior curtains were partially hanging outside of the door.

Inside the mobile home, nothing appeared disturbed with the exception of the victim's bedroom. Agent Melton found Mrs. Covington's body lying on her right side on the floor beside her bed. The bedroom had been ransacked, and various items had been placed on the bed, including a sewing kit, a small orange-handled screwdriver, a leather handgun holster, and various religious and

medical papers. Investigators discovered blood only in the bedroom and on a knife which was located under the kitchen sink. All of the blood was consistent with the victim's blood type.

Agent Melton took twenty-six latent print impressions from various areas of the home. The fingerprint examiner testified that, of those prints, only seven proved valuable for identification purposes. All seven prints belonged to the victim.

Another agent testified that two head hairs found on a pillow from the bed were consistent with samples from the victim and that of seven hairs found on the comforter, six hairs were consistent with the victim's hair and one was not consistent with either defendant or the victim. Hairs taken from the bottom bed sheet and from the victim's left hand were also consistent with the victim's head hair. An expert in fiber comparison testified that State's Exhibit 17, a taping from the south bedroom window, contained several black cotton fibers and one dark brown triacetate fiber. The expert testified that triacetate fibers are commonly found in women's lingerie items and in jacket linings. Cotton fibers are typically found in many types of clothing.

The pathologist who performed the autopsy testified that he observed thirty-five knife wounds on the victim's body, one of which severed her jugular vein. He further testified that he believed the time of death was in the early morning hours of 18 August 1986.

A neighbor, Gail Springs, testified that defendant came to her house around midnight on the night of the murder and borrowed a screwdriver, which he never returned.

Herbert Thompson testified for the State under a grant of immunity. He testified that on 18 August 1986, defendant woke him up at a friend's house around 3:00 a.m. and asked Thompson to take him to defendant's mother's house to obtain some items to trade for cocaine. Thompson drove defendant to his mother's house, which was located just a few yards in front of the victim's mobile home. Thompson parked in front of defendant's mother's residence and observed defendant as he went inside. Ten to fifteen minutes later, Thompson observed defendant come from around the side of his mother's residence carrying something under a black jacket. Defendant got into the car and told Thompson to keep the headlights off as he backed the car out of the driveway. The two drove to Larry Saunders' home, where Thompson let defendant

out of the car. About five minutes later, defendant joined Thompson and another acquaintance at a neighboring house, and the three of them "mainlined" the cocaine. Thompson took defendant to his brother's house at approximately 4:30 a.m.

The victim's niece testified that she had been raised by Mrs. Covington since the age of four, when her parents died. She knew the defendant had known the victim for fifteen years because he lived with his mother in a house just a few yards from the victim's home. She testified that defendant had been in the victim's home before. She further testified that Mrs. Covington kept much of her jewelry in a white jewelry box on top of her bedroom dresser. After the murder, the jewelry box was missing. She identified State's Exhibit 41 as being a ring just like one the victim owned and which the niece had been unable to locate after the murder. It was described by the prosecutor as a gold band with a pink star sapphire stone. Additionally, she testified that the victim owned a small handgun which she kept in a compartment at the head of her bed. After the murder, the gun was missing, but its leather holster was found on the bed. Finally, the niece testified that she did not recall pry marks found on the rear door being there prior to the murder.

Ronald Wilfong and Josephine Fredericks both identified State's Exhibit 41 as being a ring Wilfong had bought from defendant and had given to Fredericks.

Detective Steve Hunt of the Hickory Police Department testified that around 21 August 1986, defendant became a suspect in the Covington murder, and a warrant was issued charging him with the crime. Defendant learned of the existence of the warrant from his brother and voluntarily turned himself in to the authorities. He gave a statement to the police to the effect that he was with Thompson in the early morning hours of 18 August 1986 and that after leaving Thompson, he went to his mother's house, where he spent the rest of the night. He denied having borrowed a screwdriver from Gail Springs on the night of the murder, but he admitted that he was shooting up drugs and selling them. Defendant was arrested and placed in the Catawba County jail.

While in jail, defendant was housed with witnesses Robert Lowe, Charles Stokes, Douglas Silva, and Charles Littman. Lowe testified that sometime around November of 1986, he spoke with defendant and asked if "he [the defendant] was the one that they

were suspected [sic] in the murder investigation." Defendant responded affirmatively, adding, "they ain't got no evidence on me and I ain't saying nothing."

Stokes testified that defendant told him in September 1986 that he had "broke into this lady's house, or broke in somebody's house and he was on drugs, and . . . was wanting some money to get him some drugs with, and there was somebody in the house, and he said he killed her, stabbed her with a knife." Stokes further testified that defendant said that because the victim recognized him, he stabbed her so that she would not be able to identify him. On cross-examination, Stokes testified that defendant told him he got a "heater" from the victim. He assumed that defendant meant a portable household heater; however, he acknowledged that the term "heater" is also a slang term for a gun.

Silva testified that sometime after November 1986, he was playing cards with defendant and asked defendant how he could kill a seventy-year-old woman. Defendant replied that "he had [to], she would not let him rob her, she struggled, she ripped off his mask, she saw who he was so he had to do it." Defendant also told Silva he had stolen jewelry from the victim and felt that he would escape the charges because the police had someone else under investigation.

Littman testified that in the fall of 1986, he and defendant discussed the Covington murder, and defendant told him he had killed Mrs. Covington because he broke in, she knew him, and he had to kill her. Littman testified that defendant said he was using drugs at the time and traded what he had obtained from the victim to a drug dealer named Larry Saunders in exchange for cocaine.

Defendant presented no evidence at trial.

[1] In his first assignment of error, defendant contends that the trial court erred in failing to grant his motion for change of venue. In that motion, defendant stated in support of his position that "a feeling of racial injustice has been loudly voiced by several civic and religious leaders in the black community through the news media, wherein an atmosphere has been created that may influence a jury to convict the Defendant, not because of the evidence against him, but rather to ease racial tensions." A number of assaults on elderly black women had occurred in the weeks prior to the

murder of Nancy Covington, who was herself a sixty-six-year-old black woman who lived alone. Five months prior to her murder, another woman had been murdered under similar circumstances. The two murders and the other attacks which had taken place created a great deal of community concern. As a result, the media ran numerous stories about the ensuing investigations of the two murders, including the prosecution of a suspect in the earlier murder, a proceeding which ended in a mistrial. The State ultimately accepted a guilty plea from that defendant in exchange for a reduced charge of second-degree murder. The media also focused on the efforts being made to combat the area's perceived drug problem, which was assigned as the reason for the wave of assaults.

Once defendant was suspected by the authorities as being involved in the Covington murder, the media began to run stories naming defendant as the perpetrator of the crime. One story included a photograph which depicted defendant being escorted by police officers while in handcuffs and shackles.

Defendant contends that the totality of these circumstances indicates that the jury could not help but be exposed to negative prejudicial publicity about the case that would in turn taint their opinion of defendant. Defendant concludes that the trial judge therefore abused his discretion in failing to grant defendant's motion for change of venue. We disagree.

Judge Forrest A. Ferrell conducted a pretrial hearing on the motion on 12 August 1988. In support of the motion, defendant presented copies of the newspaper accounts which had covered the story. To prove excessive word-of-mouth publicity, defendant offered the testimony of Reverend Webster E. Lytle, pastor of the victim's church and a member of the Hickory City Council. Lytle testified that five or six members of the church's six-hundred-member congregation had expressed concern about the murder of the victim, who was a popular and involved member of the church. Lytle further testified, however, that none of these persons had formed an opinion as to defendant's guilt or innocence. There was no one, to Lytle's knowledge, who had formed a fixed opinion that defendant was the person responsible for the killing. Lytle also stated that he did not consider the newspaper accounts to be inflammatory. The victim's community was known as the Ridgeview area and, according to Lytle, has a population of approximately 3,000 persons. Lytle testified that approximately 26,000

people live within the corporate limits of the Town of Hickory and that Catawba County has a population of over 100,000.

At the conclusion of defendant's evidentiary showing, Judge Ferrell denied the motion, stating the following as his reasoning:

> I think you've established that there may be sufficient public interest in the case in the Hickory area and limited primarily to the Ridgeview community. This doesn't necessarily mean that there's been established a prejudice against the defendant but you've shown that there is at least an interest and justifiably so in that—in the nature of the articles you've presented to the Court. This doesn't, however, mean that there's been any . . . showing of prejudice against the defendant in the county at large, in the body of the county. Now, I can not conclude from your showing that such exists.

The trial judge went on to say that if pretrial publicity became a problem at any time during the course of the trial, defendant was free to reopen the venue issue or to request a special venire.

The relevant statute, N.C.G.S. § 15A-957, provides in part as follows:

> If, upon motion of the defendant, the court determines that there exists in the county in which the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial, the court must either:
>
> (1) Transfer the proceeding to another county . . . , or
>
> (2) Order a special venire . . . .

N.C.G.S. § 15A-957 (1988).

A motion for change of venue or for a special venire from another county on grounds of the prominence of the victim and inflammatory publicity is addressed to the sound discretion of the trial judge, and the defendant must demonstrate an abuse of discretion before this Court will determine that the ruling was in error. *State v. Harrill*, 289 N.C. 186, 221 S.E.2d 325, *death sentence vacated*, 428 U.S. 904, 49 L. Ed. 2d 1211 (1976). The burden of showing "so great a prejudice against the defendant that he cannot obtain a fair and impartial trial" falls on the defendant. *State v. Boykin*, 291 N.C. 264, 229 S.E.2d 914 (1976).

We have analyzed the record in this case, particularly focusing our attention on Reverend Lytle's testimony and on the newspaper articles submitted for our review. Reverend Lytle's testimony that five or six persons in his congregation expressed concern was not sufficient evidence to establish pervasive word-of-mouth publicity. In fact, Lytle went out of his way to express his opinion that he and each of the persons he had talked with had maintained an open mind about the defendant's involvement. While the media coverage of these murders was somewhat extensive, it was not excessive. The articles are factual accounts of the events that were taking place. We are not convinced that the evidence presented by defendant established a prejudice so great that he could not obtain a fair and impartial trial.

Furthermore, this Court has required that a defendant specifically identify prejudice among the jurors selected before he is entitled to a new trial based upon the failure of the trial court to grant a motion for change of venue. The defendant must demonstrate that it is reasonably likely that prospective jurors would base their decision in the case upon pretrial information, either through the media or by word of mouth, rather than upon the evidence presented at trial, and would therefore be unable to remove from their minds any preconceived impressions they might have formed. *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). "[W]here a defendant does not show that he exhausted his peremptory challenges or that jurors had prior knowledge of the case, he fails to carry the burden of establishing prejudice." *State v. Harris*, 323 N.C. 112, 121, 371 S.E.2d 689, 695 (1988). In the case at bar, defendant did not request that jury selection be transcribed in order to be included in the record. The record does not reflect how many peremptory challenges defendant used. Defendant did not make any showing that there were any problems in jury selection involving pretrial publicity. Defendant has therefore failed to carry his burden of establishing prejudice.

We additionally note that the transcript reveals that the trial judge satisfied himself that excessive publicity was not a problem before he impaneled the jury. He informed counsel that he planned to ask the jurors "if anything has been in the media about the case," and posed this question to counsel. Defendant's attorney answered, "Just a very limited amount. And the Hickory Daily Record said the trial would start today." The trial judge then

asked the jury, "Anybody read anything or see anything or hear anything about this case since you'be [sic] been selected? All 15 of you." The transcript reveals that all of the jurors answered in the negative. We conclude that this assignment of error is without merit.

[2] Defendant next assigns error to the trial court's denial of his motion to prohibit jury dispersal, the text of which reads as follows:

> NOW COMES the Defendant and moves the Court that the jurors in the above-styled case shall not be allowed to disperse but shall remain together throughout the proceedings in said case and shall not be allowed to communicate with anyone except the Court or the bailiffs, nor be allowed to read current newspapers concerning the trial and all such communications shall be reported to the attorney for the Defendant.

The State points out that there is nothing in the record to indicate that defendant's motion was ever heard and denied by the court and argues that the motion should therefore be deemed either waived or withdrawn. We agree. Absent evidence of waiver or withdrawal, proceeding with a trial without hearing a pretrial motion is, in effect, a denial of that motion. *State v. Freeman*, 280 N.C. 622, 187 S.E.2d 59 (1972).

Assuming *arguendo*, however, that the motion was in fact heard and denied, we note that a motion to prohibit jury dispersal is to be decided within the sound discretion of the trial judge and will not be disturbed absent abuse of that discretion. *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). Defendant must show both that there was error in the denial of the motion and that he was prejudiced by that denial before he will be granted a new trial. *State v. Crandall*, 322 N.C. 487, 369 S.E.2d 579 (1988). In *State v. Stokes*, 308 N.C. 634, 304 S.E.2d 184 (1983), this Court held that the trial court did not abuse its discretion in denying the defendant's motions for individual voir dire in jury selection, for sequestration of the jury venire during voir dire proceedings, and for sequestration of the trial jury after selection was completed because of pretrial publicity concerning the defendant's case. This Court reasoned that defendant failed to produce any evidence tending to show the existence of inflammatory, nonfactual reporting by the news media or that any seated juror was affected by pretrial

publicity. The defendant's arguments were deemed to be speculative and unpersuasive. Such is the case here as well, as we have previously concluded herein.

We further note that the trial judge admonished the jurors during breaks in the proceedings that they were "to remember you're not to discuss the case with anyone; don't let anyone discuss the case with you; don't discuss the case among yourselves; keep an open mind. Decide the case based on the evidence that you hear from the witnesses." We conclude that defendant has failed to show actual prejudice that prevented him from receiving a fair and impartial trial.

[3] Defendant's third assignment of error concerns the trial court's failure to rule on defendant's motion for sequestration and segregation of the State's witnesses during trial. In that motion, defendant requested that the trial court enter an order sequestering all persons expected to be called by the State for the duration of the trial except during their actual testimony and that the court further enter an order to individually separate the witnesses. In support of the motion, defendant cited the "emotionally charged and prejudicial publicity" surrounding the case, his belief that the presence of an extensive number of witnesses for the State could have "an unduly persuasive effect upon the minds of the jurors," and his fear that collective gatherings of State's witnesses would lead to "the loss of individual recollection and the substitution of a 'mass' or 'consensus' recollection" when the witnesses were called to testify.

Again, defendant contends that the motion was heard and denied by the trial judge. The record does not confirm this assertion. We again apply the standard of abuse of discretion and find defendant's argument unpersuasive. He has failed to demonstrate how the denial of this motion, if in fact it was heard and denied, has actually and substantially prejudiced him.

[4] Next, defendant contends that the trial court erred in sustaining the prosecutor's objection to a defense question concerning an offense the witness' cousin had allegedly been charged with. The following exchange took place during defendant's cross-examination of the victim's niece:

Q Do you know a gentleman by the name of Michael Jeeter?

A Yes, I do.

Q How do you know Michael Jeeter?

A Well, Michael, he's my cousin. . . .

Q Do you know where Michael Jeeter was living on August the 18th, 1986?

A He was living right up the street from where my mother was living . . . .

Q . . . [A]bout how far was that from where Mrs. Covington lived?

A . . . [T]here's four apartments between his house and my mother's trailer.

. . . .

Q Do you know that Michael Jeeter has been charged—

[PROSECUTOR]: Objection.

THE COURT: Sustained.

Defendant contends that the adverse ruling by the trial court was an abuse of its discretion which resulted in undue prejudice to defendant. Again, defendant has failed to demonstrate how the trial court's ruling was improper and, specifically, how this ruling prejudiced his case. We can only speculate as to what the witness' answer would have been, since defendant did not tender an offer of proof. "[I]n order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record." *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985).

[5] Defendant next contends that the trial court erred in failing to grant his motion to dismiss. He contends that the State failed to carry its burden of presenting substantial evidence on each essential element of the charged offenses.

We have reviewed the transcripts, record, and briefs in this case, and while we concede that the physical evidence at the scene of the crime was, at best, inconclusive, we nevertheless conclude that the State presented more than sufficient evidence to allow this case to go to the jury. The evidence is to be considered 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. Thomas*, 296 N.C. 236, 250 S.E.2d 204 (1978). Contradictions and discrepancies are for the jury to resolve, and all of the evidence actually admitted which is favorable to the State, whether competent or incompetent, is to be considered by the Court in ruling on a motion for dismissal. *Id.*

This Court has upheld numerous convictions obtained primarily on the basis of admissions made to prison cell mates. In *State v. Spangler*, 314 N.C. 374, 333 S.E.2d 722 (1985), the defendant was tried for murder of her ten-month-old son. The State's only evidence consisted of the physical injuries to the child and the testimony of a fellow prison inmate who stated that the defendant had told her that she killed her child by hitting the child's head on the side of a bathtub. This Court held that "[i]f the jury chose to believe [the inmate witness], this alone could be sufficient evidence of malice, premeditation, and deliberation." *Id.* at 383, 333 S.E.2d at 728.

Evidence of corpus delicti coupled with the testimony of a cell mate relating inculpatory statements made by the defendant is sufficient to support a conviction. In this case, defendant's statements to his cell mates constitute admissions. An admission is a statement of pertinent facts which, in light of other evidence, is incriminating. 2 Brandis on North Carolina Evidence § 82 (1982). Here, defendant told Robert Lowe, "they ain't got no evidence on me and I ain't saying nothing." He told Charles Stokes that he had "broke[n] into this lady's house" because he wanted to obtain some money with which to purchase drugs and that he had stabbed her with a knife because she recognized him. He stated that he killed her so that she would not be able to identify him. When Douglas Silva asked defendant how he could kill a seventy-year-old woman, defendant replied that he had to because she would not let him rob her. He told Silva that he had stolen jewelry from the victim. Charles Littman corroborated Herbert Thompson's testimony that defendant obtained his cocaine that night from a drug dealer named Larry Saunders.

Defendant's argument that the cell mates were not reliable witnesses goes to the weight of the testimony, not to its sufficiency. The jury was properly permitted to weigh the evidence presented. Defendant's admissions to his cell mates, in conjunction with the physical evidence at the crime scene, were sufficient to establish

each element of the crimes charged, thereby justifying submission of the charges to the jury.

[6] Finally, defendant assigns error to the trial court's failure to intervene *ex mero motu* in the prosecutor's closing argument. Without being specific, defendant contends that the argument contained numerous statements that were not in evidence and that would appear to be the prosecutor's subjective feelings about the case. Defendant failed to object to any portion of the argument. Therefore, in our review, the alleged impropriety must be grossly egregious in order for this Court to determine that the trial court erred in failing to take corrective action on its own motion. *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984). We conclude, after reviewing the transcript, that the prosecutor's closing argument was well within the wide latitude permitted in hotly contested cases, and accordingly, we overrule this assignment of error.

We have conducted a thorough review of the assignments of error presented and conclude, for the reasons stated above, that defendant received a fair trial free of prejudicial error.

No error.

STATE OF NORTH CAROLINA v. STEPHEN JACKSON FAUCETTE

No. 179A89

(Filed 13 June 1990)

1. **Criminal Law § 73.2 (NCI3d)— statement not hearsay**

Testimony by a murder victim's son that the victim said she did not want defendant to come to the house because he had failed to provide support for his child was not hearsay since it was not offered to prove the truth of the matter asserted—that defendant in fact failed to provide child support.

Am Jur 2d, Evidence §§ 496, 497; Homicide §§ 329, 330.

2. **Criminal Law § 73.3 (NCI3d)— state of mind exception to hearsay rule—admissibility of statements**

Hearsay statements made by a murder victim to her son and her sister indicating that defendant had threatened her

were admissible in a murder and burglary trial pursuant to N.C.G.S. § 8C-1, Rule 803(3) to show the victim's state of mind in order to explain why the victim would not allow defendant to visit her home, to prove that defendant entered the victim's home without consent, and to rebut defendant's testimony as it pertained to inferences of self-defense. Furthermore, the prejudicial effect of these statements did not outweigh their probative value in violation of Rule 403.

Am Jur 2d, Evidence §§ 496, 497; Homicide §§ 329, 330.

3. **Criminal Law § 612 (NCI4th) — reliability of hearsay evidence**

Testimony by a murder and burglary victim's son about statements made by the victim that defendant had threatened her was not so unreliable as to be inadmissible on constitutional grounds where the testimony was admissible under the state of mind exception to the hearsay rule, it was corroborated by another witness, and the fact that defendant broke and entered the victim's home before shooting her lends credence to her statements.

Am Jur 2d, Evidence §§ 496, 497; Homicide §§ 329, 330.

4. **Criminal Law § 73.2 (NCI3d) — catchall exception to hearsay rule — materiality of testimony**

An attorney's hearsay testimony as to statements made to him by a burglary and murder victim concerning domestic difficulties between the victim and defendant and defendant's failure to support his child was material within the meaning of the Rule 804(b)(5) catchall exception to the hearsay rule because it was relevant to rebut defendant's testimony that he went to the victim's home with the intent to talk to the victim and see his child and not to commit murder, and it was relevant to establish ill will between defendant and the victim from which the jury could infer premeditation and deliberation.

Am Jur 2d, Evidence §§ 496, 497; Homicide §§ 329, 330.

5. **Criminal Law § 73.2 (NCI3d) — hearsay statements by murder victim — most probative evidence available**

The record supports the trial court's conclusion that hearsay statements made by a murder victim to her attorney were the most probative evidence of any available to the State

regarding the domestic problems existing between the victim and defendant.

Am Jur 2d, Evidence §§ 496, 497; Homicide §§ 329, 330.

6. **Criminal Law § 73.2 (NCI3d)— State's use of hearsay statements—adequate notice**

Fifteen days was adequate notice of the State's intent to use hearsay statements made by a murder victim to her attorney where defendant himself was the best source for information about these statements and no alternate investigation was likely to provide further information.

Am Jur 2d, Evidence §§ 496, 497; Homicide §§ 329, 330.

7. **Criminal Law § 73.2 (NCI3d)— hearsay statements to attorney—guarantee of trustworthiness**

The attorney-client relationship was a sufficient guarantee of trustworthiness to admit a murder victim's hearsay statements to her attorney concerning her domestic problems with defendant since the statements concerned matters within her personal knowledge, and she had a motivation to speak truthfully with her attorney.

Am Jur 2d, Evidence §§ 496, 497; Homicide §§ 329, 330.

8. **Criminal Law § 73.2 (NCI3d)— catchall hearsay exception—statements not otherwise admissible—absence of finding—harmless error**

The trial court erred in ruling that a murder victim's statements to her attorney were admissible under the Rule 804(b)(5) catchall exception to the hearsay rule without finding that the statements were not otherwise admissible. However, admission of the hearsay statements was not prejudicial error in light of the overwhelming evidence of defendant's guilt and other similar evidence before the jury.

Am Jur 2d, Evidence §§ 496, 497; Homicide §§ 329, 330.

9. **Criminal Law § 85.2 (NCI3d)— cross-examination of character witness—knowledge of crime by defendant—harmless error**

Defendant was not prejudiced by any error in the State's cross-examination of defendant's character witness about his knowledge that defendant had previously broken into a murder victim's house to rebut testimony by the witness that defend-

ant was a gentle and nonviolent person where evidence that the victim had charged defendant with breaking and entering was already before the jury.

Am Jur 2d, Evidence § 345.

10. Criminal Law § 695 (NCI4th)— indictments not read to jurors

The trial judge did not read the bills of indictment to the jury in violation of N.C.G.S. §§ 15A-1213 and 15A-1221(b) where he drew from each indictment the case number, defendant's name, and the victim's name and set out the bare particulars of the charges against defendant, but the judge did not read each indictment in its entirety and, in particular, did not recite the language pertaining to twelve or more grand jurors having concurred in each indictment.

Am Jur 2d, Trial § 715.

APPEAL as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment of life imprisonment upon defendant's conviction of first-degree murder entered by *Allen, J.*, at the 3 January 1989 Criminal Session of DURHAM County Superior Court. Defendant's motion to bypass the Court of Appeals with respect to the verdict of guilty of first-degree burglary was allowed on 20 September 1989. Heard in the Supreme Court 9 April 1990.

Lacy H. Thornburg, Attorney General, by G. Lawrence Reeves, Jr., Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Daniel R. Pollitt, Assistant Appellate Defender, for defendant-appellant.

MEYER, Justice.

After review of the record and briefs and after oral argument of the parties, we conclude defendant received a fair trial free of prejudicial error. Consequently, we affirm defendant's sentence of life imprisonment for murder and the consecutive sentence of fifteen years for first-degree burglary.

Between 7:15 and 7:30 p.m. on 29 February 1988, seventeen-year-old Michael Rochelle woke from his sleep to hear a loud crashing noise coming from near his mother's bedroom at the front of the house. Running down the hall, he heard his mother scream his name, followed by five or six gunshots in rapid succession. When

Michael entered the bedroom, he saw defendant standing over the body of his mother, Patricia Rochelle, using both hands to aim a .22-calibre pistol at the victim. Hiding under the bed was Michael's seven-year-old brother, Eldon. His two-year-old brother, Steven, was standing directly in front of the body. On seeing Michael enter the bedroom, defendant turned, pointed the gun at Michael and began pulling the trigger. As Michael ran out of the room, he heard the gun click repeatedly.

Defendant had lived with Patricia Rochelle for five or six years before moving out of the home about the middle of October 1987. It was during this relationship that Patricia Rochelle gave birth to defendant's son, Steven. Defendant became a father figure to Michael and Eldon as well. After defendant moved out of the home, Patricia visited a lawyer on several occasions in an effort to collect child support for Steven from defendant. In December 1987, defendant married another woman, Miriam Faucette, with whom he was living at the time of the murder.

Michael testified at trial that in the afternoon before the murder defendant spoke with Michael by telephone. Defendant told Michael that he wished he could have another chance to come back to the Rochelle home to live as a family, and he expressed his desire to come by to see Michael and his brothers.

During this conversation another call came through, and Michael put defendant's call on hold. The other caller turned out to be Michael's mother, who stated that under no circumstances was defendant to visit, since defendant had neither bought diapers nor sent money since the time he left. Michael switched back to defendant and told him what Patricia had said. Defendant, who sounded depressed and cried a bit during the conversation, gave Michael his telephone number before hanging up.

A few minutes later Patricia called Michael to say that defendant had just spoken to her by telephone. According to Michael, defendant told Patricia, "I've been watching you when you least expect it. And I've been seeing you and I had all the options in the world to blow your m-----f----- head off." Michael asked his mother why defendant said this and if she were sure that he said it. She responded that she was sure and that she did not know why. Shortly afterwards defendant called Michael by telephone again. Michael confronted defendant with this statement, which defendant denied.

About 7:00 p.m. on the night of the murder, Patricia spoke by telephone with her sister, Carolyn Peace. Carolyn testified that during the conversation Patricia was upset. Patricia told her that the defendant "had called her on the job again, threatening her. And my sister told me that she told [defendant] to leave her alone . . . . She said that [defendant] had said he wanted to come back home. . . . She told him to leave her alone, to go home to his wife. . . . [Defendant] told her that he was going to put a bullet in her a--." As they were speaking, Carolyn heard a loud noise on the other end of the telephone line, and Patricia was cut off in midsentence by the sound of three gunshots fired in rapid succession. Before Carolyn hung up and called the police, she heard Patricia call for Michael in a loud, frightening voice.

Patricia suffered seven wounds, one a graze to the arm and the other six to the back. Of these six, one punctured the heart and lung; another, the lung only; and a third, the victim's left buttock. Officers investigating the scene found three distinct footprints on the front door, which was splintered near the knob. Michael led officers to a .22-calibre pistol containing six live rounds which they found where Patricia kept it on the top shelf of her bedroom closet.

Shortly after 10:00 p.m. that evening, defendant surrendered himself to police. Police recovered the murder weapon, an eight-shot .22 Regent revolver containing eight empty cartridge cases, soon thereafter.

Defendant's wife, Miriam Faucette, testified that she had never known defendant to exhibit any violent behavior or to speak in a profane manner. He was president of the White Rock Holiness Church male chorus. She stated that defendant was very close to his relatives and that he particularly loved his only son, Steven. She testified further that defendant had been depressed about not being able to visit Steven. After the shooting, defendant had called her to say he "had made a mess," that "[s]omething bad had happened." Defendant asked her to drive him to the Durham magistrate's office so that he could turn himself over to the authorities.

Roscoe Alston, Jr., testified that he had known defendant since early childhood and that they were like brothers. Defendant was a gentle person who would walk away from an argument. On cross-examination, Alston testified that he did not know anything about defendant breaking and entering the victim's home.

Defendant testified that, when he entered the Rochelle home, he started talking with Patricia. She made some remark about knowing he would come, then "she started reaching" for what he thought was a gun, and he "started shooting." "I thought she was going to shoot me when I saw her go for her gun. That's what I thought she was going for. It wasn't intentionally. . . . I wanted to talk with her." On cross-examination, defendant admitted to using a single kick to open the front door and enter the victim's home without her consent. He testified that neither Eldon nor Steven was in the bedroom when he shot Patricia.

The jury found defendant guilty of first-degree murder under both the theories of premeditation and deliberation and of felony murder, with burglary being the underlying felony. Finding one aggravating circumstance and three mitigating circumstances, the jury found that the mitigating circumstances were insufficient to outweigh the aggravating circumstance. Nonetheless, the jury declined to find that the aggravating circumstance of the burglary was sufficient to call for the imposition of the death penalty when considered with the mitigating circumstances. The trial judge sentenced defendant to life imprisonment in accordance with the jury's recommendation.

Defendant asserts that the trial court erred when it allowed Michael to testify as to the hearsay statements defendant allegedly made to Patricia Rochelle some six to eight hours prior to the shooting. Defendant asserts that the same error occurred when the trial court permitted Carolyn Peace to testify to similar hearsay statements. At the conclusion of a voir dire hearing, the trial court overruled defendant's objections on the ground that N.C.G.S. § 8C-1, Rule 803(3), permitted the admission of these statements. We find no error.

[1] 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). Michael testified that Patricia said she did not want defendant to come to the house since he had failed to provide support for his child. This testimony was not offered to prove the truth of the matter asserted—that defendant in fact failed to provide child support. Rather, the State offered the testimony to show that Patricia had made the statement to show her frustration and impatience with defendant and was thus relevant to explain her

initial prohibition of visits from defendant. "[E]vidence is not hearsay if offered only to prove that the declarant made the statement . . . ." *State v. Sauls*, 291 N.C. 253, 259, 230 S.E.2d 390, 393 (1976), *cert. denied*, 431 U.S. 916, 53 L. Ed. 2d 226 (1977). Thus, this testimony was not hearsay.

[2] The State also sought to admit those of Patricia's statements made to Michael and Carolyn indicating that the defendant had made threats and other comments to Patricia. These statements regarding defendant were hearsay and would be inadmissible unless covered within a hearsay exception.

Rule 803(3) permits the introduction of hearsay that is a "statement of the declarant's then existing state of mind, emotion, sensation, or physical condition." N.C.G.S. § 8C-1, Rule 803(3) (1988). Patricia's statements regarding defendant's threat revealed her then-existing fear of defendant, further explaining why she did not want defendant visiting her home. The prohibition of visits to the home by the defendant was relevant to prove defendant's state of mind, that is, that he knew he was entering the Rochelle home without consent. *See State v. Locklear*, 320 N.C. 754, 760, 360 S.E.2d 682, 685 (1987) (testimony that rape victim stated she was "scared" and requested that defendant not be allowed near her admissible to show state of mind; relevant to show sexual intercourse committed by force and against victim's will); *State v. Walden*, 311 N.C. 667, 672, 319 S.E.2d 577, 580 (1984) (testimony that murder victim said she did not want to see defendant—"Please don't let him in," etc.—admissible to show state of mind). It was incumbent upon the State to prove that defendant entered the occupied home without consent to prove the burglary charge.

The evidence of Patricia's state of mind was also relevant to rebut defendant's self-defense inferences that he did not start shooting until he saw her reach "for her gun." The jury could infer from the evidence regarding her state of mind that it was unlikely that Patricia would do anything to provoke defendant, including reach for a weapon. *See United States v. Brown*, 490 F.2d 758, 768-69 (D.C. Cir. 1973), and cases cited therein.

Defendant urges that there was insufficient evidence for the trial court to rule on voir dire that defendant said he would "blow [the victim's] . . . head off." While it is true that Michael's description of his conversation with his mother lacked this statement of intent, Michael's subsequent description of his conversation with

defendant regarding the threats did include this statement. Thus, there was evidence to support the trial judge's ruling that defendant said "that he had chances to blow [the victim's] . . . head off and that he would do so." *See State v. Moorman*, 320 N.C. 387, 398, 358 S.E.2d 502, 509 (1987).

Defendant asserts further that the prejudicial effect of these statements outweighed any probative value, in violation of Rule 403. We disagree. Patricia's state of mind was relevant to rebut defendant's testimony as it pertained to the inference of self-defense, to show that the defendant entered the Rochelle home without consent, and to prevent the jury from being misled about why Patricia would not allow the defendant to visit the home. Thus, the probative value outweighed any prejudicial effect.

[3] Defendant contends as well that Michael's testimony about his mother's statements was so unreliable as to be inadmissible on constitutional grounds. *See State v. Porter*, 303 N.C. 680, 697, 281 S.E.2d 377, 388 (1981). "[A] sufficient inference of reliability can be made 'without more' from the showing that the challenged evidence falls within 'a firmly rooted hearsay exception.' " *Id.* at 697 n.1, 281 S.E.2d at 388 n.1 (quoting *Ohio v. Roberts*, 448 U.S. 56, 66, 65 L. Ed. 2d 597, 608 (1980)). The then-existing state-of-mind exception is firmly rooted in North Carolina jurisprudence. *See* 1 Brandis on North Carolina Evidence § 161 (1988). Furthermore, testimony from Carolyn Peace corroborated Michael's description of statements allegedly made by his mother. The fact that defendant did indeed break and enter the Rochelle home in the nighttime before shooting Patricia to death lends additional credence to Patricia's statements that defendant had threatened her.

Defendant objects as well to the testimony of Carolyn Peace regarding the statements made by her sister in the minutes before Patricia's shooting death for the same legal reasons that he objected to Michael's testimony. According to defendant, none of the statements to Carolyn revealed Patricia's then-existing state of mind, the statements were not relevant, and they were more prejudicial than probative. Lastly, defendant asserts that the inherent unreliability of these statements rendered the admission into evidence unconstitutional. For the reasons stated in our discussion of Michael Rochelle's testimony, we hold that the trial court properly admitted Carolyn Peace's testimony.

Defendant argues next that the trial court erroneously permitted Jeff Ellinger, Patricia Rochelle's attorney, to testify in rebuttal to statements that Patricia made to him when he met with her in a professional capacity on 29 October 1987 and subsequently in early January 1988. The trial judge ruled after a voir dire hearing that Ellinger's testimony was admissible under Rule 803(24), the catchall exception. We find that the error, if any, was harmless.

As an initial matter, we note that the trial court should have considered the matter under Rule 804(b)(5), the catchall hearsay exception applicable when the declarant is unavailable as a witness. However, this point is not determinative, as this section is otherwise identical to Rule 803(24). *State v. Triplett*, 316 N.C. 1, 7, 340 S.E.2d 736, 740 (1986).

Ellinger testified that Patricia retained him on 29 October 1987 to bring action against the defendant for child support and to procure an order to prevent defendant from coming near her. During the course of the attorney-client interview, Patricia related that defendant was "running around" with other women, that he was not giving her any money, and that she had asked him to leave. She also told Ellinger that she had initiated criminal charges against defendant for having broken into her mobile home a few days previously. Patricia also expressed her concern that defendant would not make timely payments on a loan for which she had pledged her automobile as collateral. In the January interview, Patricia appeared upset. Having heard that defendant had married, Patricia was concerned that she had received no child support payments and that she was going to lose her car.

Defendant argues that: (1) this testimony was not evidence of a material fact, (2) there was other more probative evidence available on this point, (3) the trial court failed to conclude that the statements were not covered by another hearsay exception, (4) the State gave defendant inadequate notice, and (5) Patricia's statements were not trustworthy. *See State v. Smith*, 315 N.C. 76, 92-98, 337 S.E.2d 833, 844-48 (1985) (setting out six-part inquiry for determining admissibility under Rule 803(24)), *cited in State v. Triplett*, 316 N.C. at 9, 340 S.E.2d at 740 (adopting *Smith* inquiry for Rule 804(b)(5) cases).

[4] The trial court found that Ellinger's testimony was evidence to the effect that defendant had not supported Steven and that it was therefore material. The requirement that the evidence be

material is "a mere restatement of the requirement of relevancy set out in Rules 401 and 402." *State v. Smith*, 315 N.C. at 94, 337 S.E.2d at 845. Prior to the introduction of this testimony, defendant had presented evidence to the effect that he loved his child and wanted to support him. From this testimony the jury could infer, and defendant ultimately argued, that he went to the Rochelle home on 29 February 1988, not with the intent to commit murder, but with the intent to talk to Patricia and see his child, Steven. Ellinger's testimony was appropriate to rebut this inference favorable to defendant. *State v. Avery*, 315 N.C. 1, 27-28, 337 S.E.2d 786, 801 (1985). Moreover, "ill-will or previous difficulty between the parties" is among the circumstances that a jury may consider in deciding that defendant killed with premeditation and deliberation. *State v. Jackson*, 317 N.C. 1, 23, 343 S.E.2d 814, 827 (1986), *judgment vacated*, 479 U.S. 1077, 94 L. Ed. 2d 133 (1987); *see also State v. Fountain*, 282 N.C. 58, 70-71, 191 S.E.2d 674, 683 (1972). Thus, Ellinger's testimony would also have been material to establish ill will between the parties from which the jury could infer premeditation and deliberation.

[5] The record supports the court's conclusion that Ellinger's statements were more probative than any other evidence available to the State. Where the declarant is unavailable, the necessity of using such hearsay testimony is greater than in Rule 803(24) cases, and the inquiry into the probative value "may be less strenuous." *State v. Triplett*, 316 N.C. at 9, 340 S.E.2d at 741. Only defendant and his victim were likely to have firsthand knowledge of their domestic difficulties. Thus, Patricia's hearsay accounts were the most probative evidence of any available to the State regarding the domestic problems existing between her and defendant.

[6] At trial, defendant argued strongly that the State failed to give adequate notice of its intent to use the statements. The State mailed its notice of intent on 30 December 1988. Counsel for defendant received the notice at his office on 2 January 1989, a legal holiday, while preparing for trial. The case came on for trial the next day. The State did not seek to present the evidence until 17 January 1989, fifteen days after defendant's counsel received the notice. We hold that fifteen days provided adequate notice, given that defendant himself was the best source for information about these statements and that no alternate investigation was

likely to provide further information, as defendant's counsel conceded at trial.

[7] The court concluded that the attorney-client relationship was a sufficient guarantee of trustworthiness to admit Patricia's statements. The attorney-client relationship promotes a candid exchange of information. Given that Patricia's statements were regarding matters within her personal knowledge and that she had a motivation to speak truthfully with her attorney, we concur with the trial court's finding of trustworthiness in these statements. *See generally State v. Nichols*, 321 N.C. 616, 624-25, 365 S.E.2d 561, 566-67 (1988) (setting forth nonexclusive list of factors to consider in determining trustworthiness).

[8] Defendant calls to our attention the fact that the trial court failed to conclude that these statements were not otherwise admissible. The trial judge "must . . . determine that the statement is not covered by any of the exceptions listed in Rule 804(b)(1)-(4)." *State v. Triplett*, 316 N.C. at 9, 340 S.E.2d at 741. We decline to adopt the State's interpretation that the necessary conclusion was implicit in the trial court's ruling and was therefore adequate to meet the *Triplett* requirement. Accordingly, we find that the failure to make the necessary conclusion constituted error.

"It is well established that the erroneous admission of hearsay, like the erroneous admission of other evidence, is not always so prejudicial as to require a new trial." *State v. Ramey*, 318 N.C. 457, 470, 349 S.E.2d 566, 574 (1986). Evidence of defendant's guilt was overwhelming. Prior testimony indicated that ill will existed between the victim and defendant and that there had been a continuing disagreement over child support. Testimony regarding defendant's failure to make loan payments did little to prejudice defendant given prior evidence of ill will and irresponsibility. Evidence that defendant had previously forced entry into the Rochelle home was already before the jury in the form of defendant's statement to police. Evidence that defendant ran around with other women was not particularly inflammatory, especially in view of the fact that defendant married Miriam Faucette a mere four months after quitting his residence with Patricia and the fact that, after the marriage, he kept begging Patricia to let him come back. Nor were the prosecutor's closing references to this evidence particularly likely to have affected the jury's verdict. We conclude that under the facts of this case, there was no reasonable likelihood the jury

would have reached a different result had the court excluded this evidence. *See* N.C.G.S. § 15A-1443 (1988).

Defendant also asserts that admission of this hearsay evidence violated his rights under the sixth amendment of the federal Constitution and under article I, section 23 of our state Constitution. For the reasons we rejected this contention in the context of Patricia's statements offered through her son Michael, we reject them in this context as well.

[9] Defendant argues next that the State introduced inadmissible character evidence when the prosecutor asked Roscoe Alston, Jr., on cross-examination whether he knew that defendant had broken into Patricia's house on a previous occasion. The trial court determined that although the arrest warrant had been dismissed, the State was permitted to cross-examine Alston about specific instances of conduct since Alston had testified that defendant was "sort of a gentle type person" and that he had never observed defendant to be a violent person. Defendant asserts that evidence of breaking and entering is not relevant to rebut the character trait of nonviolence offered by defendant.

Without determining whether breaking into the homes of others rebuts evidence that one is a gentle type person, we find that any error which might have occurred was not prejudicial. Detective Simmons testified in the State's case-in-chief that the defendant told him that Patricia had charged defendant with breaking and entering. Thus, this evidence was already available for the jury's consideration.

[10] Defendant finally argues that the trial court read the bills of indictment to all prospective and eventual jurors during jury selection in violation of N.C.G.S. §§ 15A-1221(b) and -1213. N.C.G.S. § 15A-1221(b) states that "[a]t no time during the selection of the jury or during trial may any person read the indictment to the prospective jurors or to the jury." N.C.G.S. § 15A-1213 is substantially similar. Defendant did not object at the time.

The State concedes that the trial court did indeed read portions of the indictments to the prospective and eventual jurors. We note, however, that the court did not read each indictment in its entirety and, in particular, did not recite from the indictments the language pertaining to twelve or more grand jurors having concurred in each indictment.

N.C.G.S. §§ 15A-1213 and -1221 require the trial court to identify the parties and their counsel and to briefly inform the prospective jurors as to the name of the defendant, the charge, the date of the alleged offense, and the name of any victim alleged in the pleading. To comply with these requirements, the trial court may draw "information from the bills of indictment to the extent necessary to identify the defendant and explain the charges against him and the circumstances under which he was being tried." *State v. Leggett*, 305 N.C. 213, 218, 287 S.E.2d 832, 835-36 (1982). In the case before us, the trial court drew from the indictment the case number, defendant's name, and the victim's name and set out the bare particulars of the charges of murder and burglary as required by the statutes. "[T]he statement of the trial court was consistent with the spirit of each statute in question," and the trial court did not give the jurors "a distorted view of the case before them by an initial exposure to the case through the stilted language of indictments and other pleadings." *Id.* at 218, 287 S.E.2d at 836. We find no error.

In summary, we conclude that defendant received a fair trial free of prejudicial error.

No error.

STATE OF NORTH CAROLINA v. EAZED RUDOLPH MEEKINS

No. 363A87

(Filed 13 June 1990)

1. Criminal Law § 73.3 (NCI3d)— murder—victim's fear of defendant—admissible

There was no error in a prosecution for first degree murder, first degree burglary, first degree kidnapping, felonious larceny, and possession of stolen property from the admission of testimony from the victim's niece that the victim told her she was afraid of defendant. Where the voir dire testimony provided a plausible reason and factual basis for the victim's fear of defendant, the victim's fear of defendant was relevant to the issue of the relationship between the victim and the defendant, and there was no abuse of discretion in the trial

court's determination that the probative value of the testimony was not outweighed by its tendency to unfairly prejudice defendant. N.C.G.S. § 8C-1, Rule 803(3).

Am Jur 2d, Homicide §§ 329, 330.

2. Criminal Law § 86.5 (NCI3d)— statement by defendant to sheriff—other crimes—admissible

The trial court did not err in a prosecution for first degree murder, first degree burglary, first degree kidnapping, felonious larceny, and possession of stolen property by allowing the sheriff to testify over objection that defendant had told him that the murderers had said they would trust defendant because he was wanted for raping a white girl. The statement by defendant that the murderers believed he was a fugitive was relevant to show why the murderers wanted defendant to join them; it added credibility both to the sheriff's testimony that the statement as related by the sheriff was made and to the statement itself, which conflicts with defendant's denial at trial that he was involved in the murder; and the trial court was well within its discretionary ambit in ruling the evidence admissible. N.C.G.S. § 8C-1, Rules 401 and 402.

Am Jur 2d, Evidence §§ 320-327.

3. Criminal Law § 88.4 (NCI3d)— cross-examination—other offenses

The trial court did not err in a prosecution for first degree murder, first degree burglary, first degree kidnapping, felonious larceny, and possession of stolen property by allowing defendant to be cross-examined about a pending rape charge where defendant had told a sheriff that the murderers had said that they could trust him because he was wanted for raping a white girl. The State's cross-examination of defendant was designed to show defendant's motive for the murder and theft of the victim's purse and car in that the State was trying to establish defendant's intent to flee from the pending charges. The State did not cross-examine defendant about the rape accusation to show that he was unworthy of belief because of his alleged bad act.

Am Jur 2d, Evidence §§ 282, 283, 325, 326.

STATE v. MEEKINS

[326 N.C. 689 (1990)]

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment sentencing him to life imprisonment in Case No. 86CRS1655 on a first-degree murder conviction imposed by *Williams, J.*, presiding, at the 16 February 1987 Criminal Session of Superior Court, CHOWAN County. Motion to bypass Court of Appeals on defendant's convictions for first-degree burglary and felonious larceny in Case No. 86CRS1656 and first-degree kidnapping in Case No. 86CRS1657 allowed 14 April 1988. Heard in the Supreme Court 13 December 1988.

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

Malcolm Ray Hunter, Jr., Appellate Defender, by David W. Dorey, Assistant Appellate Defender, for defendant appellant.

EXUM, Chief Justice.

Defendant was properly indicted for first-degree murder, first-degree burglary, first-degree kidnapping, felonious larceny and possession of stolen property. He was found by a jury to be guilty as charged. After a sentencing hearing on the first-degree murder conviction the jury returned a recommendation of life imprisonment, which was imposed.[1] Judgment was arrested on the possession of stolen property conviction, and defendant was sentenced to terms of years on the other convictions.

Defendant contends his convictions should be vacated and that he is entitled to a new trial because of prejudicial error in the admission of certain evidence. We find no reversible error in defendant's trial.

I.

The State's evidence tends to show as follows:

---

1. In making its recommendation as to punishment, the following aggravating factors were found by the jury: The murder occurred while defendant was fleeing after committing burglary, it occurred during the course of a kidnapping, it was for pecuniary gain and was especially heinous, atrocious or cruel. The following mitigating factors were also found: Defendant's mental age, that defendant committed the murder while under the influence of a mental or emotional disturbance, that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, that this impairment was related to his limited intellectual capacity and also his lack of education or the level of education which he was able to perform. The jury found that the mitigating

On or about 29 April 1986 in the early morning the victim Ethel Owens, a 79-year-old widow, was abducted from her home in her own automobile, murdered in this automobile and her body left in a roadside ditch along a rural highway where it was found on 3 May 1986.

On the night of 28 April defendant was at a party in his aunt's trailer, which was described by a witness as being "three good rock throws away" from the victim's home. Defendant, wearing a green Army field jacket, was drinking liquor and wine with several other people. At approximately midnight defendant got upset and broke two glass bottles at the party. He later left, saying he was going jogging. At 4 a.m. on 29 April defendant woke Wanda Jean Lee, who had been at the party, and asked her for some clothes he had left with her earlier. He told Ms. Lee he had hitchhiked to the house, which is forty-five minutes away from where the party took place. The next morning Ms. Lee found a woman's red and black housecoat in her apartment.

At about 5 a.m. on 29 April defendant visited James Overton and asked him for some clothes. Defendant was wearing shorts with bloodstains on them. He explained he had been in a fight with his brother. Overton recognized the car defendant was driving as the victim's. Overton asked for money and saw defendant remove eight dollars from a woman's purse inside the car. He observed that defendant also had some blank checks.

At 8:30 a.m. on 29 April the victim's great-niece, Cindy Williams, drove past the victim's house and noticed her car was missing. Later that day she entered the victim's home and noticed a mattress was partially off the bedframe and the sheets were thrown to one side. Beside the bed was a rolled undergarment. Unable to locate her great-aunt at other relatives' houses, Ms. Williams returned to the victim's house and called her parents. Her mother, the victim's niece, came to the victim's home and noticed it was unusually messy. She observed bloodstains on some sheets and an odor of urine from a recliner chair.

Sheriff Norman Newbern arrived at the crime scene at 7:30 p.m. on 29 April. He observed the door to a storage room of the residence had been broken into and a window screen placed against

---

factors were sufficient to outweigh the aggravating factors and recommended life imprisonment.

a wall inside the room. On the ground outside the window the sheriff found a paring knife and a zipper attached to some olive green cloth. Later that night S.B.I. investigators found finger and palm prints throughout the house. Six prints were later identified as defendant's. His right palm print and left thumbprint were on the screen's interior, and his right ring fingerprint was on the screen's exterior. His right and left thumbprints were on the door between the den and kitchen.

Melvin Burton, Wanda Jean Lee's boyfriend, testified he had been defendant's friend for several years. He recalled that defendant broke two bottles together at the 28 April 1986 party and visited Ms. Lee early the next morning. Burton saw defendant later that day and noticed a scratch on his forehead. Defendant explained he had been scratched by his brother during a basketball game. Defendant had some books of checks with him bearing the name of Ethel Owens. Defendant asked Burton to help him get some checks cashed. Burton took defendant to a service station in Elizabeth City, but the station refused to cash the checks. Later defendant and Burton were at a party drinking. While sitting on some back steps defendant began to cry. When Burton asked what was wrong, defendant replied, "I didn't mean to do it. I didn't mean to kill her." On cross-examination Burton testified that defendant said "I didn't mean to kill Ethel Owens."

Defendant was taken into custody for questioning just before midnight on 1 May 1986. He told officers he was with two men who killed Ethel Owens and disposed of her body. Defendant claimed he rode in the back of victim's car and was never in the front seat. The victim's car was found in the Albemarle Hospital parking lot on 2 May 1986. There were bloodstains matching the victim's type at the top of the passenger seat running down to the floor, on the kickboard under the passenger door and on the outside of the car. A knife was found on the floorboard of the car. Defendant's fingerprints were found on the steering wheel, the rearview mirror and the driver's armrest.

On 3 May Ethel Owens' badly deteriorated body was found in a roadside ditch. Her body was clad only in a housecoat. She had been stabbed nineteen times. Near the body was found a billfold containing the birth certificate of James Overton, which Overton had previously given defendant; a newspaper article about defendant; and a matchbook from the wedding of defendant's brother.

Defendant offered evidence tending to show as follows:

Melvin Burton, not defendant, had been wearing a green Army jacket at the party on 28 April 1986. Defendant testified that he got into an argument at the party, broke two wine bottles together and cut his hand. He rested on the back porch at the party for an hour, then hitchhiked to Burton's house. There Burton paid him fifty dollars to get rid of Ethel Owens' car. Defendant drove to James Overton's house to change pants. He then parked the victim's car in the hospital parking lot, where a girlfriend picked him up and drove him home. He later met with Burton and Wanda Jean Lee. Ms. Lee produced some personal checks bearing the victim's name, and defendant joined her as she unsuccessfully tried to cash the checks.

Defendant also testified that his mother had been Ethel Owens' housekeeper and that he had done some heavy lifting and repair work in the victim's home on two or three occasions, the most recent being some nine months before the murder.[2]

II.

[1] Defendant first argues that the trial court erred in admitting certain testimony from the victim's niece, Elizabeth Sawyer. The trial court conducted a *voir dire* concerning the admissibility of this testimony. On *voir dire* Ms. Sawyer testified that the victim told her two weeks before her murder that she feared defendant because defendant had asked for one hundred dollars and she had refused to give it to him. The trial court then determined to admit the testimony under North Carolina Rule of Evidence 803(3), noting that "it relates to an existing mental or emotional state of mind of the declarant concerning her feelings about the defendant, Eazed Rudolph Meekins."

Ms. Sawyer then testified before the jury over defendant's objection that she had spoken to the victim two weeks before her death and that the victim told her "that she was afraid of Zeb Meekins." After this testimony, the court instructed the jury as follows:

> Ladies and gentlemen of the jury, at this time let me instruct you that you are to consider this witness' testimony concerning

---

2. During cross-examination defendant was equivocal regarding when he was last in the victim's house. He testified that he might have worked in her house only several weeks or a few months before her death.

> any statement made by Mrs. Ethel Owens only to the extent that you find that it indicates ill will or fear on the part of the victim by the Defendant or of the Defendant. You may consider it for no other reason in this case.

Ms. Sawyer then testified that the victim had previously said several times she was fearful of defendant.

Defendant contends that admission of this testimony was reversible error because the State failed to demonstrate a meaningful factual basis for the victim's fears, the testimony was irrelevant to any material issue in the case and any relevancy that did exist was outweighed by the tendency of the evidence unfairly to prejudice defendant.

In *State v. Alston*, 307 N.C. 321, 298 S.E.2d 631 (1983), this Court held that evidence regarding a victim's fear of the defendant should be accompanied with some factual basis for that fear. We said:

> Evidence of a victim's fear of the defendant is subject to misuse. Therefore, the naked assertion by a victim prior to his death that he fears the defendant should not be admitted into evidence absent some evidence tending to show a factual basis for such alleged fear.

Id. at 328, 298 S.E.2d at 637. Also, Rule 803 of the North Carolina Rules of Evidence establishes the admissibility of state of mind evidence, reading in pertinent part:

> 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, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health). . . .

N.C.G.S. § 8C-1, Rule 803(3) (1988). Evidence tending to show the state of mind of the victim is admissible as long as the declarant's state of mind is relevant to the case. *State v. Cummings*, 326 N.C. 298, 389 S.E.2d 66 (1990). *See also State v. Weeks*, 322 N.C. 152, 367 S.E.2d 895 (1988). In *Cummings* the victim's comments to a paralegal three weeks before she disappeared about her husband's threats to kill her were admitted because the victim's state of mind was relevant to the issue of her relationship with her husband. *Id.* at 313, 389 S.E.2d at 74. Any evidence offered to

shed light upon the crime charged should be admitted by the trial court. *State v. McElrath*, 322 N.C. 1, 13, 366 S.E.2d 442, 449 (1988). Evidence, even if relevant, should not be admitted unless it comports with Rule 403 of the North Carolina Rules of Evidence, which states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

N.C.G.S. § 8C-1, Rule 403 (1988).

Ms. Sawyer's testimony on *voir dire* that defendant asked the victim for one hundred dollars and that she refused him provides a plausible reason and factual basis for the victim's fear of defendant. The victim's fear of defendant was relevant to the issue of the relationship between the victim and defendant. At trial defendant testified that the victim had "always been a sweet lady" to him who would lend money to him and hire him for jobs around the house. Ms. Sawyer's testimony tends to show that the victim's state of mind some two weeks before her murder was not that of a "sweet lady" who would lend defendant money but was that of one who was fearful of defendant.

Whether the probative value of relevant evidence is outweighed by its tendency unfairly to prejudice defendant is a question to be decided initially in the trial court's discretion. *State v. Mason*, 315 N.C. 724, 340 S.E.2d 430 (1986). We find no abuse of discretion in the trial court's determination here that the evidence in question met this test of admissibility. The evidence was relevant, as we have shown, to show a relationship between defendant and the victim which was more favorable to the State and contrary to defendant's version of this relationship, which was more favorable to defendant. The State was clearly entitled to its benefit. It is not the kind of evidence, either, which would have much tendency unfairly to prejudice defendant or to inflame or cause the jury to convict him on an improper basis in light of all the other rather overwhelming evidence tending to show defendant's guilt of the crimes charged. *See State v. DeLeonardo*, 315 N.C. 762, 340 S.E.2d 350 (1986).

III.

[2, 3] Defendant next contends the trial court erred in permitting Sheriff Norman Newbern to testify over objection and motion to strike about certain statements defendant made to him on 1 May 1986. Defendant also contends that he was impermissibly questioned on his own cross-examination regarding these statements.

The trial court allowed Sheriff Newbern's testimony after conducting a *voir dire* and concluding that admission of the statement would not violate defendant's constitutional rights because it was given freely, voluntarily and understandingly after defendant freely, knowingly, intelligently and voluntarily waived his rights to remain silent and to be represented by counsel.

After this ruling the following colloquy occurred:

Q. Sheriff Newbern, on the early morning of May 2, 1986, what did Zeb Meekins tell you with reference to this incident?

MR. ABBOTT: Objection.

COURT: Overruled.

A. Uh, you want me to start back over?

Q. Yes, if you would, please.

A. Zeb stated . . . that he was jogging after being shut up in the house for two days at Mary Jane Case's, that Roger, Roger Crutch and Junior Mills, which was Lewis J. Mills, came to him in Miss Ethel's [the victim's] car. That Mrs. Ethel Owens was on the passenger side, that Junior was driving. Roger was sitting in the back seat. He stated that he told him, said, "Zeb come here we can trust you since you are wanted for raping a white girl . . ."

MR. ABBOTT: Objection.

COURT: Overruled.

WITNESS NEWBERN: Zeb got in the car; they told him to push the screen back in the house so no one would notice. Then Junior began stabbing Mrs. Ethel Owens. That she screamed, "Please don't kill me. Don't kill me." That he grabbed for his arm to stop him but it was too late. Said he got a scratch on his face below his eye. Zeb stated he knew Mrs. Owens was dead; that she was fifty to eighty miles away. I asked

Zeb where the body was, that she still could be alive. He stated that she was no way alive and that he was sure that she was dead. And kept stating: "She's dead, man. She's dead." That he would tell us where the body was if we would contact his attorney. An attorney was called and uh . . .

Q. Okay.

MR. ABBOTT: Motion to strike his testimony.

COURT: Motion to strike is denied.

During cross-examination of defendant, the State advised the court out of the hearing of the jury that it would question defendant about his statement to Sheriff Newbern "that Roger and Junior told him: We can trust you since you're wanted for raping a white girl." Defendant, through counsel, then stated, "Your honor, obviously we would object to that information coming in before the jury." The trial judge heard arguments and overruled defendant's objection. The jury returned to the courtroom, and during State's cross-examination of defendant the following colloquy took place:

Q.: Well, do you remember telling the sheriff that Roger and Junior picked you up?

A.: No, I don't.

Q.: While you were out jogging?

A.: No, I don't. No sir.

Q.: You remember that they told you quote: We can trust you since you are wanted for raping a white girl?

A.: Who was that?

Q.: Roger and Junior tell you that?

A.: No, sir.

Q.: Mr. Meekins, isn't it a fact that—in fact, you were in hiding at that time, weren't you?

A.: I wouldn't call it that. Uh, I had knowed Mrs. Powell for 'bout two years and we was dating off and on. And I decided to break up with her and that's when she uh, said that I raped her. Which I didn't.

Defendant contends that part of his statement to Sheriff Newbern that Rogers said, "Zeb come here we can trust you since you are wanted for raping a white girl" was irrelevant to any material issue in the case, inadmissible as character evidence, and that its probative value was clearly outweighed by its tendency unfairly to prejudice defendant.

Defendant characterizes the contested evidence as tending to show he *committed* another extrinsic crime, *i.e.*, the rape. Actually the evidence shows only that defendant was accused of committing the extrinsic crime, or at least his companions, according to his statement, thought so. Accusations that defendant has committed other extrinsic crimes are generally inadmissible even if evidence that defendant actually committed the crime would have been admissible. *State v. Rankin*, 306 N.C. 712, 295 S.E.2d 416 (1982); *State v. Mack*, 282 N.C. 334, 193 S.E.2d 71 (1972); *State v. Williams*, 279 N.C. 663, 185 S.E.2d 174 (1971).

The first question presented here, then, is whether Sheriff Newbern's testimony that defendant admitted that he saw the victim murdered and her murderers invited him to join in the event because they believed he was wanted for rape and, presumably, would not contact the police, was relevant to some fact or issue in the case. We conclude that it was.

" '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). All relevant evidence is admissible unless excluded by some other rule of law. N.C.G.S. § 8C-1, Rule 402.

The statement by defendant that the murderers believed he was a fugitive is relevant for several reasons. It explains why Roger Crutch and Junior Mills wanted defendant to join them. It adds credibility both to Sheriff Newbern's testimony that the statement as related by the sheriff was made and to the statement itself. The statement conflicts with defendant's denials at trial that he was involved with the murder of Ethel Owens.

The second question is whether it was error to permit the State to cross-examine the defendant about the pending rape charge. We conclude it was not. The State's cross-examination of defendant about his being wanted on the rape charge was designed to show

defendant's motive for the murder of Ethel Owens and the stealing of her purse and her car. The State was trying to establish defendant's intent to flee from the pending charges and that he committed the murder and robbery in order to obtain the means whereby he could escape. We conclude therefore that it was relevant under Rules 401 and 402.

We must now consider whether the probative value of this evidence regarding the pending rape charge was "substantially outweighed by the danger of unfair prejudice." N.C.G.S. § 8C-1, Rule 403 (1988). Whether to exclude evidence under this rule is a matter within the sound discretion of the trial court. *State v. Mason*, 315 N.C. 724, 340 S.E.2d 430 (1986).

The trial court here did not abuse its discretion in admitting the evidence of which defendant complains. While this is the sort of evidence that inclines juries to decide cases on an improper basis and its admission should be carefully scrutinized by our trial judges, we are confident that here the trial court was well within its discretionary ambit in ruling the evidence admissible.

As we have shown, the evidence of defendant's incriminating pretrial statement was relevant and valuable to the State on the question of whether defendant made the statement attributed to him by Sheriff Newbern and whether the statement was true. Cross-examination of defendant about these charges was designed to show a possible motive for the commission of the crimes charged—an important fact for the State to establish in any criminal case. Other evidence of defendant's guilt was fairly overwhelming, and there is little chance the jury would have improperly seized on only this evidence as a basis for conviction.

Regarding cross-examination of defendant on questions relating to his being wanted for rape, this case differs from *State v. Williams*, 279 N.C. 663, 185 S.E.2d 174. There, we held that a witness's credibility may not be impeached by cross-examination as to whether he had been accused, however formally, of an unrelated crime. The theory underlying *Williams* is that a mere unproven accusation that a witness has committed a crime is not sufficiently probative of the witness's credibility to justify its admission even if, as when *Williams* was decided, the actual commission or conviction of the crime would have been a proper subject of cross-examination.

Unlike *Williams*, the State here did not cross-examine defendant about the rape accusation to show he was unworthy of belief because of this alleged bad act. Rather, the prosecutor inquired about this for the purpose of establishing defendant's motive for the crime for which he was on trial.

Accordingly, we overrule all defendant's assignments of error and conclude that he received a fair trial free from reversible error.

No error.

JANIE P. PULLEY v. REX HOSPITAL

No. 387A89

(Filed 13 June 1990)

1. **Negligence § 52.1 (NCI3d)— hospital visitor as invitee**

A plaintiff who was visiting a patient in a hospital was a business invitee of the hospital.

Am Jur 2d, Hospitals and Asylums § 35.

2. **Negligence § 49 (NCI3d)— tripping on sidewalk—breach of duty—obvious condition**

Prior North Carolina cases do not establish a rule that a plaintiff can never state a valid case for recovery upon tripping on a sidewalk. Viewed in sum, our prior cases merely establish that the facts must be viewed in their totality to determine if there are factors which make the existence of a defect in a sidewalk, in light of the surrounding conditions, a breach of the defendant's duty and less than obvious to the plaintiff.

Am Jur 2d, Premises Liability §§ 477, 646.

3. **Negligence § 49 (NCI3d)— tripping on sidewalk—sufficient forecast of evidence for recovery**

The trial court erred in entering summary judgment for defendant hospital in plaintiff's action to recover for injuries sustained when she fell on the uneven sidewalk while walking toward the emergency and outpatient entrance to visit a pa-

tient in the hospital where plaintiff's forecast of evidence would support findings by a jury that one section of the sidewalk was as much as three inches higher than the abutting section; plaintiff did not see the alleged three-inch rise in the sidewalk as a result of dim, dappled lighting; plaintiff's attention was diverted from the uneven sidewalk by low-hanging tree branches; plaintiff's attention and her path along the sidewalk were diverted by other pedestrian traffic; and people entering emergency rooms are frequently and foreseeably very distracted from their ordinary behavior. Genuine questions of material fact remained as to whether the combination of lighting, tree branches, and oncoming pedestrians made it reasonable for plaintiff to turn her attention away from the sidewalk and whether such a result should reasonably have been foreseen by defendant hospital.

Am Jur 2d, Premises Liability §§ 477, 646.

Justice MEYER dissenting.

Justice MARTIN dissenting.

APPEAL of right by the plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 95 N.C. App. 89, 381 S.E.2d 892 (1989), affirming the entry of summary judgment for the defendant by *Bailey (James H. Pou), J.*, at the 6 June 1988 Non-Jury Civil Session of Superior Court, WAKE County. Heard in the Supreme Court on 13 March 1990.

Kirk, Gay, Kirk, Gwynn & Howell, by Philip G. Kirk and Katherine M. McCraw, for the plaintiff appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Ronald C. Dilthey and Susan K. Burkhart, for the defendant appellee.

MITCHELL, Justice.

The question we address is whether the Superior Court erred in entering summary judgment for the defendant Rex Hospital in this case. We conclude that the Superior Court did err. Accordingly, we reverse the decision of the Court of Appeals, which affirmed the Superior Court's judgment, and remand this case for further proceedings.

Upon the defendant's motion for summary judgment, the Superior Court considered the parties' various pleadings, affidavits and depositions. The forecast of evidence favoring the plaintiff tended to show that on the evening of Sunday, 15 July 1984, the plaintiff Janie Pulley went to visit her mother who was a patient at the defendant Rex Hospital in Raleigh. At approximately 10:00 p.m., Pulley was walking along a sidewalk on the hospital grounds towards the hospital entrance used by "Emergency [and] Outpatient" patients; the main hospital entrance had already closed for the evening. Although Pulley had *left* the hospital building via this sidewalk before, she had never *entered* the hospital by walking along this sidewalk. The sidewalk was poorly lit, with dim, uneven illumination coming from several nearby lights, signs and windows. As she walked along the sidewalk a short distance from the hospital entrance, Pulley moved to her right to allow other pedestrian traffic to pass, then ducked to walk under several low-hanging tree branches which extended over the sidewalk. Pulley walked under the branches, then stumbled on an uneven portion of the sidewalk and fell face-forward, suffering injuries. The irregularity in the sidewalk was at an expansion joint, where two sections of the sidewalk join. Along the joint, the edge of one sidewalk section was as much as three inches higher than the abutting section.

The forecast of evidence favoring the defendant Rex Hospital tended to show that Pulley had traveled over the sidewalk several times prior to her accident. The walkway was well lit, and the tree branches did not overhang the walk, or Pulley was past the branches when she fell. The edge of the sidewalk section which Pulley tripped over was no more than one-quarter inch higher than the abutting section. The hospital frequently inspects its facilities and grounds for safety hazards, and would have discovered and corrected any hazard on the sidewalk. Some of the evidence favoring the defendant hospital came from depositions of the defendant's witnesses and some came from a deposition of the plaintiff herself.

Upon the forecast of evidence, the Superior Court entered summary judgment for the defendant Rex Hospital. The Court of Appeals affirmed, Judge Phillips dissenting. *Pulley v. Rex Hospital*, 95 N.C. App. 89, 381 S.E.2d 892 (1989). We reverse.

I.

This Court has repeatedly discussed motions for summary judgment under N.C.G.S. § 1A-1, Rule 56. For example:

> By making a motion for summary judgment, a defendant may force a plaintiff to produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie case at trial or be able to surmount an affirmative defense. *Dickens v. Puryear*, 302 N.C. 437, 453, 276 S.E.2d 325, 335 (1981). "The party moving for summary judgment must establish the lack of any triable issue by showing that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law." *Watts v. Cumberland County Hosp. System*, 317 N.C. 321, 322-23, 345 S.E.2d 201, 202 (1986); [*see*] *Caldwell v. Deese*, 288 N.C. 375, 218 S.E.2d 379 (1975). "[A]ll 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." *Dickens v. Puryear*, 302 N.C. at 453, 276 S.E.2d at 335, quoting *Page v. Sloan*, 281 N.C. 697, 706, 190 S.E.2d 189, 194 (1972). Upon a motion for summary judgment by a defendant, a plaintiff "need not present all the evidence available in his favor but only that necessary to rebut the defendant's showing that an essential element of his claim is non-existent or that he cannot surmount an affirmative defense." *Dickens v. Puryear*, 302 N.C. at 453, 276 S.E.2d at 335.

Morrison v. Sears, Roebuck & Co., 319 N.C. 298, 300-01, 354 S.E.2d 495, 497 (1987). With specific regard to negligence cases, we have said that:

> While our Rule 56, like its federal counterpart, is available in all types of litigation to both plaintiff and defendant, "we start with the general proposition that issues of negligence . . . are ordinarily not susceptible of summary adjudication either for or against the claimant, but should be resolved by trial in the ordinary manner." It is only in exceptional negligence cases that summary judgment is appropriate. This is so because the rule of the prudent man (or other applicable standard of care) must be applied, and ordinarily the jury should apply it under appropriate instructions from the court.

Page v. Sloan, 281 N.C. 697, 706, 190 S.E.2d 189, 194 (1972) (citations omitted).

II.

As in any negligence case, the plaintiff's case here involved allegations that the defendant owed the plaintiff a certain duty,

that the duty was breached, and that the breach proximately and foreseeably caused the plaintiff injury. In its answer, the hospital denied negligence and, alternately, alleged as an affirmative defense that the plaintiff was contributorily negligent.

[1] The forecast of evidence tended to show that Pulley was at the hospital to visit her sick mother. Those visiting patients in a hospital are business invitees of the hospital. *Goldman v. Kossove*, 253 N.C. 370, 372, 117 S.E.2d 35, 37 (1960). Therefore, Pulley was an invitee, and the hospital owed her "a duty to maintain the premises in a condition reasonably safe for the contemplated use and a duty to warn of hidden dangers known to or discoverable by the [hospital]." *Branks v. Kern*, 320 N.C. 621, 624, 359 S.E.2d 780, 782 (1987) (citations omitted). However, it is also "the law in North Carolina that there is no duty to warn an invitee of a hazard obvious to any ordinarily intelligent person using [her] eyes in an ordinary manner, or one of which the plaintiff had equal or superior knowledge." *Id.* (citations omitted). To establish that the hospital breached its duty to her, Pulley thus will be required to show that the area in which she was injured was not in a reasonably safe condition *for its contemplated use*. Pulley will also have to show that the hospital either knew or should have known of the unsafe condition. Further, she may not recover if she knew of the unsafe condition or if it should have been obvious to any ordinary person under the circumstances existing at the time she was injured.

III.

Both the defendant and the Court of Appeals cite to several cases from the large body of North Carolina cases in which plaintiffs who tripped and fell on sidewalks failed to recover either because the existence of a defect in the sidewalk did not amount to negligence by the defendant, or because the plaintiff was contributorily negligent in not seeing or avoiding an obvious hazard, or both. *See, e.g., Evans v. Batten*, 262 N.C. 601, 138 S.E.2d 213 (1964) (trip and fall over slight fault in wet sidewalk on clear day; plaintiff should have anticipated fault); *Falatovitch v. Clinton*, 259 N.C. 58, 129 S.E.2d 598 (1963) (per curiam) (plaintiff tripped over minor defect in sidewalk on clear day; no breach of duty by the defendant); *Murchinson v. Apartments*, 245 N.C. 72, 95 S.E.2d 133 (1956) (per curiam) (plaintiff tripped at night over "step" where street and sidewalk join); *Watkins v. Raleigh*, 214 N.C. 644, 200 S.E. 424 (1939)

(daytime trip and fall over fault in sidewalk, nearby trees cast shadows on sidewalk, but the plaintiff could have seen the fault had she looked; either the defendant breached no duty, or the plaintiff was contributorily negligent); *Houston v. Monroe*, 213 N.C. 788, 197 S.E. 571 (1938) (trip and fall at night over depression in crosswalk; either the defendant breached no duty, or the plaintiff was contributorily negligent). We do not find such cases to be controlling authority in the present case.

[2] While we recognize that "[s]light depressions, unevenness and irregularities in outdoor walkways, sidewalks and streets are so common that their presence is to be anticipated by prudent persons," *Evans v. Batten*, 262 N.C. at 602, 138 S.E.2d at 214, none of our prior cases—singularly or in their totality—establish a rule that a plaintiff can never state a valid case for recovery based upon tripping on a sidewalk. Viewed in sum, our prior cases merely establish that the facts must be viewed *in their totality* to determine if there are factors which make the existence of a defect in a sidewalk, in light of the surrounding conditions, a breach of the defendant's duty and less than "obvious" to the plaintiff. Such factors may include the nature of the defect in the sidewalk, the lighting at the time of the accident, and whether any other reasonably foreseeable conditions existed which might have distracted the attention of one walking on the sidewalk. *See Frendlich v. Vaughan's Foods*, 64 N.C. App. 332, 337, 307 S.E.2d 412, 415 (1983).

IV.

Upon its review of the record, the Court of Appeals concluded that:

> Ms. Pulley's own account of the conditions surrounding her fall establish that she could not recover on her claim. First, Ms. Pulley testified at her deposition that the branches overhanging the sidewalk did not prevent her from looking at the sidewalk, and that she "had already passed the tree limb [and was walking upright] before [she] stumbled." She further stated that "nothing obscur[ed] her view of the sidewalk."
>
> . . .
>
> Second, Ms. Pulley testified at the deposition that the section of the sidewalk where she fell was illuminated by canopy lights, ground lights, and pole lights around the driving circle. She also admitted that when she returned two hours later

to the spot where she fell, "there was enough light at this time [about midnight] to see the sidewalk condition." We are convinced by this testimony and by our review of the photographic exhibits showing the lighting conditions as they existed at the time of the fall that the light was ample to allow Ms. Pulley to walk in safety. . . .

Finally, Ms. Pulley, who had been on that section of sidewalk many times in the past, admitted that she was not looking at the sidewalk as she walked, and that "had [she] been focusing [her] full attention on the sidewalk, [she] would have seen the unevenness." Under these circumstances, we are constrained to hold that Ms. Pulley's own contributory negligence entitled Rex Hospital to judgment as a matter of law.

Pulley v. Rex Hospital, 95 N.C. App. 89, 91-92, 381 S.E.2d 892, 894 (1989) (brackets in original).

[3] Conflicting in part with the evidence summarized by the Court of Appeals, the plaintiff's verified complaint contained, among others, the following factual allegations:

7. That a portion of said sidewalk was raised, causing it to be uneven with the portion of the sidewalk upon which Plaintiff was walking.

8. That the Defendant maintained inadequate lighting in the sidewalk area, making it impossible for the plaintiff to see the raised portion of the sidewalk.

9. That Plaintiff, while walking on said sidewalk, had to duck under the low hanging branch and then stumbled over the raised portion of the sidewalk, which she was unable to see because of the poor lighting conditions, and fell face forward upon said sidewalk.

These allegations, when taken with similar factual allegations in the plaintiff's affidavits, which were not entirely negated by her somewhat ambivalent deposition testimony, raise genuine questions of material fact. Those questions concern the condition of the sidewalk, the adequacy of the sidewalk lighting, and the effect of the nearby tree on sidewalk pedestrians. There was evidence that where the two sections of the sidewalk joined, one section was as much as three inches higher than the abutting section. Other evidence tended to show that as a result of dim, dappled

lighting, the plaintiff did not see the alleged three-inch rise in the sidewalk. From the forecast of evidence, we conclude that a reasonable juror might find that the plaintiff's attention was diverted from the uneven sidewalk by low-hanging tree branches, so that she did not see the rise in the sidewalk. Additionally, the forecast of evidence would support the same juror in finding that this result was reasonably foreseeable by the defendant.

Although not raised in the pleadings, there was also evidence tending to show that both the plaintiff's attention and her path along the sidewalk were diverted by other pedestrian traffic. While the plaintiff had a duty to look where she was walking, that duty did not require her to walk along with her eyes constantly focused at her feet. Indeed, there is evidence in this case that if the plaintiff had only been looking toward her feet, she would have walked into both low-hanging tree branches and oncoming pedestrians. The plaintiff admitted that she had "regained her composure" after ducking under the overhanging tree branches before she fell. Nevertheless, genuine questions of material fact remain as to whether the combination of the lighting, the tree branches, and oncoming pedestrians made it reasonable for the plaintiff to turn her attention away from the sidewalk, and whether such a result should reasonably have been foreseen by the defendant hospital.

We also note that a reasonable juror, in considering whether the defendant breached its duty to the plaintiff and whether the plaintiff was exercising ordinary care in watching where she was walking, might consider a fault in a sidewalk leading into a hospital emergency room quite differently from an identical fault in an ordinary city sidewalk. A reasonable juror could believe that people entering emergency rooms are frequently and foreseeably *very* distracted from their ordinary behavior.

V.

While we make, of course, no comment upon the plaintiff's chance of succeeding in this action, the forecast of evidence does create a triable question of whether the defendant breached its duty to maintain its premises in a reasonably safe condition. Further, the forecast of evidence does not establish as a matter of law that the defect in the sidewalk was known to the plaintiff or "obvious" under the conditions existing at the time she fell or that she was contributorily negligent. The Superior Court thus

erred in entering summary judgment for the defendant, and the Court of Appeals erred in affirming that judgment.

The decision of the Court of Appeals is reversed. This case is remanded to the Court of Appeals for its further remand to the Superior Court, Wake County, for proceedings consistent with this opinion.

Reversed and remanded.

Justice MEYER dissenting.

The majority reverses the Court of Appeals' affirmance of the trial judge's entry of summary judgment for the defendant on the ground that the Court of Appeals "appears not to have given proper weight to the factual allegations in the plaintiff's verified complaint," which the majority finds, when taken in conjunction with the plaintiff's affidavits, created a genuine issue of material fact. I disagree.

The only thing we have in the record before us from the plaintiff herself is her verified complaint and the results of her testimony upon deposition taken by defendant. Plaintiff furnished no personal affidavit of her own in response to defendant's motion for summary judgment. The allegations in the plaintiff's complaint as to the negligent acts of the defendant are largely refuted in her deposition testimony.

In her complaint, plaintiff alleges that the lighting was inadequate, "making it impossible for the Plaintiff to see the raised portion of the sidewalk," and that the "lighting in the area was so inadequate as to make the uneven sidewalk a hidden peril." On deposition, however, she testified:

> In the area of where the accident occurred, the lighting sources that illuminate this area consists of lighting from the overhead lights in the ceiling of the overhang at the emergency room doorway, the sidewalk lights that are spaced around the sidewalk and the pole lights around the driving circle. [And later in her deposition:] The overhead lighting is the main source of illumination of this section of the sidewalk.
>
> . . . .

> . . . When I came back out later that night with my brother, I saw the uneven section of the sidewalk. There was enough light at this time [about midnight] to see the sidewalk condition.
>
> . . . .
>
> . . . When my brother and I went back out to look at the sidewalk, there was enough lighting for me to see this unevenness.

With regard to the overhanging tree branches that allegedly distracted her, plaintiff alleged in her verified complaint that she "had to duck under the low hanging branch and then stumbled." In her sworn deposition, plaintiff said:

> I moved to the right and ducked down to miss the tree limbs; I raised back up and took a couple of steps when I stumped my toe and stumbled. . . .
>
> . . . .
>
> When I tripped and had my accident, I had already passed from under the branches and I had regained my composure. The tree was to my right and behind me. The branches were hanging at the corner of the building. When I actually tripped, I was beyond the overhanging portion of the tree. I had ducked under the branches earlier and I was now standing upright when the accident occurred. I had regained my posture and I had actually passed the area where I had to duck under the branches.
>
> . . . .
>
> I am not contending that the tree limb of the tree kept me from looking at the sidealk [sic]. I had already passed the tree limb before I stumbled.

Plaintiff further testified on deposition, *inter alia*, that:

> I did not see the raised sidewalk until later that night when my brother pointed it out to me.
>
> . . . .
>
> . . . I have seen other sidewalks where one section is raised above another due to either settlement or from tree roots. All you have to do is walk over any sidewalks that have been laid for any length of time and you will find uneven

sidewalks. This is something I have encountered before. . . . I never did see the unevenness. As to why I didn't see the uneven section of the sidewalk, this is probably because there were a lot of people on the sidewalk in this area and I wasn't looking down at my feet. The people that came out of the emergency room were walking on the outside or the left side of the sidewalk and I was walking on the right side. As I was walking along the righthand side of the sidewalk, there was nothing obscuring my view of the sidewalk. . . .

. . . .

. . . At this time I was looking in front of me. I have no recollection of ever that evening specifically of looking on the sidewalk. When I later went out at midnight with my brother, I looked and I saw the unevenness of the sidewalk. . . .

. . . .

Had I been looking at the sidewalk as I was walking, I don't know whether or not I could have seen the unevenness. If I had been focusing my full attention on the sidewalk, I would have seen the unevenness.

Thus, as to plaintiff's contributory negligence, her own sworn testimony on deposition establishes, without contradiction, that (1) she never saw the raised sidewalk before she fell; (2) a raised place in the sidewalk was not unexpected, and she had encountered them before; (3) plaintiff was not looking down to see where she was placing her feet; (4) nothing obstructed her view of the sidewalk; (5) plaintiff does not remember ever once on that evening looking at the sidewalk; and (6) the unevenness was visible to her if she had looked, and she could have seen it if she had focused on where she was walking.

Plaintiff may not rely on inconsistencies in the allegation of her verified complaint and her own sworn testimony on deposition to create a genuine issue of material fact. The majority opinion of this Court, relying largely on allegations of plaintiff's complaint that are refuted by her own testimony upon deposition, manufactures a genuine issue of material fact where none exists. The trial judge correctly allowed summary judgment for the defendant. The majority opinion of the Court of Appeals is well reasoned, and I vote to affirm it.

Justice MARTIN dissenting.

Believing as I do that the trial judge correctly allowed the defendant's motion for summary judgment, I dissent from the majority opinion.

The reasons stating the basis for my dissent are well stated in the persuasive, scholarly majority opinion of Judge Becton in the Court of Appeals, concurred in by Judge Lewis. That opinion is reported in 95 N.C. App. 89, 381 S.E.2d 892 (1989).

STATE OF NORTH CAROLINA v. KENNETH AARON McNEILL

No. 560A89

(Filed 13 June 1990)

1. **Jury § 7.1 (NCI3d)— murder—challenge to jury pool—racial discrimination**

The trial court did not err in a felony murder prosecution by denying defendant's motion challenging the jury pool where there was no evidence that the statutory scheme set out in N.C.G.S. § 9-2 was not followed nor that the selection process failed for any other reason to be racially neutral. Although defendant contended that a gross disparity between the black population in the community at large and the number of black individuals in the jury pool was sufficient to create a rebuttable presumption of systematic discrimination, the small sample of forty jurors from the master list of jurors of Harnett County alone is insufficient to establish a systematic exclusion of blacks from the jury pool.

Am Jur 2d, Jury §§ 173-176.

2. **Jury § 7.14 (NCI3d)— murder—peremptory challenge—only black person on jury challenged**

There was no error in a felony murder prosecution from the trial court's denial of defendant's objection to the state's peremptory challenge of the only black person on the jury where the facts before the trial court provide plenary support for the conclusion that the challenge was for legitimate, racially neutral reasons in that this juror was acquainted with de-

fendant as well as potential witnesses in the case. The trial court had no reason to suspect the genuineness of the state's explanation supporting the dismissal of the juror and, even if defendant established a prima facie showing of discrimination, the state properly rebutted the presumption created by that showing.

Am Jur 2d, Jury § 235.

3. Homicide § 20.1 (NCI3d)— murder—photograph of victim—admissible to establish identity of the victim—not prejudicial

There was no error in a felony murder prosecution from the admission of a photograph of the victim and his brother where the photograph was offered to establish the identity of the victim even though the photograph had some emotional impact on the witness, the victim's daughter. The state has a right to prove all essential elements of the case, regardless of whether defendant is contesting each element, and the photograph here allowed the state to establish the identity of the victim and the fact that he was once alive. Defendant failed to show that the photograph was unduly inflammatory or that its admission was not proper.

Am Jur 2d, Homicide § 289.

4. Criminal Law § 35 (NCI3d)— felony murder—evidence that offense committed by another—correctly excluded

The trial court did not err in a prosecution for felony murder by excluding a cigar box which the victim's daughter had identified as being like the one in which her father had kept money where there was testimony that the cigar box had been obtained after breaking into a house and then sold or given to various parties until it came into the custody of officers. Evidence showing that someone other than defendant committed a crime must point directly to the guilt of some specific person and must be inconsistent with defendant's guilt. The cigar box here fails both prongs of the test.

Am Jur 2d, Homicide § 296.

5. Homicide § 21.6 (NCI3d)— felony murder—evidence sufficient

The trial court did not err in a prosecution for murder, armed robbery, and burglary by denying defendant's motion to dismiss where defendant was positively identified as having

entered the victim's trailer sometime after 9:30 p.m. and before the Sheriff's Department was notified of the killing at 12:34 a.m.; the defendant's motive to rob the victim was established by facts indicating he had earlier attempted to borrow money for drinks or cocaine; defendant was found a few hours after the victim had been murdered in possession of cash, a packet of cocaine, and the victim's two wallets; defendant was unable to explain how he had come into possession of the victim's wallets or the cash with which he was found; and defendant had blood on his slacks when he was taken into custody within hours of the murder.

Am Jur 2d, Homicide §§ 72, 442.

6. **Appeal and Error § 32 (NCI4th); Homicide § 4.2 (NCI3d)—felony murder—felony judgment arrested orally—judgment remaining in record—corrected by appellate court—supervisory authority**

Where the trial judge in a felony murder prosecution orally arrested judgment in open court on the underlying felony but the record on appeal contained the judgment and commitment on both charges, the Supreme Court amended the commitment and judgment on the underlying felony in the exercise of its supervisory authority.

Am Jur 2d, Appeal and Error § 268; Courts §§ 115-117.

APPEAL of right by defendant pursuant to N.C.G.S. § 7A-27(a) from judgment imposing sentence of life imprisonment entered by *Stanback, J.*, at the 28 August 1989 Criminal Session of Superior Court, HARNETT County, upon a jury verdict of guilty of murder in the first degree. Defendant's motion to bypass the Court of Appeals as to judgment for robbery with a dangerous weapon was allowed by the Supreme Court 29 December 1989. Heard in the Supreme Court 11 April 1990.

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

James M. Johnson and Benjamin N. Thompson for defendant-appellant.

MARTIN, Justice.

Late in the evening of 27 January 1989, Henry Stephen Elliott was killed by a blow to the head while he was in his mobile home near Bunnlevel, North Carolina. The victim, who had a reputation for bootlegging, lived next door to the Nutgrass Inn, a tavern frequented by local residents of the area.

The state's evidence tends to show that on the day of the murder the defendant and Archie McLean, Jr. had worked together breaking up automobile transmissions, killing hogs, and making deliveries for McLean's father. At the end of the day, the defendant was paid $60.00 by the senior Mr. McLean for his day's work.

After work, the defendant and Archie McLean, Jr. went out together for the evening. They stopped twice at two different locations where the defendant purchased cocaine which the two took into some nearby woods and smoked. They then drove together to Shawtown near Lillington before returning to the senior McLean's home where defendant changed clothes and the younger McLean bathed. At defendant's urging, Archie McLean, Jr. attempted unsuccessfully to borrow $20.00 from his mother. The two men then left again and headed for the Nutgrass Inn. The defendant was dropped off at the Inn at about 9:25 p.m. while McLean went on to his girlfriend's house. Initially, the plan was for McLean to return for the defendant at about 10:30 p.m., but when Mr. McLean came back for the defendant at 10:20 p.m. he could not find him, so McLean left and went to his girlfriend's house where he stayed for the night.

The owner of the Nutgrass Inn, Ms. Flora Harris, testified at trial that she had known the defendant for approximately five years, having seen him at her Inn, at the victim's mobile home, and at another "juke joint" known as Larry's. Ms. Harris recalled that on the evening of the murder the defendant came into her establishment sometime after she had come to work, which had been between 9:30 p.m. and 10:00 p.m. Defendant bought a drink, went outside, came back in, and went outside again. During the evening, defendant bought one drink from Ms. Harris with his own money but had to borrow fifty cents from another customer to buy a second drink.

At some point, Ms. Harris went outside to use the bathroom and overheard the defendant attempting to borrow $20.00 from

another patron, Leonard Elliott. While she was still outside the Nutgrass Inn, Ms. Harris saw the defendant go into the back door of the victim's mobile home next door. A few minutes later she saw another man near the front door of the trailer but did not see him enter. She did not see the defendant leave the mobile home. Since the Nutgrass Inn closed at 11:30 p.m., Ms. Harris was able to testify that she had seen the defendant enter the victim's mobile home sometime after 9:30 p.m. when she had come to work but before 11:30 p.m. when the Inn was closed.

Additional testimony at the trial established that the victim's body was discovered in the early morning hours and that a number of citizens suspected the defendant of perpetrating the crime. A group of approximately six to ten individuals confronted the defendant at Larry's juke joint sometime around 3:00 a.m. and demanded that he empty his pockets. After removing some loose change from his pockets, the defendant ran but was caught by someone in the crowd. He then took some folding money and a pocketknife from his pockets and pulled a black wallet and a green wallet from his belt area. A $25.00 packet of cocaine was found in one of the wallets. Defendant had some bloodstains on his pants at that time.

Deputy Larry Munson of the Harnett County Sheriff's Department went to the victim's trailer at 1:16 a.m. where he found Mr. Elliott's body. At approximately 4:00 a.m., he went to Larry's place where he found the defendant surrounded by the individuals who had confronted him and a large crowd of on-lookers. There was money lying on the ground in front of the defendant and two wallets on the hood of a car. The deputy took the items and the defendant into custody and left the area. The wallets were later identified by the victim's children as belonging to their father.

On 17 April 1989, the Harnett County Grand Jury indicted the defendant for murder in the first degree of Henry Stephen Elliott, robbery with a dangerous weapon, and first-degree burglary of Mr. Elliott's premises. The case was tried at the 28 August 1989 criminal session of the Superior Court for Harnett County. At the close of the state's evidence, the defendant moved for a dismissal as to all charges. Defendant's motion was granted as to the first-degree burglary charge only. On 31 August 1989, the jury returned a verdict of guilty on the two remaining charges, and the court sentenced the defendant to life in prison for murder in the first degree and twenty-five years for robbery with a dangerous

weapon. As the murder conviction was obtained on the felony murder theory, the court arrested judgment on the robbery charge, which was the underlying felony supporting the murder conviction.

[1] Defendant raises five questions on this appeal. In his first assignment of error, defendant contends that the trial court erred in denying his pretrial motion challenging the jury pool. Counsel for the defense made an oral motion challenging the entire pool on the grounds that it contained a disproportionately small number of black persons. The next morning the motion was argued. During that argument, defense counsel stated that out of a forty member jury pool, only two individuals, or 5%, were black. Noting that statistics from the 1980 Census Bureau indicate that the adult population of Harnett County is 23% black, defense counsel asserted that the 18% discrepancy between the overall black population in the county and the composition of the jury pool raised a prima facie case of systematic exclusion of blacks from the jury pool. During the hearing, defense counsel correctly noted that a prima facie case is generally established by satisfying a three-prong test showing that (1) the group allegedly excluded from the jury pool is a cognizable group; (2) the representation of that cognizable group in the jury pool is not fair and reasonable as compared to the number of such persons within the community; and (3) the underrepresentation of the group is due to systematic exclusion of the group in the jury selection process. *Duren v. Missouri*, 439 U.S. 357, 58 L. Ed. 2d 579 (1979). *See also State v. McCoy*, 320 N.C. 581, 359 S.E.2d 764 (1987); *State v. Price*, 301 N.C. 437, 272 S.E.2d 103 (1980).

While there is no evidence on record other than defense counsel's own assertions regarding the racial composition of the jury, nor any reference at all to the race of the defendant, this Court will assume arguendo that defendant is black and that defense counsel's representations regarding the racial composition of the jury pool are correct. In its brief to this Court, the state does not dispute that the first two prongs of the test set out in *Duren* for establishing a prima facie case have been satisfied. The dispute is whether the defendant satisfied the third prong of the test by demonstrating that the disproportionately low number of black people in the jury pool was the result of systematic exclusion of that group in the compiling of the jury pool. It was the defendant's position at the time of the hearing on the motion as well as on this appeal that the gross disparity between the black population in the community

at large and the number of black individuals in the jury pool was sufficient evidence, in and of itself, to create a rebuttable presumption that the disproportionately low representation of blacks in the jury pool was the result of systematic discrimination. Believing that the prima facie case had been thus established, the defendant asserts that the state then had the burden to go forward and show that there had not been a systematic exclusion.

The law in this area is clear. A criminal defendant has a constitutional right to be tried by a jury of his peers. U.S. Const. amend. VI; N.C. Const. art. I, §§ 24 and 26. Included in this right is the guarantee that members of his own race have not been systematically and arbitrarily excluded from the jury pool which is to decide the defendant's guilt or innocence. *State v. McLaughlin*, 323 N.C. 68, 372 S.E.2d 49 (1988); *State v. Wilson*, 262 N.C. 419, 137 S.E.2d 109 (1964). The test articulated by the United States Supreme Court in *Duren* determines when a disproportionate representation of defendant's race in a jury pool is impermissible. Defendant must prove the systematic or arbitrary exclusion of members of his race from the jury pool. We hold that defendant has failed to establish a prima facie case of unfair systematic exclusion of a cognizable group from the jury pool. *State v. Harbison*, 293 N.C. 474, 238 S.E.2d 449 (1977). Defendant has failed to show that the procedure in establishing the jury pool was not racially neutral or that there is a history of relatively few blacks serving on Harnett County juries. The small sample of forty jurors from the master list of jurors of Harnett County alone is insufficient to establish a systematic exclusion of blacks from the jury pool.

In North Carolina, N.C.G.S. § 9-2 controls the selection process of the jury pool. That statute has been expressly recognized as providing "a system for objective selection of veniremen." *State v. Avery*, 299 N.C. 126, 131, 261 S.E.2d 803, 807 (1980). In the case before us, there is no evidence that the statutory scheme set out in N.C.G.S. § 9-2 was not followed nor that the selection process failed for any other reason to be racially neutral. Defendant's first assignment of error is without merit.

[2] Defendant's next assignment of error concerns the trial court's denial of his objection to the state's peremptory challenge of the only black person on the jury. Again, it is of concern that the record does not reflect the race of excluded juror nor the race of her replacement or the race of the remainder of the jurors.

However, following his objection to the state's exclusion of this juror, defense counsel stated without contradiction from the state that the juror was the only black person in the box. The remainder of the discussion which followed defense counsel's objection creates the inference that the replacing juror was not black. Because the voir dire of the jury was not transcribed for the record, it is difficult to discern what actually occurred. Nonetheless, statements of counsel on the record indicate that the juror, Mrs. McLean, had asserted during the voir dire that she knew the defendant although she had not seen him for five years and that she might also know some of the witnesses in the case. It is the defendant's position that the exclusion of the only black juror from the jury in this case was a violation of the defendant's right to equal protection as recognized in *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986). The teaching of *Batson* is now familiar learning to the Bench and Bar.

Assuming without deciding that the defendant established a prima facie case of discrimination based solely on the fact that the prosecutor's use of a peremptory challenge resulted in the removal of the only black person in an otherwise all white jury, the facts before the trial court provide plenary support for the conclusion that the challenge was for legitimate, racially neutral reasons. In view of the fact that this juror was acquainted with the defendant as well as potential witnesses in the case, the state has satisfied its burden by coming forward with a neutral explanation for its challenge of her. Moreover, we read the trial court's comment that the defense had failed to show a pattern of discrimination on the part of the state as reflecting the court's awareness that such a showing might have provided some evidence of the state's lack of sincerity in coming forward with a rational explanation for its peremptory challenge. *See State v. Jackson*, 322 N.C. 251, 368 S.E.2d 838 (1988). However, there being no showing of a history of discriminatory practice on behalf of the district attorney, the trial court had no reason to suspect the genuineness of the state's explanation supporting the dismissal of this juror. We hold that even if the defendant can be said to have established a prima facie showing of discrimination in the challenge of this juror, the state properly rebutted the presumption created by that showing in accord with the standard set forth in *Batson*.

[3] Defendant next contends that the court erred in admitting a photograph of the victim and his brother into evidence. During

the testimony of the victim's daughter, the prosecutor offered the photograph into evidence as a means of establishing the identity of the victim. Defense counsel objected and argued that because the defense was not contesting the victim's identity nor the fact that he was deceased at the time of the trial, the photograph had no probative value. Moreover, the photograph had some emotional impact on the witness, and defense counsel objected to its admission because of the inflammatory nature of the photograph as well as the daughter's reaction to it. The defendant contends that the prejudicial effect outweighed any probative value of the photograph and that its admission constituted reversible error.

The state, however, correctly points out that it has a right to prove all essential elements of the case, regardless of whether the defendant is contesting each element or not. *State v. Hunt*, 325 N.C. 187, 381 S.E.2d 453 (1989); *State v. Elkerson*, 304 N.C. 658, 285 S.E.2d 784 (1982); *State v. Lester*, 294 N.C. 220, 240 S.E.2d 391 (1978). The responsibility of weighing the probative value of proffered evidence against its prejudicial effect rests within the sound discretion of the trial judge and will not be disturbed on appeal absent a showing of abuse of that discretion. *See State v. Mason*, 315 N.C. 724, 340 S.E.2d 430 (1986); *State v. Penley*, 318 N.C. 30, 347 S.E.2d 783 (1986). In this case, the photograph allowed the state to establish the identity of the victim and the fact that he was once alive. Defendant has failed to show that the photograph was unduly inflammatory or that its admission was not proper. Defendant's third assignment of error is without merit.

[4] Defendant's next question also concerns an evidentiary ruling of the trial court. At trial, Lieutenant Atkins of the Harnett County Sheriff's Department identified a Tampa Nugget cigar box which he had received from Charles Elliott. Following an objection to defense counsel's line of questioning concerning the origins of the box, the jury was excused and the witness was allowed to elaborate out of the hearing of the jury concerning his understanding of how Charles Elliott had obtained the cigar box. Lieutenant Atkins stated that on the morning the victim was killed, Laverne Smith gave the box, which at that time was full of quarters, to Larry McNeill who sold it for $50.00 to Charles Elliott's son, Charles McKoy. It was the lieutenant's understanding that Laverne Smith had obtained possession of the box after he had broken into a house near the business district of Bunnlevel. The victim's trailer

was located in an outlying area known as the Sandhills of Bunnlevel. The victim's daughter had previously identified the box as being like one which her father had owned. Charles McKoy was put on the stand and also identified the box as the one he had obtained at Larry McNeill's house.

Defendant correctly asserts that since the box was identified by three witnesses, a proper foundation had been laid for its admission. Although the state contends that the daughter's identification of the box was ambivalent, we find that her testimony that the box was substantially similar to the box in which her father had kept money at his trailer was sufficient to identify it for admission as evidence. *State v. Joyner*, 301 N.C. 18, 269 S.E.2d 125 (1980) (noting that it is not necessary that the witness positively identify the object in order for a proper foundation to be laid and that the lack of positive identification goes to the weight of the witnesses' testimony, not to the admissibility of the object).

Defendant is also correct in his assertion that any properly identified object which has a relevant connection with a case is admissible into evidence. 1 Brandis on North Carolina Evidence § 118 (1988). However, where the evidence is proffered to show that someone other than the defendant committed the crime charged, admission of the evidence must do more than create mere conjecture of another's guilt in order to be relevant. Such evidence must (1) point directly to the guilt of some specific person, and (2) be inconsistent with the defendant's guilt. *State v. Brewer*, 325 N.C. 550, 386 S.E.2d 569 (1989); *State v. Cotton*, 318 N.C. 663, 351 S.E.2d 277 (1987). *See generally* 1 Brandis on North Carolina Evidence § 93 (1988). The cigar box proffered by the defendant in this case fails both prongs of this test, and hence the trial court ruled correctly that it should not have been admitted into evidence.

Regarding the first prong of the test for relevancy, evidence produced during the voir dire examination of Lieutenant Atkins indicated that the box as identified was taken from a house located within the town of Bunnlevel. The victim was murdered in a trailer, not a house, which was located in the Sandhills section outside of Bunnlevel, not in the town itself. Consequently, even if it is assumed that Laverne Smith had stolen this box, his possession of it does not place him at the scene of the murder that night. Moreover, regarding the second prong of the relevancy test, Laverne Smith's possession of this box on the night of the murder is not

inconsistent with the defendant's own guilt. The Harnett County Sheriff's Department was contacted about the victim's death at 12:34 a.m., and the defendant was not confronted by the citizen's group until sometime around 2:00 a.m. or 3:00 a.m. Clearly the defendant had ample opportunity to have sold the box to someone else or to have otherwise disposed of it prior to having been taken into custody. The fact that the box ended up in Laverne Smith's possession is not inconsistent with the defendant's armed robbery and murder of the victim. For the reasons set forth above, defendant's Exhibit 15, the Tampa Nugget cigar box, was properly excluded from evidence.

[5] Defendant's final contention is that there was insufficient evidence to carry the case to the jury. As a result, the defendant asserts that the trial court erred in failing to grant his motion for dismissal made at the close of all the evidence and renewed after the verdict but before entry of judgment. In reviewing a motion to dismiss, the court is to consider the evidence in the light most favorable to the state, and the state is entitled to every reasonable inference to be drawn therefrom. *State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984); *State v. Earnhardt*, 307 N.C. 62, 296 S.E.2d 649 (1982). In this case, the defendant was positively identified as having entered the back door of the victim's trailer sometime after 9:30 p.m. and before the Sheriff's Department was notified of the killing at 12:34 a.m. The defendant's motive to rob the victim was established by facts indicating that he was attempting to borrow money earlier in the evening for drinks or cocaine. Only a few hours later, after the victim had been murdered, the defendant was found in possession of cash and a packet of cocaine as well as the victim's two wallets. The defendant was unable to explain how he had come into possession of the victim's wallets or the cash with which he was found. He had blood on his slacks when he was taken into custody by the Sheriff's Department within hours of the murder. Defendant relies heavily on the fact that the evidence against him is largely circumstantial, but we note that the test of sufficiency for the purposes of reviewing a motion to dismiss is the same regardless of whether the evidence is direct or circumstantial. *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980). We hold that the evidence against defendant when viewed in the light most favorable to the state would permit a reasonable juror to conclude that the defendant committed this murder. Defendant's motion to dismiss was properly denied.

[6] In concluding, we note that the transcript of this case reflects that after sentencing the defendant on the murder charge, the trial judge also sentenced him to twenty-five years in prison on the armed robbery charge. The record shows that at that point, the trial judge arrested judgment orally in open court on the armed robbery conviction as it constituted the underlying felony supporting the felony murder charge. *See State v. Silhan*, 302 N.C. 223, 275 S.E.2d 450 (1981); *State v. Squire*, 292 N.C. 494, 234 S.E.2d 563 (1977); *State v. Thompson*, 280 N.C. 202, 185 S.E.2d 666 (1972). Despite the arrest of judgment, however, the record on appeal contains judgment and commitments on both charges. In the exercise of our supervisory authority, we hereby amend the judgment and commitment on the armed robbery charge, File # 89-CRS-1032, Harnett County, in this cause, by adding the following to said judgment: "This judgment and commitment was arrested by the presiding judge 31 August 1989." The Clerk of this Court shall direct the Clerk of Superior Court, Harnett County, to issue a corrected judgment and commitment and to forward a certified copy of the same to the Department of Correction.

No error.

RAYCHELL GOLDSTON v. AMERICAN MOTORS CORPORATION, AMERICAN MOTORS SALES CORPORATION, AMERICAN MOTORS (CANADA), INC., AND LEITH OF NEW BERN, INC., D/B/A EAST CAROLINA HONDA-VOLVO

No. 487PA89

(Filed 13 June 1990)

Appeal and Error § 134 (NCI4th)— disqualification of attorney —interlocutory order—right of appeal

Where counsel had been properly admitted pro hac vice under N.C.G.S. § 84-4.1 and was actively engaged in plaintiff's products liability suit for several years, plaintiff had a substantial right to the continuation of representation by that counsel and could immediately appeal the trial court's interlocutory order disqualifying counsel from further representation of plaintiff.

Am Jur 2d, Appeal and Error §§ 47, 50, 51, 856, 859; Attorneys at Law §§ 184, 189.

Justice MEYER dissenting.

ON plaintiff's petition for discretionary review of the order of the Court of Appeals, entered 20 October 1989, granting defendants' motion to dismiss plaintiff's interlocutory appeal of an order disqualifying counsel by *Farmer, J.*, entered 21 April 1989 in the Superior Court of DURHAM County. Heard in the Supreme Court 12 April 1990.

Michael E. Mauney and Charles Darsie for plaintiff-appellant.

Yates, Fleishman, McLamb & Weyher, by Joseph W. Yates, III, for defendant-appellees.

MARTIN, Justice.

Our decision does not require an extensive recital of the facts. In brief, on 7 February 1982 the plaintiff, an East Carolina University coed, was rendered a quadriplegic when the 1979 Jeep CJ-7 Golden Eagle in which she was riding flipped over on the sand dunes of Radio Island. She filed suit on 18 May 1984 against American Motors Corporation ("AMC"), and two of its subsidiaries, American Motors Sales Corporation and American Motors (Canada), Inc. for negligent design of the factory-mounted roll bar, negligent construction, negligent marketing, negligent failure to warn, and negligent failure to recall. Her lawsuit further alleged breach of warranties by AMC, its subsidiaries and East Carolina Honda-Volvo. Two years later, R. Ben Hogan of the Alabama Bar was admitted pro hac vice to represent plaintiff along with her present counsel, Norman Williams, Michael Mauney and Charles Darsie. Hogan is nationally known for his active involvement in product liability litigation and specifically in liability actions arising from accidents involving AMC or Jeep vehicles.

In 1988 Hogan was contacted by Rahn Huffstutler, a former AMC attorney and engineer who had assisted AMC in the defense of similar product liability suits. Upon his departure from AMC, Huffstutler had retained several confidential and protected documents. Huffstutler met with Hogan on various occasions to discuss the probable use of the documents at trial and the potential use of Huffstutler as an expert witness for plaintiff. Upon learning

of these meetings, AMC moved to enjoin Huffstutler from disclosing the confidential and privileged information obtained during his employment with AMC. The Court of Common Pleas of Ohio (Huffstutler's residence) granted AMC's prayer for permanent injunctive relief. That decision was reviewed by the Court of Appeals of Wood County, and the issue is presently before the Supreme Court of Ohio.

At the same time, AMC moved to have Hogan disqualified as counsel in each of the Jeep cases in which he was involved across the country. Because of his involvement in this case, a series of hearings was conducted in the trial court between October 1988 and April 1989 to determine the extent of Hogan's contacts with Huffstutler. Judge Manning conditionally denied the motion by defendants to disqualify Hogan upon the express requirement that Hogan file an affidavit verifying that his contacts with Huffstutler were limited to those admitted by him during the hearings. Upon reviewing the submitted affidavit which enumerated substantially greater contacts than previously disclosed, Judge Farmer, in accordance with Judge Manning's order, ruled that Hogan must be disqualified from any further representation of plaintiff.

Plaintiff appealed the ruling and the Court of Appeals dismissed the appeal. Plaintiff then filed a notice of appeal and a petition for discretionary review with this Court. We dismissed the appeal but allowed the petition limited to the sole issue of the appealability of the trial court's interlocutory order. The issue before us is whether plaintiff has a substantial right to counsel of her own choosing and, if so, whether plaintiff may immediately appeal when her chosen counsel is disqualified.

Generally, there is no right of immediate appeal from interlocutory orders and judgments. The North Carolina General Statutes set out the exceptions under which interlocutory orders are immediately appealable. Relevant here are the following statutes:

N.C.G.S. § 1-277(a) provides:

> An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding . . . .

N.C.G.S. § 7A-27(d) provides:

> From any interlocutory order or judgment of a superior court or district court in a civil action or proceeding which affects a substantial right . . . appeal lies of right directly to the Court of Appeals.

This Court, speaking through Justice Huskins, said: "Ordinarily, an appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to appellant if not corrected before appeal from final judgment." *Stanback v. Stanback*, 287 N.C. 448, 453, 215 S.E.2d 30, 34 (1975). Therefore, plaintiff is not entitled to appeal from the interlocutory order disqualifying her counsel unless the order deprived her of a "substantial right which [s]he would lose absent a review prior to final determination." *Robins & Weill v. Mason*, 70 N.C. App. 537, 540, 320 S.E.2d 693, 696, *cert. denied*, 312 N.C. 495, 322 S.E.2d 559 (1984). Essentially a two-part test has developed—the right itself must be substantial and the deprivation of that substantial right must potentially work injury to plaintiff if not corrected before appeal from final judgment. *See Wachovia Realty Investments v. Housing, Inc.*, 292 N.C. 93, 232 S.E.2d 667 (1977).

"Normally, a litigant has a fundamental right to select the attorney who will represent him in his lawsuit." *Hagins v. Redevelopment Commission*, 275 N.C. 90, 102, 165 S.E.2d 490, 498 (1969). This is a basic premise of the adversary system in judicial proceedings. We hold that plaintiff had a substantial right to have R. Ben Hogan represent her in her lawsuit against AMC. We are mindful of the apparent disharmony with the decision in *Leonard v. Johns-Manville Corp.*, 57 N.C. App. 553, 291 S.E.2d 828, *cert. denied*, 306 N.C. 558, 294 S.E.2d 371 (1982). There the Court of Appeals denied the appeal on the basis that the trial court's interlocutory order denying a motion for admission of counsel pro hac vice did not involve a substantial right and was not immediately appealable as a matter of right. In *Leonard*, the subject matter of the appeal was to have been whether the trial court erred in its determination that the out-of-state counsel failed to meet the conditions precedent for admission pro hac vice set forth in N.C.G.S. § 84-4.1. "[P]arties do not have a right to be represented in the courts of North Carolina by counsel who are not duly licensed to practice in this state. Admission of counsel in North Carolina

pro hac vice is not a right but a discretionary privilege." 57 N.C. App. at 555, 291 S.E.2d at 829. In the case at bar, R. Ben Hogan had been properly admitted pro hac vice under the statute and was actively involved in plaintiff's lawsuit for several years. The distinction is thus: once the attorney was admitted under the statute, plaintiff acquired a substantial right to the continuation of representation by that attorney—just as with any other attorney duly admitted to practice law in the State of North Carolina. We also note that the trial court did not summarily remove Hogan pursuant to N.C.G.S. § 84-4.1. The order removing Hogan as counsel affected a substantial right of the plaintiff.

Depriving plaintiff of her counsel of choice, who is an alleged expert in cases of this nature, certainly exposed her to potential injury unless corrected before trial and appeal from final judgment. Plaintiff is faced with an extremely difficult task of showing harm in the event that she should receive a favorable verdict. How does one prove the actual amount of damages sustained in the loss of representation by counsel with the years of experience and know-how which Mr. Hogan allegedly has developed through his practice of suing major manufacturers of jeeps and related vehicles for tort liability? Thus, when the trial court's order disqualifying counsel was entered, plaintiff correctly moved to appeal that decision immediately before proceeding with further discovery and the trial.

We are cognizant of the United States Supreme Court decision in *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 86 L. Ed. 2d 340 (1985), which held that appellate courts do not have jurisdiction to review on appeal an order disqualifying counsel in a civil case because it is not a collateral order subject to immediate appeal under 28 U.S.C.A. § 1291. The federal statute grants the courts of appeals jurisdiction of appeals from all "final decisions of the district courts," except where a direct appeal lies to the United States Supreme Court. The United States Supreme Court has consistently held that the finality requirement means that a party may not appeal until there has been a decision on the merits. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 66 L. Ed. 2d 571 (1981) (citations omitted). The narrow exception to this rule is called the "collateral order doctrine." For a case to fall within this doctrine and be immediately appealable, it must: (1) conclusively determine the disputed question; (2) resolve an important issue completely separate from the merits of the action; and (3) be effec-

tively unreviewable on appeal from a final judgment. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 57 L. Ed. 2d 351 (1978).

Richardson-Merrell is inapposite because the issue before us is controlled by our interpretation of the North Carolina statutes. Our statutes setting forth the appeals process do not include the same jurisdictional "finality" requirement as does the federal statute. As a result, our Court has taken a different approach and developed the *Wachovia* two-prong test. As we have previously stated, for an interlocutory order to be immediately appealable, it must: (1) affect a substantial right and (2) work injury if not corrected before final judgment. *Wachovia*, 292 N.C. 93, 232 S.E.2d 667. Here, these requirements have been met by plaintiff.

The trial court's order is appealable, and the Court of Appeals was in error in dismissing plaintiff's appeal without first passing on the merits thereof. The cause is remanded to the Court of Appeals for a decision on the merits.

Reversed and remanded.

Justice MEYER dissenting.

The "substantial right" test for appealability of interlocutory orders is more easily stated than applied. *See Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 299 S.E.2d 777 (1983). It is usually necessary to resolve the question of whether an appeal is premature in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered. *Bernick v. Jurden*, 306 N.C. 435, 293 S.E.2d 405 (1982).

Under the peculiar circumstances presented in this case, I am not convinced that the trial court's disqualification of co-counsel Hogan was a decision which would tend to be particularly injurious to plaintiff if not heard on appeal before final judgment. From the beginning, plaintiff has been represented by three North Carolina attorneys whom the trial court found to be fully competent to try her case. In his order dated 5 April 1989, Judge Manning found that plaintiff's North Carolina counsel were "competent, capable lawyers well able to proceed to trial in complicated litigation of this type without Hogan. This finding is based on the Court's personal observation of plaintiff's North Carolina counsel." Plaintiff's local counsel encouraged plaintiff to retain Hogan, a member

of the Alabama bar, as additional counsel to be admitted *pro hac vice*. This change of strategy did not take place until more than two years after the filing of plaintiff's complaint.

The United States Supreme Court and a number of state courts of last resort have held that orders disqualifying counsel are not immediately appealable as a matter of right. The United States Supreme Court has addressed the appealability of orders granting disqualification on at least two separate occasions. In *Flanagan v. United States*, 465 U.S. 259, 263-64, 79 L. Ed. 2d 288, 291 (1984), the Court held that orders granting disqualification of criminal defense counsel were not immediately appealable since meaningful appellate review would be available after final judgment. In *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 430-41, 86 L. Ed. 2d 340, 346-53 (1985), the Court held that orders granting disqualification in civil proceedings are likewise not immediately appealable.

In *Richardson-Merrell*, the Court noted, first, that "[w]hen an appellate court accepts jurisdiction of an order disqualifying counsel, the practical effect is to delay proceedings on the merits until the appeal is decided." *Id.* at 434, 86 L. Ed. 2d at 348. Second, the Court noted that to the extent motions to disqualify are interposed for otherwise improper purposes, it is the trial court which has the "primary responsibility to police the prejudgment tactics of litigants . . . [;] the district judge can better exercise that responsibility if the appellate courts do not repeatedly intervene to second-guess prejudgment rulings." *Id.* at 436, 86 L. Ed. 2d at 350.

Numerous state courts have applied the same rule that orders granting disqualification are not immediately appealable. *See, e.g., Burger and Burger v. Murren*, 202 Conn. 660, 522 A.2d 812 (1987) (overruling *State v. Rapuano*, 192 Conn. 228, 471 A.2d 240 (1984)); *Jenkins v. U.S.*, 548 A.2d 102 (D.C. App. 1988); *Chuck v. St. Paul Fire and Marine Ins. Co.*, 61 Haw. 552, 606 P.2d 1320 (1980); *National Wrecking v. Midwest Terminal*, 164 Ill. App. 3d 621, 518 N.E.2d 193 (1987); *Harris v. Harris*, 310 Md. 310, 529 A.2d 356 (1987); *Maddocks v. Ricker*, 403 Mass. 592, 531 N.E.2d 583 (1988).

The decisions of the United States Supreme Court and these other state appellate courts are not dispositive of the issue before this Court, and I would not favor such a rule to be applied to a party's *primary* counsel, whether counsel be regularly admitted in North Carolina or admitted *pro hac vice*. I would, however, apply the rule to disqualification of secondary *pro hac vice* counsel.

I do not take issue with the majority's statement of the general principle that a party has a fundamental right to her counsel of choice. I would not hesitate for a moment to join in the result reached by the majority if it were the plaintiff's primary North Carolina counsel who had been disqualified. Here, however, plaintiff has three competent primary North Carolina counsel continuing to represent her. It is only a secondary, out-of-state co-counsel, who was admitted *pro hac vice* and who joined the case two years after it was filed, who has been disqualified. Plaintiff does not have an unqualified right to additional out-of-state counsel admitted *pro hac vice*. Parties do not have a right to be represented in the courts of North Carolina by counsel who are not duly licensed to practice in this state. Although North Carolina law permits attorneys from other states to be admitted on a limited basis to practice in the courts of this state under the provisions of N.C.G.S. § 84-4.1, it is viewed as a privilege which is afforded to litigants and is one which, by statute, is *subject to summary revocation within the discretion of the trial court*. The purpose of this statute is to afford the courts a means to control out-of-state counsel and to assure compliance with the obligations and responsibilities of attorneys practicing in the courts of this state. Specifically, N.C.G.S. § 84-4.2 provides in part as follows:

> Permission granted under the preceding section [allowing *pro hac vice* admission] may be summarily revoked by the General Court of Justice . . . on its own motion and in its discretion.

N.C.G.S. § 84-4.2 (1985).

I note that the Ohio Supreme Court has granted review of the decision by the Court of Appeals of Wood County which vacated the permanent injunction granted by the Court of Common Pleas of Ohio in AMC's favor against Rahn Huffstutler, the former AMC engineer (also an attorney) who sought to utilize the protected documents he had acquired upon departing AMC in his capacity as an expert witness for plaintiff. Hogan met with Huffstutler on numerous occasions to discuss these documents and to determine the most effective way of utilizing Huffstutler's testimony at this and other pending trials involving AMC Jeeps across the country.

I also note that AMC has obtained orders of disqualification in each of the Jeep cases in both state and federal courts in which Hogan was involved. *See Order in Matthews v. Jeep Eagle Corp.*,

No. 88-6120-CA-01 (Cir. Ct. Fla. Oct. 30, 1989); *Order in Hull v. Jeep Eagle Corp.*, No. 3:89-161-16 (D.S.C. Sept. 13, 1989); *Order in Perry v. Jeep Eagle Corp.*, No. IP 88-685-C (S.D. Ind. Aug. 24, 1989, amended Sept. 7, 1989) (copies before the trial court and before this Court); *see also Jacobs v. American Motors Corp.*, No. 89-0518-CV-W-5 (W.D. Mo. Feb. 20, 1989) (WESTLAW, Allfeds library, 1989 WL 200920).

The trial judge here disqualified Hogan as counsel in this case because his participation obviously posed a serious threat that the proceedings would be tainted by the misuse of privileged and confidential information. Judge Manning conducted a series of extensive hearings in which he examined the elements for disqualification and probed in detail Hogan's contacts with Huffstutler. It is obvious from the record before this Court that after a series of hearings on the matter of disqualifying Hogan, Judge Manning was uncertain that all of Hogan's contacts with Huffstutler had been disclosed to the court. In the exercise of an abundance of caution, Judge Manning denied defendants' disqualification motion on 5 April 1989 but only conditionally, upon the express condition that Hogan file an affidavit verifying that his contacts with Huffstutler were limited to those admitted by him in open court and which occurred prior to 1 October 1988. The reason the October 1988 date was chosen as the closing date of the record for the purposes of the disqualification hearing is not apparent to me from the record. It may have been chosen because it was the approximate date plaintiff withdrew Huffstutler as a possible expert witness in the case. Judge Manning ruled that Huffstutler was privy to confidential information and that defendants had not proved that information had passed to plaintiff, but that Hogan would be disqualified for giving an appearance of impropriety if he had "contact" with Huffstutler not previously disclosed to the court or occurring after 1 October 1988. Specifically, Judge Manning ordered that "[i]n the event that Hogan files an affidavit and certificate admitting contacts other than the two on record here, then and in such event, the presumption of an appearance of impropriety has been met and the conditional denial of the motion to disqualify is withdrawn and the motion to disqualify is allowed."

Hogan's subsequently filed affidavit disclosed substantially greater contacts with Huffstutler than he had previously admitted, including some after 1 October 1988. Consequently, defendants' motion to disqualify Hogan was granted by Judge Robert L. Farmer

at the conclusion of a final hearing held on 19 April 1989. In drafting his order, Judge Farmer reviewed Judge Manning's original order and incorporated it into his own ruling.

When faced with similar circumstances, courts in other jurisdictions have held that disqualification is mandated when a lawyer gains access to protected information of his opponent through his communication with another lawyer or other person who previously represented or had some relationship with the other side and who was privy to confidential information which is substantially related to the issue in the pending matter. *See, e.g., Lackow v. Walter E. Heller & Co. Southeast*, 466 So. 2d 1120 (Fla. Dist. Ct. App. 1985); *Williams v. Trans World Airlines, Inc.*, 588 F. Supp. 1037 (W.D. Mo. 1984).

At the very least, I find that Hogan's actions violated Canon IX of the Rules of Professional Conduct of the North Carolina State Bar in that they failed to avoid the appearance of impropriety. That Canon provides: "A lawyer should avoid even the appearance of professional impropriety." N.C. Rules of Professional Conduct Canon IX (1985). Our courts have held that it is within the discretion of the trial court to disqualify an attorney for violation of these ethical rules, but this discretion must be exercised within the parameters of the applicable canon(s). *Lowder v. Mills, Inc.*, 60 N.C. App. 275, 300 S.E.2d 230, *aff'd in part, rev'd in part on other grounds*, 309 N.C. 695, 309 S.E.2d 193 (1983). Parties have no right to be represented by counsel who is tainted in the particular matter being adjudicated, whether home-grown or *pro hac vice*. In this case, Judge Farmer's decision was made solely within his discretion. He acted wisely and properly to ensure compliance with Canon IX. For all of the above reasons, I respectfully dissent.

STATE OF NORTH CAROLINA v. CHARLIE TEW

No. 405A89

(Filed 13 June 1990)

1. Appeal and Error § 75 (NCI4th)— DWI—motion to suppress breathalyzer reading denied—guilty plea—appealable

Defendant could appeal the denial of his motion to suppress breathalyzer results despite a subsequent guilty plea

where he specifically reserved his right to appeal upon entering his plea. N.C.G.S. § 15A-979.

Am Jur 2d, Appeal and Error § 271.

2. Automobiles and Other Vehicles § 126.2 (NCI3d)— breathalyzer test—results within .02 of each other—results rounded down

The trial court did not err by admitting breathalyzer test results in a DWI prosecution where the inked test record pointer marked the instrument's test card at a point between .22 and .23 on the first test; the breathalyzer operator rounded this figure down to the nearest hundredth for a test result of .22; the pointer indicated an alcohol concentration of .20 on the second test; and the operator had therefore obtained two results within .02 of each other as required by N.C.G.S. § 20-139.1(b3). When read *in pari materia*, the term "readings" was intended by the Legislature to mean the test "results" recorded by the chemical analyst in hundredths, rounded down as provided in the Commission regulations.

Am Jur 2d, Automobiles and Highway Traffic §§ 307, 375, 377, 380.

Justice WEBB dissenting.

APPEAL by the State of North Carolina pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 95 N.C. App. 634, 383 S.E.2d 400 (1989), reversing the judgment of *Currin, J.*, at the 19 September 1988 Criminal Session of Superior Court, WAYNE County. Heard in the Supreme Court 12 March 1990.

Lacy H. Thornburg, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, for the State-appellant.

Barnes, Braswell, Haithcock & Warren, P.A., by R. Gene Braswell and Glenn A. Barfield, for defendant-appellee.

MEYER, Justice.

The issue presented in this case requires us to interpret certain provisions of N.C.G.S. § 20-139.1, the part of our Motor Vehicle Act governing the performing of chemical analysis of a driver's alcohol concentration and the admissibility into evidence of the results of such tests.

On 22 July 1987, defendant was arrested for driving while impaired (DWI). Defendant pled not guilty in district court and was adjudged guilty by Judge Joseph E. Setzer. Defendant appealed to the superior court for a trial *de novo*, entering a plea of not guilty. After impanelment of the jury, but prior to introduction of evidence, defendant orally moved to suppress the results of a chemical analysis performed at the time of his arrest. The court held a voir dire hearing on the motion, at which time Judge Samuel T. Currin denied defendant's motion to suppress. Defendant then entered a plea of guilty to DWI, specifically reserving his right to appeal the denial of his motion to suppress. Judge Currin found defendant guilty and sentenced him to level two punishment for the offense. Defendant appealed to the Court of Appeals. That court reversed the holding of the trial court and held that defendant's motion to suppress the test results should properly have been granted. Judge Cozort dissented from the majority vote. The State appeals to this Court as of right. This Court allowed the State's request for writ of supersedeas and stay on 25 September 1989. We now reverse the decision of the Court of Appeals.

[1] N.C.G.S. § 15A-979(b) provides that "[a]n order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty." Although not a part of the statute, the official commentary to that section provides some insight into the rationale and consequences of this provision:

> [Subsection (b)] permits a defendant whose motion to suppress was denied to plead guilty and then appeal the ruling of the judge on the motion. If the appellate court sustains the ruling on the motion, the conviction stands; if the ruling on the motion is overturned, then the defendant is entitled to a new trial at which the evidence would be suppressed. This provision is intended to prevent a defendant whose only real defense is the motion to suppress from going through a trial simply to preserve his right of appeal. This section on its face would apply whether the appeal is from district court or superior court, though the right of trial de novo already guarantees the defendant the right to renew motions in superior court—even after a plea of guilty. If the superior court judge reaffirms the ruling denying the motion to suppress, however, the Constitution of North Carolina may force the defendant either to plead guilty in superior court or go to trial . . . .

N.C.G.S. § 15A-979 official commentary (1988).

This Court has held that when a defendant intends to appeal from the denial of a suppression motion pursuant to this section, he must give notice of his intention to the prosecutor and to the court before plea negotiations are finalized; otherwise, he will waive the appeal of right provisions of the statute. *State v. Reynolds*, 298 N.C. 380, 259 S.E.2d 843 (1979), *cert. denied*, 446 U.S. 941, 64 L. Ed. 2d 795 (1980). In the case *sub judice*, defendant did in fact specifically reserve his right to appeal upon entering his plea of guilty. Consequently, the path has been paved for us now to address the substantive issue presented.

[2] The State takes issue with the Court of Appeals' interpretation of the relevant statute, N.C.G.S. § 20-139.1 (1983). In relevant part, this statute provides as follows:

> A chemical analysis, to be valid, must be performed in accordance with the provisions of this section. The chemical analysis must be performed according to methods approved by the Commission for Health Services by an individual possessing a current permit issued by the Department of Human Resources for that type of chemical analysis. The Commission for Health Services is authorized to adopt regulations approving satisfactory methods or techniques for performing chemical analyses . . . .

N.C.G.S. § 20-139.1(b) (1983).

In conjunction with this provision, subsection (b3) provides in part:

> By January 1, 1985, the regulations of the Commission for Health Services governing the administration of chemical analyses of the breath must require the testing of at least duplicate sequential breath samples. Those regulations must provide:
>
> . . . .
>
> (2) That the test results may only be used to prove a person's particular alcohol concentration if:
>
> a. The pair of readings employed are from consecutively administered tests; and

b. The readings do not differ from each other by an alcohol concentration greater than 0.02.

(3) That when a pair of analyses meets the requirements of subdivision (2), only the lower of the two readings may be used by the State as proof of a person's alcohol concentration in any court or administrative proceeding.

N.C.G.S. § 20-139.1(b3) (1983).

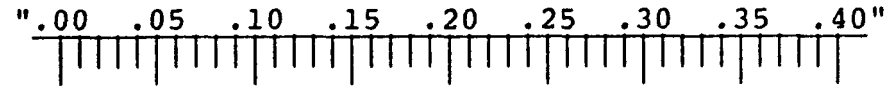
In response to the Legislature's mandate, the Commission for Health Services developed appropriate operating procedures for use in conducting breathalyzer chemical analyses pursuant to the provisions set out in the statute. In regulation 10 NCAC 7B .0354, the Commission enunciated the following policy:

(a) When performing chemical analyses of breath under the authority of G.S. 20-139.1 and the provisions of these rules, chemical analysts shall report alcohol concentrations on the basis of grams of alcohol per 210 liters of breath. All *results* shall be reported to hundredths. Any *result* between hundredths shall be reported to the next lower hundredth.

10 NCAC 7B .0354(a) (1987) (emphases added).

Defendant was arrested for DWI as a result of the observations of Officer A.W. Baldwin of the Goldsboro City Police Department. Officer Baldwin initially noted that defendant failed to dim his headlights in response to Baldwin's signal. As the patrol car pulled behind defendant's car, defendant weaved somewhat within his lane. After stopping defendant, Officer Baldwin spoke to him and noted that defendant had a strong odor of alcohol on his breath and acted in an abusive and boisterous manner.

Defendant was then taken before Trooper J.D. Booth, a twenty-year veteran of the North Carolina Highway Patrol and certified breathalyzer operator, who performed a chemical analysis of defendant's breath using the Breathalyzer Model 900. In accordance with the Commission's regulations as set forth on his operational checklist, Booth administered two tests of defendant's breath. The card used in the breathalyzer test bears no markings which would indicate readings in more precise increments than hundredths. The delineations on the face of the record card appear as



and show no delineation more precise than hundredths.

In a typical breathalyzer test, the analyst positions the test record card in alignment with the face of the instrument, which is calibrated to two decimal places. A plastic cover encases the scale and the blood alcohol pointer. This cover is designed to allow the operator to apply pressure to the inked pointer in order to mark the test record card. Once the pointer has stopped at a particular point over the scale as a result of the introduction of the breath sample, the chemical analyst depresses the plastic cover, which in turn causes the inked pointer to make an ink impression on the card.

On the first test, Booth observed that the inked test record pointer marked the instrument's test record card at a point on the breathalyzer scale between .22 and .23. In accordance with the regulations, Booth rounded this figure downward to the nearest hundredth for a test result of .22. On the second test, the pointer indicated an alcohol concentration of .20. Because he rounded down the first reading, Booth obtained two results which were within .02 of each other as required by N.C.G.S. § 20-139.1(b3).

At the voir dire hearing on his motion to suppress the chemical analysis, defendant introduced into evidence the test record cards from which Booth observed and recorded the test results. Defendant contended that, although the card does not bear indications more precise than hundredths, by interpolation, the marking on the card for the first test indicated a "reading" of approximately .226 and the markings on the card for the second test indicated a "reading" of .20, and the test results thus were rendered invalid under subsection (b3) of the statute. That subsection specifically provides that "the test *results* may only be used to prove a person's particular alcohol concentration if . . . [t]he *readings* do not differ from each other by an alcohol concentration greater than 0.02." N.C.G.S. § 20-139.1(b3)(2) (1983) (emphases added).

Defendant argues that the word "results" used in the statute and the regulation and the word "readings" used in the statute are not synonymous and should be read as having different mean-

ings. He contends that "readings" refers to the actual ink markings which by interpolation may be read in various increments more precise than hundredths, whereas "results" can only refer to the readings after having been rounded down. We disagree.

Defendant alternatively contends that the meaning of the term "readings" is ambiguous because of possible confusion with the statute's use of the term "results." As such, defendant contends that the term should be strictly construed against the State and in favor of defendant because N.C.G.S. § 20-139.1 is a criminal statute. *State v. Martin*, 7 N.C. App. 532, 173 S.E.2d 47 (1970).

The majority of the panel of the Court of Appeals agreed with defendant's interpretation of the statutory provision. *State v. Tew*, 95 N.C. App. 634, 383 S.E.2d 400. Judge Cozort dissented, stating that while he did not disagree with the majority's literal interpretation of the statute, he believed that when the subsection is considered *in pari materia* with the remainder of the provisions governing procedures for chemical analysis, the intent of the Legislature was to interpret "readings" as the rounded-down results recorded by the chemical analyst. He did not believe that the General Assembly intended for the evidence obtained from breathalyzer readings to be suppressed when the rounded-down readings are within .02 of each other. We agree. Accordingly, we reverse the Court of Appeals.

This case requires us to interpret the legislative intent behind the enactment of N.C.G.S. § 20-139.1, a key provision of the Safe Roads Act of 1983. That Act was enacted in response to a growing public commitment to stronger enforcement of laws prohibiting drinking and driving. The Act was introduced on the first day of the 1983 legislative session as the first bill in each house. It became law only after reflecting the input from six standing committees which produced over one hundred amendments to the bill, and after a two-month review by a joint conference committee which was formed to resolve the differences between the competing versions submitted by each house.

It is a cardinal principle that in construing statutes, the courts should always give effect to the legislative intent. *State v. Fulcher*, 294 N.C. 503, 243 S.E.2d 338 (1978). In ascertaining such intent, a court may consider the purpose of the statute and the evils it was designed to remedy, the effect of proposed interpretations of the statute, and the traditionally accepted rules of statutory

construction. *Electric Service v. City of Rocky Mount*, 20 N.C. App. 347, 201 S.E.2d 508, *aff'd*, 285 N.C. 135, 203 S.E.2d 838 (1974).

All parts of the same statute dealing with the same subject are to be construed together as a whole, and every part thereof must be given effect if this can be done by any fair and reasonable interpretation. *Duke Power Co. v. Clayton, Comr. of Revenue*, 274 N.C. 505, 164 S.E.2d 289 (1968). A construction of a statute which operates to defeat or impair its purpose must be avoided if that can reasonably be done without violence to the legislative language. *State v. Hart*, 287 N.C. 76, 213 S.E.2d 291 (1975). Individual expressions must be construed as a part of the composite whole and be accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit. *In re Hardy*, 294 N.C. 90, 240 S.E.2d 367 (1978).

These rules apply to both criminal and civil statutes. *Vogel v. Supply Co. and Supply Co. v. Developers, Inc.*, 277 N.C. 119, 177 S.E.2d 273 (1970). While a criminal statute must be strictly construed against the State, the courts must nevertheless construe it with regard to the evil which it is intended to suppress. *In re Banks*, 295 N.C. 236, 244 S.E.2d 386 (1978).

In the context of the provision at issue here, it is undisputed that the General Assembly intended to vest the Commission for Health Services with sole responsibility for determining the methods and procedures that would be employed in the sequential testing of breath in the context of chemical analysis. In so doing, the statute outlined the Legislature's expectations and goals, providing in N.C.G.S. § 20-139.1(b3) that, by 1 January 1985, the Commission regulations governing the administration of chemical analyses of the breath shall require the testing of at least duplicate sequential breath samples under the conditions set out by that statute. Following the guidelines enumerated by the Legislature, the Commission established the applicable procedures and published them in 10 NCAC 7B .0354. Quite clearly, the Commission mandated that the chemical analyst, upon his examination of the markings placed upon the test record card, record the test results in hundredths. Where an issue of statutory interpretation arises, the construction adopted by those who execute and administer the law in question is highly relevant. *Comr. of Insurance v. Automobile Rate Office*, 294 N.C. 60, 241 S.E.2d 324 (1978); *MacPherson v. City of Asheville*, 283 N.C. 299, 196 S.E.2d 200 (1973). The construction adopted by the

Commission in this case is particularly instructive since the subject matter involves the proper use of a scientific instrument for which the Commission was authorized to determine the rules of operation.

Our appellate courts have previously held that the General Assembly's intent in enacting the provision requiring sequential blood testing was to ensure the accuracy of the process. *See State v. White*, 84 N.C. App. 111, 351 S.E.2d 828, *stay denied*, 319 N.C. 227, 353 S.E.2d 404, *dismissal allowed*, 319 N.C. 409, 354 S.E.2d 887 (1987). Our understanding of the testing procedure leads us to believe that the utilization of a trained chemical analyst's reading of the marks indicated on the test record card by the inked blood alcohol pointer would more often lead to accurate results than would reliance on a court's subsequent observation of the marked card. The breathalyzer scale is calibrated to hundredths. Because the point on the blood alcohol pointer may rest between two marks on the scale and because the ink often tends to bleed or smear due to the fact that the end of the pointer is blunt, the Commission requires the chemical analyst to give the benefit of the doubt to the defendant and record the results to the next lower hundredth rather than attempt to obtain a more precise result. Our analysis of similar statutes reveals that the General Assembly has consistently determined that results of a chemical analysis are to be reported only to two decimal places. *See, e.g.*, N.C.G.S. §§ 20-16.2, 20-16.5, 20-179 (1989).

We note that nowhere in the statute is there a requirement that the test record card be submitted as evidence. The fact that the Legislature did not require presentation of the card which bears the actual visual recordation of the breathalyzer marking indicates a legislative intent that the proffered "reading" be the analyst's rounded-down results upon his observation of the instrument as the regulations require. This recorded test result becomes memorialized in an affidavit, which itself is expressly admissible under the statute. N.C.G.S. § 20-139.1(e1) (1983). An interpretation requiring the courts to examine the test record cards in order to speculate as to whether the marking was accurately and precisely recorded by the analyst would defeat the Legislature's purpose of ensuring accurate results.

For the foregoing reasons, we conclude that when the General Assembly used the term "readings" in N.C.G.S. § 20-139.1(b3), it intended that the term be interpreted consistently with the regula-

tions it required the Commission for Health Services to promulgate. When read *in pari materia* with the statute's remaining provisions, the term "readings" was intended by the Legislature to mean the test "results" recorded by the chemical analyst in hundredths, rounded down as provided in the Commission regulations. The trial court did not err in denying defendant's motion to suppress. We therefore reverse the holding of the Court of Appeals. This matter is remanded to the Court of Appeals for further remand to the Superior Court, Wayne County, for reinstatement of that court's judgment.

Reversed.

Justice WEBB dissenting.

I dissent. N.C.G.S. § 20-139.1(b3)(2) says:

(2) That the test results may only be used to prove a person's particular alcohol concentration if:

a. The pair of readings employed are from consecutively administered tests; and

b. The readings do not differ from each other by an alcohol concentration greater than 0.02.

In this case the readings differed from each other by an alcohol concentration greater than 0.02. The test results should not have been used. The elaborate reasoning of the majority is irrelevant. The plain meaning of the statute is clear and we should go no further in interpreting it. We may not like the result but it is not for us to change the statute.

NORTHAMPTON COUNTY DRAINAGE DISTRICT NUMBER ONE, PLAINTIFF v. LARRY DONALD BAILEY, JR. AND WIFE, MAXINE SPENCE BAILEY; BETTY GATLIN, UNMARRIED; CLAUDE M. FENNELL AND WIFE, BRENDA D. FENNELL; THOMAS L. REDD AND WIFE, CONNIE B. REDD; JESSE B. OUTLAW AND WIFE, DESSIE B. OUTLAW; WILLIAM SLADE AND WIFE, KATHLEEN SLADE; JAMES M. BUSH AND WIFE, DOROTHY W. BUSH; THOMAS DAVID TANN AND WIFE, VERNEAR O. TANN; JESSE LEE EASON AND WIFE, LILY M. EASON; LUCIUS CORNELL SLADE, UNMARRIED; WHALLON HOLLOMAN AND WIFE, SAWYER HOLLY HOLLOMAN; JAMES O. BUCHANAN, TRUSTEE FOR FARMER'S HOME ADMINISTRATION, LIENHOLDER; JOSEPH J. FLYTHE, TRUSTEE FOR THE FEDERAL LAND BANK OF COLUMBIA, LIENHOLDER; THURMAN E. BURNETTE, TRUSTEE FOR FARMER'S HOME ADMINISTRATION, LIENHOLDER; JOSEPH J. FLYTHE, TRUSTEE FOR JOHN M. FIELDS, LIENHOLDER, DEFENDANTS, AND MANNING P. COOKE, AGENT, ROBERT DARRELL MORRIS, JOHN SOUTHGATE VAUGHAN, PHILLIP B. PARKER AND JOHN D. SNIPES, JR., INTERVENOR-DEFENDANTS

No. 576A88

(Filed 13 June 1990)

1. **Drainage § 4 (NCI3d)— two-county drainage district— appointment of commissioners by clerk of court of one county —denial of equal protection**

The appointment of the commissioners of a two-county drainage district by the clerk of superior court of one county violates the equal protection rights of landowners who live in the drainage district in the second county since they may not vote for the clerk of court who appoints the commissioners while residents of the first county may vote for the appointing clerk of court. U. S. Const. amend. XIV; N. C. Const. art. I, § 19.

Am Jur 2d, Drains and Drainage Districts §§ 14, 16, 27.

2. **Drainage § 4 (NCI3d)— drainage commissioners—election or appointment—determination by clerks of court—unlawful delegation of legislative power**

The unfettered discretion provided by N.C.G.S. § 156-81(a) and (i) to clerks of superior court to determine whether drainage commissioners should be elected or appointed constitutes an unlawful delegation of legislative power. N. C. Const. art. I, § 1.

Am Jur 2d, Drains and Drainage Districts §§ 10, 11, 27.

3. Drainage § 6 (NCI3d)— drainage district maintenance assessments—notice and opportunity to be heard

N.C.G.S. § 156-138.3 violates the law of the land clause of the N. C. Constitution insofar as it dispenses with notice and an opportunity to be heard before maintenance assessments may be imposed on landowners within a drainage district since the imposition of the assessments is not simply a matter of mathematical computation but requires an exercise of discretion by the commissioners. N. C. Const. art. I, § 19.

Am Jur 2d, Drains and Drainage Districts § 48.

4. Costs § 3.1 (NCI3d); Drainage § 8 (NCI3d)— action to recover drainage assessments—attorney fees for district members

The superior court had authority under N.C.G.S. § 6-21(8) to award attorney fees to defendants as part of the costs in an action to recover drainage district assessments. Assuming that N.C.G.S. § 105-374(i) is incorporated by reference into Ch. 156, provisions of that statute authorizing attorney fees for taxing authorities do not prohibit attorney fees from being taxed as part of the costs for members of drainage districts.

Am Jur 2d, Drains and Drainage Districts §§ 57, 58.

5. Cost § 4.2 (NCI3d)— defense against drainage assessments—amount of attorney fees

The amount of the fees awarded to defendants' attorneys as part of the costs of an action to recover drainage district assessments was reasonable where the trial court considered the skill, time and labor expended by defendants' attorneys as well as the complexity of the case.

Am Jur 2d, Drains and Drainage Districts §§ 57, 58.

6. Drainage § 6 (NCI3d)— appointment of drainage commissioners—assessments not taxes—no improper taxation by commissioners

The provision of the drainage law which allows clerks of court to appoint drainage commissioners does not violate N. C. Const. art. I, § 8 and art. V, § 2 on the ground that it allows a commission not elected by the people to impose taxes upon district members since drainage district assessments are not taxes.

Am Jur 2d, Drains and Drainage Districts §§ 27, 39, 43.

ON appeal and discretionary review of the decision of the Court of Appeals, 92 N.C. App. 68, 373 S.E.2d 560 (1988), reversing in part a judgment entered on 6 August 1987 by *Phillips, J.*, in the Superior Court of HERTFORD County. Heard in the Supreme Court on 11 September 1989.

The plaintiff in this action is a drainage district formed in 1960 under Chapter 156 of the General Statutes of North Carolina. It lies partly in Northampton County and partly in Hertford County. Its commissioners are appointed by the Clerk of Superior Court of Northampton County. The drainage district brought this action to recover on assessments which had been made against persons who owned land in the Hertford County part of the district.

After a trial without a jury the superior court held among other things that the defendants had been deprived of the equal protection of the laws under article I, section 19 of the North Carolina Constitution and the fourteenth amendment to the Constitution of the United States. The court held this was so because residents of Northampton County who owned land in the drainage district could vote for the clerk of superior court who appointed the drainage district commissioners while the residents of Hertford County could not. The court also held that N.C.G.S. § 156-81(a) and (i) and N.C.G.S. § 156-79 which grant clerks of court the unfettered discretion to determine whether there shall be appointed or elected commissioners delegate a legislative power to the clerks in violation of article II, section 1 and article I, section 19 of the North Carolina Constitution as well as the due process clause of the fourteenth amendment to the Constitution of the United States. The court found further that to the extent Subchapter III of Chapter 156 allows assessments without notice and a chance to be heard it violates article I, section 19 of the North Carolina Constitution and the due process clause of the fourteenth amendment to the Constitution of the United States. The court also held that the defendants were entitled to have attorney fees taxed against the plaintiff as part of the costs.

The Court of Appeals reversed the superior court on the three constitutional questions and on the question of attorney fees. Judge Becton dissented as to the part of the opinion of the Court of Appeals which held there was not a violation of the equal protection clause. The defendants appealed from that part of the Court of Appeals opinion which held the defendants had not been deprived

of any constitutional rights. We granted the defendants' petition for discretionary review as to the question of attorney fees.

Frank M. Wooten, Jr. and Browning, Sams, Poole, Hill & Hilburn, by Robert R. Browning and P. Gwynett Hilburn, for plaintiff appellee.

Baker, Jenkins & Jones, P.A., by Ronald G. Baker, for defendants, and Charles J. Vaughan, for intervenor-defendants appellants.

Geo. Thomas Davis, Jr., for Hyde County Drainage District #7.

William P. Mayo, for Beaufort County Drainage District Number One (Pantego Creek Drainage District), Beaufort County Drainage District Number Two (Broad Creek Drainage District), Beaufort County Drainage District Number Five (Albemarle Drainage District), and Beaufort County Pungo Drainage District Number One (Pungo River Drainage District), amicus curiae.

Robert B. Broughton, General Counsel, and Fred Alphin, Associate General Counsel, for North Carolina Farm Bureau Federation, Inc., amicus curiae.

Lacy H. Thornburg, Attorney General, by Daniel C. Oakley, Special Deputy Attorney General, and Philip A. Telfer, Assistant Attorney General, for the State of North Carolina, amicus curiae.

WEBB, Justice.

This appeal involves several questions regarding drainage district assessments. Chapter 156 of the General Statutes of North Carolina which was enacted in 1909 authorizes the creation of drainage districts. The constitutionality of this statute was established in *Sanderlin v. Luken*, 152 N.C. 738, 68 S.E. 225 (1910). We held in that case that the procedure which allowed the clerks of superior court to order the establishment of drainage districts did not constitute an unconstitutional delegation of legislative power. We also held that drainage district assessments, which are assessed for the benefit of the members of the district, are not taxes which require a vote of the people before they may be imposed. The defendants in this case raise several questions as to parts of Chapter 156.

[1] The first question posed by this appeal is whether the defendants who are residents of Hertford County have been denied the equal protection of the laws under article I, section 19 of the Con-

stitution of North Carolina and the fourteenth amendment to the Constitution of the United States. The defendants contend they are deprived of the equal protection of the laws because they cannot vote for the Clerk of Superior Court of Northampton County, who appoints the commissioners of the drainage district, while the owners of property in the drainage district who live in Northampton County can vote for the clerk. We agree with the defendants and reverse the Court of Appeals.

In this case we receive guidance from *White v. Pate*, 308 N.C. 759, 304 S.E.2d 199 (1983). In that case the plaintiffs brought an action to prevent the clerk of superior court from appointing drainage district commissioners. They alleged that because the commissioners were not elected they were deprived of the equal protection of the laws under the North Carolina Constitution by not being allowed to vote for the commissioners. The drainage district in that case was located in a single county. Justice Mitchell, writing for this Court and relying on several cases, said that in deciding an equal protection case a two-tiered scheme of analysis must be made. When a classification operates to the disadvantage of a suspect class or if a classification impermissibly interferes with the exercise of a fundamental right a strict scrutiny must be given the classification. Under the strict scrutiny test the government must demonstrate that the classification it has imposed is necessary to promote a compelling governmental interest. If the classification does not interfere with a fundamental right or create a suspect class a rational basis analysis is required. If the governmental classification bears some rational relationship to a conceivable legitimate interest of government the classification does not violate the equal protection of the laws.

We held in *White* that the owners of land in a drainage district do not comprise a suspect class. We also held in that case that the plaintiffs were not deprived of a fundamental right by not being allowed to vote for drainage district commissioners because no one was allowed to so vote. We said, "[n]othing in our prior decisions, however, should be taken as indicating that the right to vote, per se, is constitutionally protected." *White v. Pate*, 308 N.C. 759, 768, 304 S.E.2d 199, 205.

This case is distinguished from *White* in that the drainage district in this case lies in two counties. In *White* the drainage district was in one county. The landowners in that district who

lived in the county could vote for the clerk who appointed the commissioners. In this case a part of the landowners who live in the drainage district can vote for the clerk who appoints the commissioners and a part may not. The right to vote on equal terms is a fundamental right. *Dunn v. Blumstein*, 405 U.S. 330, 31 L.Ed.2d 274 (1972); *Texfi Industries v. City of Fayetteville*, 301 N.C. 1, 269 S.E.2d 142 (1980). The defendants have been deprived of a fundamental right. We must use strict scrutiny in determining whether the equal protection of the laws was denied the defendants in this case.

We hold that the plaintiff has not demonstrated that the classification of voters made in this case was necessary to promote a compelling governmental interest. The interest which was to be promoted was the placing in office of drainage district commissioners. The clerk could have accomplished this by having elected commissioners which would not have deprived the defendants of the right to vote on equal terms with owners of land in the district who live in Northampton County. It was not necessary to have appointed commissioners in this case in order to promote the governmental interest.

The appellee argues that it is erroneous to equate ownership of land in the district with the right to vote. They say that owning land in either county of the district does not qualify or disqualify a person from voting for the clerk of superior court. A person may own land in the Northampton part of the district and not be allowed to vote for the clerk if he does not live in Northampton County. On the other hand, a person may own land in the Hertford part of the district and vote for the clerk if he or she lives in Northampton County. We can concede this may be the case without changing the outcome of this case. The fact that there are owners of land in the Hertford County section of the district who cannot vote for the clerk while owners of land in the district who live in Northampton County can vote for the clerk establishes the constitutional infirmity of this procedure.

[2] The defendants next contend that the unfettered discretion provided by N.C.G.S. § 156-81(a) and (i) to the clerks of superior court to determine whether drainage commissioners should be elected or appointed is an unconstitutional delegation of legislative powers. Article II, section 1 of the Constitution of North Carolina provides: "[t]he legislative power of the State shall be vested in the General

Assembly, which shall consist of a Senate and a House of Representatives." This section of the Constitution has been interpreted to mean that the General Assembly cannot delegate a portion of its legislative power to subordinate agencies or units of government without accompanying such a delegation with adequate guiding standards to govern the exercise of the delegated power. *Adams v. Dept. of N.E.R.*, 295 N.C. 683, 249 S.E.2d 402 (1978); *Watch Co. v. Brand Distributors*, 285 N.C. 467, 206 S.E.2d 141 (1974); *Turnpike Authority v. Pine Island*, 265 N.C. 109, 143 S.E.2d 319 (1965); *Williamson v. Snow*, 239 N.C. 493, 80 S.E.2d 262 (1954); *Coastal Highway v. Turnpike Authority*, 237 N.C. 52, 74 S.E.2d 310 (1953); *Efird v. Comrs. of Forsyth*, 219 N.C. 96, 12 S.E.2d 889 (1941).

The plaintiff and the defendants agree that giving the clerks of superior court the power to determine whether commissioners shall be elected or appointed is a delegation of legislative power. No standard was set by the General Assembly for the making of this decision. The plaintiff, relying on *Adams*, says this is not an unconstitutional delegation of legislative power. It says this is so because the General Assembly has not delegated the power to set policy to the clerks. It quotes from N.C.G.S. § 156-54 which says the drainage of swamplands and surface water are the objects to be maintained and the way commissioners are chosen was considered to be inconsequential by the General Assembly to the main thrust of the drainage law. The decision as to whether commissioners are to be elected or appointed should be considered, says the plaintiff, as a ministerial act.

We cannot hold that the decision as to how a governing board of a drainage district is chosen is a ministerial act. The purpose of the act to have commissioners selected can be attained without the General Assembly's relinquishment of this legislative power. We hold it is an unconstitutional delegation of legislative power.

[3] The appellants next contend that they were denied due process of law under the law of the land clause, article I, section 19 of the Constitution of North Carolina when maintenance assessments were levied against them without notice and an opportunity to be heard. N.C.G.S. § 156-138.3 provides specifically that notice is not required before a maintenance assessment is made. The defendants concede that *Breiholz v. Pocahontas County*, 257 U.S. 118, 66 L.Ed. 159 (1921), holds that such notice is not required under

the Constitution of the United States. We said in *Watch Co. v. Distributors*, 285 N.C. 467, 474, 206 S.E.2d 141, 146, "in the construction of the provision of the State Constitution, the meaning given by the Supreme Court of the United States to even an identical term in the Constitution of the United States is, though highly persuasive, not binding upon this Court." We must examine the defendants' due process claim pursuant to our State Constitution.

The defendants rely on *Bowie v. West Jefferson*, 231 N.C. 408, 57 S.E.2d 369 (1950) and *Lexington v. Lopp*, 210 N.C. 196, 185 S.E. 766 (1936). In *Bowie* the General Assembly had enacted a special act which allowed the Town of West Jefferson to revalue property within the town without notice to the taxpayers or an opportunity for them to be heard. We held that this statute was unconstitutional under both the State and Federal Constitutions. We said that notice and an opportunity to be heard were not necessary if the amount of tax to be imposed was simply a matter of mathematical computation but it is required where the tax is not to be calculated by a precise standard. In *Lexington* we affirmed a judgment of superior court which held the provisions of a city charter were unconstitutional which allowed the city to make improvements to a street and make assessments for them without notice to the landowners and an opportunity to be heard.

We hold that we are bound by *Bowie* and *Lexington* to hold that N.C.G.S. § 156-138.3 violates the law of the land clause of the Constitution of North Carolina insofar as it dispenses with notice and an opportunity to be heard before imposing maintenance assessments on landowners within the drainage district. The imposition of these assessments was not a matter of mathematical computation. It took some discretion on the part of the commissioners to determine what maintenance to provide and on this discretion depended the amount of the assessments. The landowners should have been given an opportunity to be heard.

[4] The defendants next argue that the Court of Appeals was in error in holding the superior court did not have the authority to award attorney fees to them. We agree with the defendants and reverse the Court of Appeals on this point. N.C.G.S. § 6-21 provides in part:

> Costs in the following matters shall be taxed against either party, or apportioned among the parties, in the discretion of the court:

. . . .

(8) In all proceedings under the Chapter entitled Drainage, except as therein otherwise provided.

. . . .

The word "costs" as the same appears and is used in this section shall be construed to include reasonable attorney's fees in such amounts as the court shall in its discretion determine and allow. . . .

N.C.G.S. § 6-21 allows a court to award attorney fees to the defendants in this case unless it is otherwise provided in Chapter 156 of the General Statutes.

The Court of Appeals held and the plaintiff argues to this Court that N.C.G.S. § 156-105 provides that assessments shall be collected in the same manner as state and county taxes and N.C.G.S. § 105-374 which provides for the foreclosure of tax liens provides in subsection (i) as follows:

The word "costs," as used in this subsection (i), shall be construed to include one reasonable attorney's fee for the plaintiff in such amount as the court shall, in its discretion, determine and allow. When a taxing unit is made a party defendant in a tax foreclosure action and files answer therein, there may be included in the costs an attorney's fee for the defendant unit in such amount as the court shall, in its discretion, determine and allow. . . .

The plaintiff argues that this section provides only for the allowance of attorney fees to the taxing authorities and not taxpayers as part of the costs, that this section is incorporated into Chapter 156, and that the defendants are not entitled to attorney fees as a part of the costs.

Assuming that N.C.G.S. § 105-374(i) is incorporated by reference into Chapter 156, we do not believe that because the section provides for attorney fees for taxing authorities that it prohibits attorney fees being taxed as part of the costs for members of drainage districts. If we gave the statute the interpretation for which the plaintiff contends attorney fees as part of the costs would be governed entirely by N.C.G.S. § 105-374(i) and N.C.G.S. § 6-21(8) would have no meaning.

[5] The plaintiffs also contend that the award of the attorney fees as part of the costs was arbitrary and without basis. After the judgment in superior court was entered in this case Ronald G. Baker, who represented the original defendants in the trial of this case, and Charles J. Vaughan, who represented the intervening defendants, filed affidavits supporting their motions for attorney fees. Based on these affidavits the court found that Mr. Baker had devoted approximately 75.5 hours to the case and Mr. Vaughan had devoted approximately 81.42 hours to the case. The court found that each of these attorneys had performed valuable legal services in connection with the defense of the case. The court found that in light of the complexities of the case each of the attorneys should be paid at the rate of $65.00 per hour. The court awarded $4,900 to Mr. Baker and $5,300 to Mr. Vaughan as attorney fees to be taxed as part of the costs.

It was error for the Court of Appeals to disturb this order of the superior court. The superior court considered the skill, time, and labor expended as well as the complexity of the case. The fees allowed were reasonable under the circumstances. *See Hudson v. Hudson*, 299 N.C. 465, 263 S.E.2d 719 (1980); *Perkins v. Perkins*, 85 N.C. App. 660, 355 S.E.2d 848 (1987); *Self v. Self*, 37 N.C. App. 199, 245 S.E.2d 541, *cert. denied*, 295 N.C. 648, 248 S.E.2d 253 (1978).

[6] The appellants contend that the provision of the drainage law which allows the clerks of court to appoint drainage commissioners is unconstitutional under article I, section 8 and article V, section 2 of the Constitution of North Carolina because it allows a commission which is not elected by the people to impose taxes upon them. We held in *Sanderlin v. Luken*, 152 N.C. 738, 68 S.E. 225, that drainage district assessments are not taxes. We are bound by *Sanderlin* to overrule this assignment of error.

The superior court also held that the manner in which the drainage district commissioners held their meetings violated Article 33c of Chapter 143 of the General Statutes of North Carolina, which is known as the open meetings law. The Court of Appeals affirmed this holding but said it did not deprive the defendants of due process. No assignment of error was made in this Court as to this part of the judgment of the superior court and we do not consider it. The superior court awarded the plaintiff judgment against the defendants for certain past assessments. No assignment

of error was made as to this part of the judgment and we do not consider it.

For the reasons stated in this opinion we reverse in part and affirm in part the opinion of the Court of Appeals. We remand to the Court of Appeals for remand to the superior court for a judgment consistent with this opinion.

Reversed in part, affirmed in part and remanded.

STATE OF NORTH CAROLINA v. ARTHUR L. McELROY

No. 275A88

(Filed 13 June 1990)

1. **Homicide § 19.1 (NCI3d)— murder trial—self-defense—practice of martial arts and possession of weapons by defendant—admission as harmless error**

Assuming arguendo that the trial court in a first degree murder case erred in allowing the state to introduce as relevant to self-defense testimony that defendant practiced martial arts exercises and possessed weapons, this error was harmless in light of the substantial evidence presented by the state tending to show that defendant shot and killed the victim with premeditation and deliberation.

Am Jur 2d, Homicide §§ 291, 315.

2. **Criminal Law § 50.2 (NCI3d)— witness's understanding of meaning of statement—admissible nonexpert opinion**

Testimony by a state's witness in a murder trial that he understood defendant's warning to him not to tell anyone what had occurred or "you know what will happen" to mean that defendant would shoot or kill him was admissible nonexpert opinion testimony under N.C.G.S. § 8C-1, Rule 701 since it was rationally based on the witness's perception and was helpful to the jury in explaining why the witness did not immediately report the victim's death to law enforcement authorities.

Am Jur 2d, Expert and Opinion Evidence §§ 391, 392.

APPEAL of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by *Johnson, J.*, at the 14 March 1988 Criminal Session of Superior Court, CUMBERLAND County, upon a jury verdict of guilty of first degree murder. Heard in the Supreme Court 14 February 1990.

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

Malcolm Ray Hunter, Jr., Appellate Defender, by Staples Hughes, Assistant Appellate Defender, for defendant.

FRYE, Justice.

Defendant presents two issues on appeal: (1) whether the trial court erred in allowing the State to introduce testimony that defendant practiced martial arts exercises and possessed weapons; and (2) whether the trial court erred in allowing one of the State's witnesses to testify concerning the witness' understanding of what defendant meant when he warned the witness not to tell anyone about what had happened. We need not decide the first issue because, even if it was error to introduce the evidence concerning defendant's participation in martial arts exercises and possession of weapons, it was harmless error. With regard to the second issue, we conclude that the trial court did not err.

In a proper indictment, defendant was charged with first degree murder in the death of Mickey Johnson. The case was tried as a noncapital case. The evidence and the testimony presented at trial tended to show that the victim boarded in the home which defendant shared with his mother. On the evening of 31 October 1986, defendant and James Rutherford, who worked with defendant as a house painter, had dinner at the home of some friends. Both defendant and Rutherford drank two or three beers and a wine cooler and then smoked some marijuana before defendant left to go to his own home. After defendant left, Rutherford remained at the friend's home and fell asleep on the couch in the living room of the home.

Defendant, who is a diabetic, called Rutherford at the friend's home about 4:00 or 4:30 a.m. that morning and asked Rutherford to come to his house because he was having a diabetic attack and wanted someone there who could call an ambulance if he got worse. Rutherford testified that when he arrived at defendant's

home, he observed a windowpane broken out of the door leading to the kitchen. When Rutherford entered the kitchen, Mickey Johnson was slumped in a chair by the refrigerator. Johnson's eyes were closed, and blood was coming from his chest. Rutherford testified that defendant entered the room with a .22 caliber rifle and told Rutherford, "I'm going to finish him off." Rutherford said that defendant then fired two shots into the victim, stopping to reload between the two shots.

When he was arrested, Rutherford gave a written statement to the police. In this written statement, Rutherford told the police that he saw defendant fire only one shot at the victim and that before he fired this shot, defendant said, "I want to make sure he's dead." Rutherford testified that while he had read the statement before signing it, he had actually told the officer that he saw defendant fire two shots, but the officer did not write it down correctly. At trial, Pete Tindall, one of defendant's witnesses, testified that Rutherford had told him that Rutherford only saw defendant fire one shot at the victim, and that was a shot to the victim's head. The medical examiner testified that the victim had two gunshot wounds to the left chest, which had caused the victim's death, and a superficial wound to the head.

According to Rutherford, defendant told him that he had been awakened by the sound of a window smashing. Defendant said that when he awoke, he began shaking and could not move. Rutherford said that defendant told him the victim, who was very drunk at the time, came into defendant's room with a knife, waving it, and saying, "You want to cut me? Cut me now. I doubt it. I doubt it." The victim was six feet, two inches tall and weighed about 165 pounds. Defendant is about five feet, four inches tall and weighs about 120 to 125 pounds.

Rutherford testified that after he arrived at defendant's home, defendant's eyeballs kept moving from left to right "like he was paranoid." Rutherford further testified that defendant was acting upset and confused and could not stop shaking. Defendant offered evidence through the testimony of a physician, who is a specialist in endocrinology, that he had been a diabetic for fourteen years and that in the preceding months, he had had repeated episodes of hypoglycemia characterized by a decrease in consciousness. One of these episodes had resulted in a probable seizure and an emergency room visit in August 1986.

According to Rutherford's testimony, after defendant shot Johnson, defendant asked Rutherford to help him carry the body to the house next door. Rutherford assisted as requested, and the two men dropped the body on a pile of sheetrock. Defendant then covered the body with more sheetrock, and defendant and Rutherford returned to defendant's house. Before they left defendant's house with the body, defendant warned Rutherford not to tell anyone about what he had seen. Defendant repeated this warning to Rutherford when they returned to the house after leaving the body next door. Johnson was reported missing in November 1986, but his body was not found until December 1986.

Defendant was questioned about the death and gave the detective a full written statement after being advised of his rights. In this statement, defendant told the police that he had gotten home from a party about 1:00 a.m. the morning of 1 November 1986 and had gone to bed after smoking a cigarette. He related that he was awakened by a voice which sounded like Johnson. Defendant claimed that he forced himself to get up and walked into the hallway. There he stepped on a drop of blood. In his statement, defendant said that he drank seven-up and sugar until he "started coming around." After he saw the broken glass and the knife, he called Rutherford.

Defendant did not testify at trial, but he did present evidence at trial through the testimony of Susan Willis, the girlfriend of the victim; Pete Tindall, a friend of defendant; and Dr. Mary K. Lawrence, the specialist who had treated defendant for his medical problems. After being instructed on first degree murder, second degree murder, and manslaughter, the jury returned a verdict of guilty of first degree murder. The trial court imposed a sentence of life imprisonment, and defendant appeals from this conviction.

[1] The State questioned Rutherford, its chief witness, about defendant's participation in kick boxing and other martial arts activities and about defendant's interest in weapons. Rutherford's testimony was that defendant practiced twice a week with certain martial arts weapons such as nunchucks, throwing stars, or tripod weapons and defendant practiced kick boxing with a large bag tied in a tree in his backyard. Rutherford also testified that defendant owned a .25 caliber firearm and that he watched many martial arts films. This testimony was admitted over defendant's objections. Defendant also objected to the State's questioning during

the cross-examination of Pete Tindall concerning defendant's kick boxing practice and defendant's use of martial arts weapons.

When defendant objected to Rutherford's testimony concerning defendant's involvement with martial arts activities and moved to strike some of that testimony from the record, the trial judge stated, "We receive this evidence for any purported claims by the Defendant in respect to self-defense. It is received for that limited purpose only." Defendant contends that this evidence is irrelevant to his self-defense claim and that the trial judge erred in admitting it. Defendant further contends that this evidence was extremely prejudicial and, while defendant did not place his character in issue, this evidence was almost certainly taken by the jury as probative of character for violence and aggression. In support of these contentions, defendant cites *State v. Morgan*, 315 N.C. 626, 340 S.E.2d 84 (1986), for the proposition that evidence of extrinsic acts which are arguably violent or aggressive in nature are inadmissible on the issues of whether a defendant asserting self-defense at trial was the aggressor, of whether he feared the deceased, of whether he believed it necessary to exercise deadly force, or of whether such belief was reasonable.

We find it unnecessary to discuss defendant's contentions relative to this issue because, even assuming *arguendo* that the admission of this testimony was improper, the error was harmless in light of the other evidence presented at trial. Even if defendant proves error in the trial court's ruling, relief will not ordinarily be granted absent a showing of prejudice. *State v. Herring*, 322 N.C. 733, 370 S.E.2d 363 (1988). "A defendant is prejudiced by errors . . . when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is on the defendant." N.C.G.S. § 15A-1443(a) (1988).

The State presented evidence that the victim was shot three times by a .22 rifle which had to be reloaded each time before the next shot could be fired. The evidence further revealed that defendant shot the victim at least one time after Rutherford arrived and after defendant told him either, "I want to make sure he's dead," or "I'm going to finish him off." Rutherford also testified that the victim was alive at the time Rutherford arrived at defendant's home because the victim was slumped over in the chair in

the kitchen, and he was snoring. Defendant fired at least one shot at the victim after stating words to the effect that he was going to make sure the victim was dead. The substantial evidence presented by the State clearly indicated that defendant shot and killed Johnson with premeditation and deliberation. Therefore, it is highly unlikely that the jury would have reached a different verdict had the testimony about defendant's training in martial arts and possession of weapons not been admitted, and the admission of this evidence, even if error, was harmless error. *See* N.C.G.S. § 15A-1433(a).

[2] In his second assignment of error, defendant contends that the trial court improperly allowed Rutherford to testify as to Rutherford's understanding of defendant's intention from a statement he made to Rutherford. During the State's direct examination of Rutherford, the following exchange took place:

> Q. Now, other than attempting to clean up the blood in the house, what was Arthur doing?
>
> A. Cleaning it up and telling me what happened.
>
> Q. And that's what you have already told us?
>
> A. Yes.
>
> Q. Did he tell you anything about you remaining silent?
>
> A. No. He just told me that if I said anything that, you know, what would happen.
>
> Q. What did you understand him to mean by, "you know what will happen?"
>
> [Objection by defense counsel overruled.]
>
> THE WITNESS: That he was going to shoot me or whatever, kill me.

Defendant contends that this testimony was inadmissible because a witness may not give his opinion of another person's intention on a particular occasion.

Rule 701 of the North Carolina Rules of Evidence deals with opinion testimony of nonexpert witnesses. The rule provides:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception

> of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

N.C.G.S. § 8C-1, Rule 701 (1986). In support of his contention that this testimony is inadmissible under this rule, defendant states the general rule found in 1 Brandis on North Carolina Evidence § 129 (3rd ed. 1988), that a witness may not give his opinion of another person's intention on a particular occasion. In further support of this contention, defendant cites *State v. Sanders*, 295 N.C. 361, 245 S.E.2d 674 (1978).

In *Sanders*, the defendant was appealing a ruling by the trial judge excluding the testimony of three defense witnesses who were to testify as to why they thought the officers entered the holding cell prior to the stabbing death for which defendant was on trial. *Id.* at 369, 245 S.E.2d at 680. The witnesses would have testified that they thought the officers went to the cell to "beat up" the defendant. *Id.* at 369, 245 S.E.2d at 680-81. This Court held in *Sanders* that this testimony was inadmissible because, while the witnesses could tell the jury what the officers did as they entered the cell, they were no more qualified than the jury to conclude what the officers intended to do when they entered the cell. *Id.* at 370, 245 S.E.2d at 681. However, in the present case, defendant spoke directly to Rutherford which placed Rutherford in a better position to tell the jury what that statement meant to him than the witnesses in *Sanders*. In *Sanders*, the witnesses were merely speculating as third parties as to what the officers were going to do to the defendant when the officers entered the cell. Rutherford, on the other hand, was asked to tell what defendant's statements meant to Rutherford himself.

Rutherford's testimony meets the requirements of Rule 701 in that it was both rationally based on his perception and helpful to the jury. Rutherford was explaining what the statement meant to him and thus what effect it had on him, and this testimony was helpful in explaining why Rutherford did not immediately report Johnson's death to law enforcement authorities. His testimony was properly admitted under Rule 701.

For the reasons stated herein, we find no prejudicial error in defendant's trial.

No error.

STATE OF NORTH CAROLINA v. RONNIE EARL ELEY

No. 441A88

(Filed 13 June 1990)

Judges § 2 (NCI3d)— special superior court judge—commission not received—jurisdiction

A special superior court judge had jurisdiction to preside at a duly authorized special criminal session of the Superior Court of Hertford County at which defendant was convicted where a Gates County venire was requested for this Hertford County criminal trial; a commission was issued by the Chief Justice of the Supreme Court of North Carolina assigning Judge Beaty to preside over the selection of the jury in Gates County; no special session was set for the trial because it was unclear how long it would take to select the jury; the jury voir dire was completed on a Friday, at which point Judge Beaty telephoned the Administrative Assistant of the Chief Justice to inform him that the trial could begin on Monday in Hertford; the Administrative Assistant followed his procedure for assigning an available judge to preside over a special session; the Administrative Assistant's records indicated that the commission was properly issued but the document was not received by the Clerk of Court of Hertford County, the District Attorney, or the Judge; and a commission was later issued *nunc pro tunc* after the technical omission was discovered. Judge Beaty's jurisdiction, power, and authority as a superior court judge flowed from the Constitution of North Carolina and his appointment and commission by the Governor as a superior court judge, and his assignment by the Chief Justice of the Supreme Court to preside at the special session was merely the mode by which Judge Beaty was directed to preside at that session of court. Furthermore, there was ample authority in article IV § 11 of the North Carolina Constitution to enable the Chief Justice to issue the *nunc pro tunc* commission and N.C.G.S. § 7A-46 does not purport to instruct the Chief Justice as to how his order for a special session is to be issued. The commission is merely a manifestation that the session has been ordered and is not essential to the validity of the Chief Justice's order establishing the special session or the proceedings occurring during such session.

Am Jur 2d, Judges §§ 248, 250, 253-255.

Chief Justice EXUM did not participate in the deliberation or decision of this appeal.

APPEAL of right pursuant to N.C.G.S. § 7A-27(a) from judgment imposing sentence of life imprisonment entered by *Beaty, J.*, at the 6 June 1988 Special Criminal Session of Superior Court, HERTFORD County, upon a jury verdict of guilty of murder in the first degree. Defendant's motion to bypass the Court of Appeals as to additional judgments for armed robbery and conspiracy allowed by the Supreme Court 29 March 1988. Heard in the Supreme Court 14 March 1990.

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

Malcolm Ray Hunter, Jr., Appellate Defender, by Staples Hughes, Assistant Appellate Defender, for defendant-appellant.

MARTIN, Justice.

Defendant, who was charged with murder in the first degree, robbery with a dangerous weapon, and conspiracy, was convicted by a jury on all charges at the 6 June 1988 Special Criminal Session of the Superior Court of Hertford County, the Honorable James A. Beaty, Jr. presiding. Following defendant's convictions, Judge Beaty entered judgment and sentenced defendant to life in prison for the murder. The armed robbery and conspiracy charges were consolidated for judgment with a sentence of forty years imposed for those convictions. On appeal, defendant does not challenge the lawfulness of his arrest, arraignment, or the procedural conduct of the trial itself. Defendant's sole argument on this appeal is that Judge Beaty was without jurisdiction to conduct the trial at the Special Criminal Session of Superior Court in Hertford County because he had not been assigned by the Chief Justice of the Supreme Court of North Carolina to preside over that session of court. Therefore, defendant asserts that his trial should be declared null and void. Upon a careful examination of the record, we disagree with defendant's contentions and hold that Judge Beaty had jurisdiction to preside over the special session of court at which defendant was tried.

With respect to the issue raised upon this appeal the record in this case shows the following: The Honorable Franklin R. Brown requested a Gates County venire for this Hertford County criminal trial. In a commission issued on 11 April 1988, the Chief Justice of the Supreme Court of North Carolina assigned the Honorable James A. Beaty, Jr. to preside over the selection of the jury at the 30 May 1988 Special Criminal Session of the Superior Court of Gates County. No special session was set for the trial itself because it was unclear at that time how long it would take to select the jury. The jury voir dire was completed on Friday, 3 June 1988, at which point Judge Beaty telephoned Mr. Dallas Cameron, Jr., the Administrative Assistant to the Chief Justice, to inform him that defendant's trial could begin in Hertford County on Monday, 6 June 1988.

As the Administrative Assistant to the Chief Justice, Mr. Cameron had the duty to "[a]ssist the Chief Justice [of the Supreme Court of North Carolina] in performing his duties relating to the assignment of superior court judges" and to "[a]ssist the Supreme Court in preparing calendars of superior court trial sessions." N.C.G.S. § 7A-345(1) (1989) and N.C.G.S. § 7A-345(2) (1989), respectively. Over the years, Mr. Cameron has developed an identifiable procedure for the Chief Justice when ordering a special session of court and assigning an available judge to preside over the special session. According to Mr. Cameron's sworn affidavit, his procedure in the spring of 1988 was as follows:

> In the Superior Court Division, when I become aware of the necessity for the assignment of a Superior Court Judge and/or the establishment of a special session of court and receive the approval of the Senior Resident Judge in the District, I determine what judges are available for assignment to that term and note on my schedule the date, location and nature of the session of court, and the Superior Court Judge to be assigned to it. In May and June of 1988 my practice was to place a zero to the left of such a schedule notation, indicating that the commission had not been issued. I then caused the commission to be prepared, indicating the type of session to be held (Criminal, Civil or Mixed), the county, the date the session was to commence, the date of the commission and the Superior Court Judge who was assigned to hold the session. I affixed the signature of the Chief Justice to the document by means of a rubber stamp, and attested the signature

as Administrative Assistant. I then conveyed the document to my secretary, who copied it and mailed it to the Judge who had been assigned to hold the term of court, the District Attorney, and the Clerk of Court in the appropriate county. After the commission had been prepared, and the Chief Justice's stamped signature affixed thereto, I changed the zero on my schedule document to an asterisk, indicating that the commission had been issued.

In May and June of 1988, it was my practice to take an identical commission document to the Chief Justice for his handwritten signature within a few days of the commission having been issued in the manner set forth above.

The record further shows that while Mr. Cameron was talking with Judge Beaty on 3 June 1988 regarding the establishment of a special criminal session in Hertford County to commence 6 June 1988, he made a notation on his master schedule authorizing issuance of the commission. To the best of Mr. Cameron's recollection, the commission was then prepared and, following his usual procedure, he stamped the Chief Justice's name on the commission, affixed his own signature thereto, and gave the document to his secretary to be copied and mailed. Having completed those steps of the process, Mr. Cameron then placed an asterisk on his master schedule indicating that the commission had been properly issued. The record is less clear regarding what happened to the commission document at that point. What is clear, however, is that the document was not received by the Clerk of Court of Hertford County, the District Attorney, or Judge Beaty. Furthermore, the Administrative Office of the Courts has not been able to locate its copy of the commission document and has concluded that the duplicate which is routinely made from that copy for the Chief Justice's handwritten signature was apparently not prepared.

When this technical omission was brought to Mr. Cameron's attention, a proper *nunc pro tunc* commission was issued on 3 October 1989 to take the place of the missing order. In addition to establishing the special session of court, the commission named the Honorable James A. Beaty, Jr. as the presiding judge.

Turning to the legal issue before us, we hold that Judge Beaty had jurisdiction to preside over defendant's trial in Hertford County. Our holding is supported by *State v. Ledford*, 28 N.C. 5 (1845), a case involving whether it was necessary to set out in a perjury

indictment the commission of the trial judge presiding at the prior trial at which the perjury was committed. In holding that such was not necessary, the great Chief Justice Ruffin wrote for the Court:

> The truth is, however, that such designation or appointment is not in the nature of a special commission or authority to hold a court created by the act; but the powers of the judge are derived from his election and commission as a judge of the Superior Courts, and the designation directed by the act serves only to make it the duty of the particular judge to hold the particular term. . . . The provision of the act of 1842, ch. 16, is nothing more than a mode by which the judge is assigned to the duty of holding a particular term of a Superior Court by the Governor . . . . All persons must take notice of the judicial character of the persons who are the judges of the highest courts of original jurisdiction, civil and criminal. *S. v. Kimbrough*, 13 N.C., 431.
>
> . . . .
>
> In reference to the judge's commission, we have already said, upon authority, that his official character is to be judicially noticed. There can be no such absurdity in the law as that the judge who by the general law and a permanent commission holds a Superior Court is to listen to evidence that he is the judge of the Court. The record made by him establishes to those who succeed him that he held the court at the terms at which, according to the purport of the record, he appears to have held them.

State v. Ledford, 28 N.C. at 9-10.

Likewise, in *Sparkman v. Daughtry*, 35 N.C. 168 (1851), this Court held:

> Nor was it necessary that the appointment of the judge to hold the court should be spread upon the record. He does not claim his powers, as a judge of the Superior Courts, from the appointment of the Governor, but from his election and commission as a judge of the Superior Courts. The appointment by the Governor is, under the act of 1844, ch. 16, nothing but a mode by which the judge is assigned to hold the special term of the court. We are bound, then, to presume, *prima*

facie, that the special term of Gates Superior Court was regularly ordered and duly held, until the contrary appears.

Sparkman v. Daughtry, 35 N.C. at 170.

We now reaffirm the above holdings of this Court and note that these principles also apply to the constitutional office of special superior court judges.[1] Judge Beaty's jurisdiction, power, and authority as a superior court judge flowed from the Constitution of North Carolina and his appointment and commission by the Governor as a superior court judge. N.C. Const. art. IV, § 9.

His assignment by the Chief Justice of this Court, pursuant to article IV, § 11 of the Constitution of North Carolina, to preside at the 6 June 1988 special session of Superior Court of Hertford County was merely the mode by which he was directed to preside at that session of court.[2] The issuance of a commission by the Chief Justice assigning a superior court judge to preside over a session of superior court does not endow the judge with jurisdiction, power, or authority to act as a superior court judge. The commission so issued merely manifests that such judge has been duly assigned pursuant to our Constitution to preside over such session of court.

Further, we find ample authority in article IV, § 11 of our Constitution to enable the Chief Justice to issue the *nunc pro tunc* commission on 3 October 1989 to memorialize the assignment of Judge Beaty to preside over the 6 June 1988 session of Superior Court of Hertford County. This section only directs that the Chief Justice make such assignments, the method of so doing is left to the Chief Justice and the Supreme Court. The Administrative Assistant to the Chief Justice has been delegated the responsibility of assisting the Chief Justice in the making of such assignments. N.C.G.S. § 7A-345 (1989). This Court may take judicial notice of the official records of the Office of the Chief Justice of the Supreme Court, including those records kept by the Administrative Assistant to the Chief Justice. *See Staton v. Blanton*, 259 N.C. 383,

---

1. Judge Beaty at the time of this trial was a special superior court judge. On 1 January 1989, he became a regular superior court judge.

2. Under the prior law controlling when *State v. Ledford* and *Sparkman v. Daughtry* were decided, superior court judges were assigned by the Governor, rather than by the Chief Justice as is the practice today. N.C. Const. of 1776, § 13.

130 S.E.2d 686 (1963). Our examination of those records for the week of 6 June 1988 discloses, in accord with the practices of the Administrative Assistant to the Chief Justice, that a special session of superior court for the trial of criminal cases in Hertford County was scheduled for that week and that Judge Beaty was assigned by the Chief Justice to preside over that session of court.

A *nunc pro tunc* order may be issued to record an order actually made which through some inadvertence was never entered in the record of the court. *See* 56 Am. Jur. 2d *Motions, Rules, and Order* § 44 (1971). In determining the appropriateness of entering a *nunc pro tunc* order, the court may consider the record itself, other written evidence, and other satisfactory evidence including parol evidence. *Id.* Thus, in considering the constitutional authority of the Chief Justice and the Supreme Court of North Carolina, the records of the office of the Administrative Assistant to the Chief Justice and the record in this appeal, we hold that the issuance of the *nunc pro tunc* commission on 3 October 1989 was unquestionably lawful and in full accord with the Constitution of North Carolina.

Defendant finally argues that the Chief Justice failed to authorize the 6 June 1988 session of court pursuant to N.C.G.S. § 7A-46. Without deciding the intriguing question of whether this statute violates our Constitution, the record as reviewed above clearly supports our holding that the Chief Justice complied with this statute. The statute does not purport to instruct the Chief Justice as to how his order for a special session is to be issued. Defendant erroneously argues that without a paper commission in hand the Chief Justice's order establishing a special session of court is a nullity. Again, the commission is merely a manifestation that the session has been ordered. It is not essential to the validity of the Chief Justice's order establishing the special session or the proceedings occurring during such session. This argument is rejected.

Further, when it appears from the record that a cause was tried at a special session of a superior court, it is presumed prima facie that an order for holding such session was duly made, and that it was duly held. *Sparkman v. Daughtry*, 35 N.C. 168. Such is the case here. Defendant has failed to rebut this presumption.

We hold that Judge Beaty had jurisdiction to preside at the 6 June 1988 duly authorized Special Criminal Session of the Superior Court in Hertford County at which the defendant was convicted.

No error.

Chief Justice EXUM did not participate in the deliberation or decision of this appeal.

BRUCE STANCIL v. HOWARD STANCIL

No. 299PA89

(Filed 13 June 1990)

Corporations § 18 (NCI3d); Uniform Commercial Code § 37.5 (NCI3d) — investment securities — shares of closely held corporation — oral agreement for sale unenforceable

Shares of stock in a closely held corporation are instruments "of a type" commonly dealt in on securities exchanges or markets within the meaning of N.C.G.S. § 25-8-102(1)(a) and are thus investment "securities" for purposes of article 8 of the U.C.C. Therefore, the pertinent statute of frauds, N.C.G.S. § 25-8-319, renders an oral agreement for the sale of such shares unenforceable.

Am Jur 2d, Commercial Code §§ 113-115; Corporations § 681.

ON discretionary review of the decision of the Court of Appeals, 94 N.C. App. 319, 380 S.E.2d 424 (1989), reversing a judgment entered by *Watts, J.*, in the Superior Court, WILSON County, on 13 June 1988. Heard in the Supreme Court on 13 March 1990.

Lee, Reece & Weaver, by W. Earl Taylor, Jr. and Cyrus F. Lee; and Lane & Boyette, by Wiley L. Lane, Jr., for the plaintiff-appellee.

Narron, Holdford, Babb, Harrison & Rhodes, P.A., by Elizabeth B. McKinney and William H. Holdford, for the defendant-appellant.

MITCHELL, Justice.

The plaintiff filed this action on 29 October 1986 to compel the specific performance of an alleged oral agreement between the plaintiff and the defendant. The plaintiff alleged that the agree-

ment gave him the right to purchase the defendant's shares of stock in Bruce Stancil Refrigeration, Inc. The defendant raised as an affirmative defense that article 8 of the Uniform Commercial Code—Investment Securities (hereinafter, article 8), codified in Chapter 25 of the General Statutes of North Carolina, makes such oral agreements for the sale of investment securities unenforceable and moved for summary judgment. The trial court granted the motion and entered summary judgment for the defendant. On appeal, the Court of Appeals reversed and remanded. Thereafter, this Court granted the defendant's petition for discretionary review. We now conclude that the trial court's judgment was correct and reverse the decision of the Court of Appeals.

The pleadings and the parties' forecasts of evidence tended to show that the plaintiff incorporated Bruce Stancil Refrigeration, Inc. as a North Carolina close corporation in 1973. The defendant, the plaintiff's brother, became associated with the corporation in 1980. The plaintiff sold fifty percent of the stock in the corporation to the defendant for $35,000. In his complaint, the plaintiff alleged that the defendant orally agreed to sell his shares to the plaintiff in the event that the defendant (1) could not perform his duties at the company, (2) left the business, or (3) could not work with the plaintiff in an agreeable manner. Thereafter, the brothers' professional relationship deteriorated, and the defendant left the company on 12 October 1984. The plaintiff now contends that the defendant's departure gave the plaintiff the right under the oral agreement to purchase the defendant's shares of stock. The defendant has refused to sell his shares of stock in the closely held corporation to the plaintiff.

Before the trial court, the defendant moved for summary judgment arguing that N.C.G.S. § 25-8-319 makes oral contracts for sales of investment securities, including shares of stock of a closely held corporation, unenforceable. The trial court granted the defendant's motion. The Court of Appeals held that shares of stock in a closely held corporation, such as the shares of Bruce Stancil Refrigeration, Inc., are not investment "securities" as that term is defined in N.C.G.S. § 25-8-102 and, therefore, article 8—including N.C.G.S. § 25-8-319—does not apply to this case. We disagree.

With respect to the applicability of article 8, the Court of Appeals focused on the fact that the corporation involved here was closely held. Relying upon *Penley v. Penley*, 314 N.C. 1, 332

S.E.2d 51 (1985), and *Meiselman v. Meiselman*, 309 N.C. 279, 307 S.E.2d 551 (1983), the Court of Appeals concluded that shares of stock in the closely held corporation were not suitable for trading on a securities exchange or market. While this may be true, the Court of Appeals' reliance on *Penley* and *Meiselman* in this regard was misplaced. Since both of those decisions involved questions arising under the North Carolina Business Corporations Act, N.C.G.S. Chapter 55, they are inapposite to the central question in this case—whether shares of a closely held corporation are investment "securities" for purposes of article 8.

Under article 8, an investment security is an instrument which:

> (i) is issued in bearer or registered form; and (ii) is of a type commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment; and (iii) is either one of a class or series or by its terms is divisible into a class or series of instruments; and (iv) evidences a share, participation or other interest in property or in an enterprise or evidences an obligation of the issuer.

N.C.G.S. § 25-8-102(1)(a) (1986).[1]

The Court of Appeals indicated that shares of stock in a closely held corporation are not securities, because they are not suitable for trading on a securities exchange. 94 N.C. App. 319, 323, 380 S.E.2d 424, 427 (1989). We disagree. Under N.C.G.S. § 25-8-102, it is inconsequential whether the shares of stock in question are in fact suitable for trading or have ever been traded on an exchange or market. The statutory definition only requires in this regard that instruments be "of a type" that is dealt in on securities exchanges or markets in order to be deemed investment securities. Since stock exchanges and markets generally facilitate the trading of shares of corporate stock, it is our conclusion that the shares of a corporation—whether publicly or closely held—are instruments "of a type" commonly dealt in on securities exchanges or markets.

---

1. Even though 1989 N.C. Sess. Laws ch. 588, § 1, which took effect on 1 October 1989, amended this statute to classify "investment securities" as "certificated" or "uncertificated" securities, the operative definitions still deem "securities" to be instruments "of a type commonly dealt in on securities exchanges or markets." N.C.G.S. § 25-8-102 (Cum. Supp. 1989).

A few courts construing language analogous to that of N.C.G.S. § 25-8-102 have held that shares of stock of a closely held corporation are not investment "securities." *E.g., Rhode Island Hospital v. Collins*, 117 R.I. 535, 368 A.2d 1225 (1977); *Blasingame v. American Materials Inc.*, 654 S.W.2d 659 (Tenn. 1983). In *Rhode Island Hospital*, the Supreme Court of Rhode Island reasoned that shares of a closely held corporation were not investment securities because they did not exhibit a reasonable expectation that dividends would be derived from the profits of the corporation. *Rhode Island Hospital*, 117 R.I. at 538, 368 A.2d at 1227. In *Blasingame*, the Supreme Court of Tennessee concluded that shares of a closely held corporation were not investment "securities," because there was no available market for them. *Blasingame*, 654 S.W.2d at 664. Neither of those specific conditions is required by N.C.G.S. § 25-8-102. Therefore, we conclude that neither the reasoning of *Rhode Island Hospital* nor the reasoning of *Blasingame* is applicable to this case.

Before this Court, the plaintiff argues that shares of a closely held corporation are not instruments "of a type" commonly dealt in upon securities exchanges or markets and, therefore, are not investment "securities" for purposes of article 8 of the U.C.C.—Investment Securities. In *Zamore v. Whitten*, 395 A.2d 435 (Me. 1978), the Supreme Court of Maine accepted such an argument and stated that "stock in [a] close family corporate business is not of a type 'commonly dealt in upon securities exchanges or markets,' nor is it commonly recognized in any area as a medium for investment." 395 A.2d at 441. We simply disagree.

Other courts have held that shares of stock in a closely held corporation should be treated as investment "securities" under article 8. *See United Independent Insurance Agencies Inc. v. Bank of Honolulu and Ramil*, 6 Haw. App. 222, 718 P.2d 1097 (1986); *Smith v. Baker*, 715 S.W.2d 890 (Ky. Ct. App. 1986); *Pantel v. Becker*, 391 N.Y.S.2d 325 (N.Y. Sup. Ct. 1977); *Jennison v. Jennison*, 346 Pa. Superior Ct. 47, 499 A.2d 302 (1985); *Associates Financial Services Company of Utah, Inc. v. Sevy*, 776 P.2d 650 (Utah App. 1989); *Wamser v. Bamberger*, 101 Wis.2d 647, 305 N.W.2d 158 (1981). For example, the Superior Court of Pennsylvania in *Jennison* concluded that "[s]hares of stock in a closely held corporation are, after all, shares of stock, which are clearly instruments 'of a type' commonly dealt in on securities exchanges or markets." *Jennison*, 346 Pa. Superior Ct. at 53, 499 A.2d at 304. It is our opinion that cases such as *Jennison* represent the better view. See Note,

Stock in a Closely Held Corporation: Is It a Security for Uniform Commercial Code Purposes? 42 Vand. L. Rev. 579 (1989). Stock certificates for shares of any corporation—whether publicly or closely held—are instrumentalities of trade and commerce which are "of a type" commonly dealt in on securities exchanges or markets. Further, although not controlling on the issue, we note that the comments to the amended version of N.C.G.S. § 25-8-102 state:

> Interests such as the stock of closely held corporations, although they are not actually traded upon securities exchanges, are intended to be included within the definitions . . . of interests 'of a type' commonly traded in those markets.

N.C.G.S. § 25-8-102, Commentary (Cum. Supp. 1989).

We conclude that the defendant's shares of stock in Bruce Stancil Refrigeration, Inc. are investment "securities" under the definition of that term in N.C.G.S. § 25-8-102(1)(a). We note, however, that, although this statute defines the term "security" broadly, the North Carolina comments suggest that the definition in the statute only applies under article 8 and does not limit the definition of "security" in police statutes or other special statutes. *See* N.C.G.S. § 25-8-102, Commentary (1986).

We now turn to the defendant's statute of frauds argument. In response to the plaintiff's efforts to enforce the alleged oral agreement, the defendant has argued that his shares of stock in Bruce Stancil Refrigeration, Inc. are "securities" for purposes of article 8, and that the pertinent statute of frauds, N.C.G.S. § 25-8-319, renders oral agreements for the sale of such securities unenforceable. As we conclude that shares of stock in a closely held corporation are investment "securities" for such purposes, we also conclude that the pertinent statute of frauds, N.C.G.S. § 25-8-319, is applicable to this case.

N.C.G.S. § 25-8-319 provides in part the following:

> A contract for the sale of securities is not enforceable by way of action or defense unless
>
> (a) there is some writing signed by the party against whom enforcement is sought or by his authorized agent or broker sufficient to indicate that a contract has been made for sale of a stated quantity of described securities at a defined or stated price; . . . .

N.C.G.S. § 25-8-319 (1986).[2] Before this Court, the plaintiff conceded that there was no writing reflecting the defendant's alleged oral agreement to sell his shares. By its terms then, the applicable statute of frauds, N.C.G.S. § 25-8-319, renders the defendant's alleged oral contract for the sale of those securities unenforceable in this action. Therefore, we hold that the trial court properly granted summary judgment for the defendant, and the decision of the Court of Appeals to the contrary is reversed.

Reversed.

AETNA CASUALTY & SURETY CO. v. NATIONWIDE MUTUAL INSURANCE CO., WILLIAM T. SAWYER, JR., JOHN WILLIAM SLATER, JR., AND RALPH LANDON McLEAN

No. 383A89

(Filed 13 June 1990)

Insurance § 90 (NCI3d)— auto insurance—exclusion—not entitled to use vehicle

The trial court should not have granted summary judgment for plaintiff in a declaratory judgment action to determine whether plaintiff owed coverage beyond the minimum amount required by N.C.G.S. § 20-279.21(b)(2) where Slater was involved in a motor vehicle collision with McLean; McLean was injured and brought an action against Slater; Slater was driving a truck owned by Sawyer; Sawyer was insured by plaintiff Aetna; McLean was insured for underinsured motorist coverage by Nationwide; and plaintiff Aetna contended that an exclusion for any person "using a vehicle without a reasonable belief that that person is entitled to do so" applied since Slater had no driver's license and knew it was wrong to drive without a license. Slater's testimony raises a question of fact of

---

2. 1989 N.C. Sess. Laws ch. 588, § 1, effective 1 October 1989, made minor amendments to this statute which are not pertinent to this case. N.C.G.S. § 25-8-319 (Cum. Supp. 1989).

whether he reasonably believed under the circumstances that he was entitled to drive the truck.

Am Jur 2d, Automobile Insurance § 188.

APPEAL by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 95 N.C. App. 178, 381 S.E.2d 874 (1989), reversing the judgment of *Llewellyn, J.*, at the 14 October 1988 Session of Superior Court, NEW HANOVER County. Heard in the Supreme Court 12 March 1990.

Poisson, Barnhill & Britt, by James R. Sugg, Jr., for plaintiff-appellant.

Murchison, Taylor, Kendrick, Gibson & Davenport, by Vaiden P. Kendrick, for defendant-appellees Nationwide Mutual Insurance Company and Ralph Landon McLean.

FRYE, Justice.

Plaintiff appeals from the Court of Appeals' decision reversing summary judgment in its favor. Resolution of this appeal depends upon the proper interpretation of section A.8 of an automobile insurance policy issued by plaintiff which excludes liability coverage for any person "using a vehicle without a reasonable belief that that person is entitled to do so."

On 3 October 1986, John William Slater, Jr., was involved in a motor vehicle collision with Ralph Landon McLean. McLean was injured and brought action against Slater. At the time of the collision, Slater was driving a truck owned by William T. Sawyer, Jr. Sawyer was insured by plaintiff Aetna Casualty and Surety Company (Aetna). McLean was insured for underinsured motorist coverage by Nationwide Mutual Insurance Company (Nationwide). Sawyer's policy with Aetna provided liability coverage in the amount of $50,000 for one in lawful possession of a covered vehicle. Plaintiff Aetna contends that Slater is not an insured under the terms of the policy issued to Sawyer since Slater did not have Sawyer's permission to drive the truck. Aetna further contends that N.C.G.S. § 20-279.21(b)(2) does not cover Slater because at the time of the accident Slater knew he was improperly driving without a license. In the alternative, Aetna contends that if any coverage is allowed, then it is the minimum amount required by N.C.G.S. § 20-279.21(b)(2), which provides for $25,000 coverage of a person operating a vehicle

with express or implied permission or a person in lawful possession. *See* N.C.G.S. § 20-279.21(b)(2) (1989).

On the day of the accident, Sawyer gave Gary Fall, his employee, permission to drive Sawyer's company truck from the jobsite to Fall's home. Sawyer further instructed Fall that no one else was to drive the truck. On that same day, Fall, while giving Slater a ride home, stopped at Slater's brother's house to play cards. While at the house, Fall asked Slater to drive the truck to the store for a case of beer. Slater, while en route to the store and while driving without a license, was involved in the accident with McLean. McLean seeks to recover from Sawyer's policy with Aetna.

Plaintiff Aetna filed this action against defendants Nationwide, Sawyer, Slater, and McLean seeking declaratory judgment to determine that plaintiff owed no coverage beyond the amount provided for in N.C.G.S. § 20-279.21(b)(2). Defendants McLean and Nationwide answered, and plaintiff subsequently filed a motion for summary judgment. Upon call of the case for hearing, defendants moved to allow oral testimony from Slater; the motion was allowed.

During the summary judgment hearing, Slater testified that on the night of the accident he was employed by Sawyer and Fall who operated as F&S Builders; that Fall customarily drove the truck home every night; that both he and Fall lived in Carolina Beach, and Fall would give Slater a ride to and from work; that on the day of the accident, Fall stopped at Slater's brother's place to play cards and that Fall was going to take him home later that evening; that Fall asked him to take the truck, go to the store, and get some beer; and that the accident occurred on that occasion.

In response to the question of whether he believed he was entitled to operate the truck on that occasion, Slater responded as follows:

> A. No, not really, because I know that it's wrong to be driving a car without a license regardless of what goes on, so I cleared that off the air. I got in the truck because I didn't want them driving. In fact, I wouldn't have let him drove (sic) me home anyways since he was already drinking. In fact, he had already made his mind up to stay at my dad's house that evening.

Q. So the reason you didn't think you should be driving was because you didn't have a license; is that correct?

A. Right, I didn't tell him that. No, I didn't tell him.

Slater later testified that, at the time of the accident, he thought Fall was a part owner of the company.

The trial court determined that there was no genuine issue of material fact and entered summary judgment in favor of plaintiff, granting the declaratory relief sought in the complaint. Defendants McLean and Nationwide appealed to the Court of Appeals from the order granting summary judgment. A divided panel of the Court of Appeals reversed, holding that the trial court erred in granting plaintiff's motion for summary judgment. *Aetna Casualty & Surety Co. v. Nationwide Mut. Ins. Co.*, 95 N.C. App. at 181, 381 S.E.2d at 876. We affirm the decision of the Court of Appeals.

The issue on appeal is whether summary judgment was properly granted in favor of plaintiff. The underlying question is whether a person knowingly operating a motor vehicle without a driver's license may nevertheless have a reasonable belief that he was entitled to operate the vehicle on a given date and time. This is a question of first impression before this Court. We have previously held that where the driver is required by the insured's policy to have permission from the insured and does not, then the driver is not covered by the insured's policy. *See Bailey v. Insurance Company*, 265 N.C. 675, 144 S.E.2d 898 (1965). We have not, however, dealt with the question where the policy excludes coverage for persons who do not have a reasonable belief that they are entitled to drive an insured's vehicle. Although the factual situation in the present case is the same as in *Bailey*—A, the insured, loans the vehicle to B; B then loans the vehicle to C, without A's permission—nonetheless, a different result may be reached because liability coverage depends on the language of the policy, and summary judgment should be granted or denied accordingly.

"Summary judgment is granted when, viewing the record in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Beckwith v. Llewellyn*, 326 N.C. 569, ---, --- S.E.2d ---, --- (1990). The burden is upon the party moving for summary judgment to show, in order to be entitled to judgment, that no questions of fact remain to be resolved. *Bank v. Gillespie*, 291 N.C. 303, 230 S.E.2d 375 (1976).

In the instant case, plaintiff, as the moving party, has the burden of showing that no material question of fact remains unresolved. The policy issued by plaintiff to Sawyer provides liability coverage, not only to covered persons and covered vehicles, but also to "any person using your covered auto." Slater was clearly a person using Sawyer's truck which was clearly a covered auto within the meaning of the coverage portion of Sawyer's liability policy. However, the Exclusions portion of the policy denies coverage for any person "using a vehicle without a reasonable belief that that person is entitled to do so." The crucial question in this case is whether Slater was operating Sawyer's vehicle without a reasonable belief that he was entitled to do so.

Plaintiff contends that since Slater had no driver's license and knew that it was wrong to drive without a license, he could not have had a reasonable belief that he was entitled to operate the vehicle at the time of the accident. Thus, plaintiff contends summary judgment was proper in its favor. The Court of Appeals held, and we agree, that the fact that Slater knew that he had no legal right to drive, is distinguishable from the dispositive question under the policy exclusion of Slater's reasonable belief of being "entitled" to drive the vehicle based upon the permission of the person in possession of the vehicle. The question under the policy is not one of legality—whether the operator had legal permission of the owner, or legal permission from the state in the form of a valid driver's license; rather, it is a question of fact—did the operator have a reasonable belief that, at the time of the accident, he was entitled to drive the vehicle? In such cases, the ultimate question is one of the state of mind of the operator, a factual question for the jury.

Although this is a case of first impression in this Court, the same issue was raised and answered two years ago in a federal case, interpreting North Carolina law. *Cooper v. State Farm Mutual Automobile Insurance Co.*, 849 F.2d 496, 499 (11th Cir. 1988). In *Cooper*, two teenagers, David Carlton and Kathy Cooper, ran away from home while driving an automobile owned by David's father, Darryl Carlton. Kathy's father, Gerald Cooper, was insured under a State Farm policy containing language identical to that in plaintiff's policy.

The court in *Cooper* first addressed the issue of whether the absence of a driver's license was conclusive. At the time of the

accident, Kathy, a fourteen-year-old, was operating the automobile. The court concluded that the legal right to drive was merely one factor to be considered in determining whether an unlicensed driver had a reasonable belief that he was entitled to operate the insured's vehicle. *Id.* The court further concluded that summary judgment was improperly granted since the issue was one for the jury. *Id.*

In *Cooper*, the court held that "under North Carolina law one need not necessarily show that he had a legal right to drive to establish a reasonable belief of entitlement under the clause at issue . . . ." *Id.* The court's holding was based on (1) North Carolina's existing law under permissive use clauses, *see Truelove v. Nationwide Mut. Ins. Co.*, 5 N.C. App. 272, 168 S.E.2d 59 (1969) (under permissive use clauses the legal right to drive is merely one factor in determining whether an unlicensed driver had permission); and (2) North Carolina's case law construing ambiguous provisions in insurance policies against the insurer, *see Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 172 S.E.2d 518 (1970).

In the present case, the record before the trial judge at the summary judgment hearing consisted of: (1) Sawyer's affidavit that Slater did not have permission from Sawyer to drive Sawyer's truck; (2) Sawyer's liability policy with Aetna; and (3) Slater's oral testimony—that Fall customarily drove the truck home every night, that Fall told Slater to drive the truck to the store, that Fall had been drinking at the time, that Slater knew he was wrong for driving without a license, and that Slater believed Fall was part owner of the company that owned the truck.

Summary judgment was apparently entered based on plaintiff's assertion that Sawyer's policy did not extend to Slater since Slater could not have had a reasonable belief that he was entitled to drive Sawyer's truck when he knew he was wrong for driving without a license. However, Slater's testimony raises a question of whether he reasonably believed under the circumstances that he was entitled to drive the truck. Although Slater answered in the negative when asked if he believed he was entitled to operate the truck, he qualified his answer by giving as a reason the fact that he was driving without a license. A jury might well conclude that while he knew that it was "wrong to be driving without a license regardless of what goes on," he nevertheless believed he was entitled to drive the truck under the circumstances because he believed that he had the permission of the owner to do so.

Since Slater's reasonable belief is a question of fact to be determined by a jury, summary judgment on this ground was improper, and the Court of Appeals was correct in reversing the trial court's ruling. We therefore affirm the Court of Appeals' decision.

Affirmed.

STATE OF NORTH CAROLINA v. FRANK DOUGLAS EVERHARDT

No. 515PA89

(Filed 13 June 1990)

1. **Assault and Battery § 22 (NCI4th) — felonious assault — mental injury as serious injury**

A mental injury will support the element of serious injury under the felonious assault statute, N.C.G.S. § 14-32.

Am Jur 2d, Assault and Battery §§ 48-50, 53-55.

2. **Assault and Battery § 22 (NCI4th) — felonious assault — mental injury — sufficient evidence of serious injury**

The state presented sufficient evidence of serious injury to support defendant's conviction of assault with a deadly weapon inflicting serious injury where its evidence tended to show that, for six successive evenings, defendant sexually assaulted his former wife with various devices and subjected her to various humiliating acts; the devices employed by defendant to assault the victim, while potentially deadly, were utilized in a manner calculated to degrade and dehumanize the victim; and the victim suffered a mental injury requiring several hospital admissions and treatment by antidepressant medication up to the time of trial.

Am Jur 2d, Assault and Battery §§ 48-50, 53-55.

ON discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 96 N.C. App. 1, 384 S.E.2d 562 (1989), finding no error in a judgment of imprisonment entered by *Ferrell, J.*, at the 15 September 1988 Session of Superior Court, CATAWBA County, upon defendant's conviction for assault with a

deadly weapon inflicting serious injury. Heard in the Supreme Court 10 April 1990.

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

Daniel R. Green, Jr. for defendant-appellant.

WHICHARD, Justice.

The State's evidence tended to show that defendant and the victim were married in July 1974 and divorced in October 1985. The couple separated in July 1984 after the occurrence of the events leading to defendant's conviction. The victim testified that for six successive evenings, beginning on 15 July 1984, defendant assaulted her sexually and subjected her to various humiliating acts. On the first evening, defendant bound the victim, pointed a loaded pistol at her head, threatened her life, and inserted the leg from a footstool into her vagina for ten to fifteen minutes. Defendant then performed vaginal intercourse on the bound victim and forced her to perform fellatio. Over the course of the next five evenings, defendant used a syringe to inject liquor into the victim's vagina, inserted various vegetables into her vagina which he then forced into her mouth, inserted cola bottles and the footstool leg into her vagina, burned her vagina with a cigarette lighter, dragged her about the house by her hair, and forced her to engage in vaginal sex and fellatio. Defendant continued to bind the victim and threaten her while performing these acts, telling her that he would kill her if she told anyone what he was doing to her, that she was stuck with him for the rest of her life, and that he would fix her so no other man would want her. On the sixth evening defendant again bound the victim and threatened her with the pistol, then had vaginal and oral sex with her against her will. Defendant then took a plate of spaghetti from the kitchen, ejaculated onto it, and forced the victim to eat it. Defendant inserted a curling iron into the victim's vagina, telling her all the while that she was ugly and "a pile of shit."

After this period of sustained abuse, the victim took her children and went to live with her mother. She testified that she had stayed with defendant up to that point because she feared that defendant would carry out his threats to kill her, and she feared for the safety of her two children. She told no one of the abuse for approximately two years because she was ashamed and afraid of defend-

ant. She testified, "I felt like I was the lowest person on the face of the earth. I had no self-esteem, no confidence in myself."

In January 1985 the victim entered the First Step support program for victims of spousal abuse. Her counselor described her as being "very timid, very weak both emotionally and physically" when she entered the program. She was hospitalized for two weeks in September 1985 for depression and suicidal tendencies. Her psychiatrist, Dr. Schmitt, testified that she was severely depressed and suffered from poor appetite, insomnia, anxiety, and feelings of hopelessness and helplessness.

In August 1986 the victim was again hospitalized for suicidal tendencies, severe depression, and anorexia nervosa. She remained in the hospital for approximately four weeks. It was during this second hospitalization that she first told her doctor of the abuse defendant inflicted upon her in July 1984. Dr. Schmitt testified that he prescribed antidepressant medication for the victim during her hospitalizations and up to the time of trial.

In December 1986 the victim entered the Raider Institute and underwent an intensive six-week program for treatment of her anorexic condition. Twelve weeks of outpatient therapy followed this last hospitalization. Dr. de la Garza, medical director of the program, testified that the victim was severely malnourished when she entered the program. He testified that in his opinion she was trying to make herself unattractive sexually by starving herself because of the sexual abuse she had suffered in the past.

At the close of the State's evidence, the trial court denied defendant's motion to dismiss the charge of assault with a deadly weapon inflicting serious injury. The Court of Appeals addressed, among other issues, the question of whether a mental injury can support the "serious injury" element of N.C.G.S. § 14-32(b). This statute provides: "Any person who assaults another person with a deadly weapon and inflicts serious injury shall be punished as a Class H felon." N.C.G.S. § 14-32(b) (1986). The Court of Appeals stated that it was not at liberty to extend the definition of serious injury under the felonious assault statute to include mental injury, but it concluded that the State had presented sufficient evidence of physical injury, pointing to the physical sequelae accompanying the victim's mental illness, such as severe headaches, insomnia, and anorexia nervosa. *State v. Everhardt*, 96 N.C. App. 1, 13, 384 S.E.2d 562, 569 (1989). On 18 January 1990 we allowed defend-

ant's petition for discretionary review, limited to the questions of whether mental injury will support the element of serious injury under N.C.G.S. § 14-32, and if not, whether the evidence was sufficient to support a finding of physical injury.

We have repeatedly defined the serious injury element of N.C.G.S. § 14-32 to mean a physical or bodily injury. *State v. Joyner*, 295 N.C. 55, 65, 243 S.E.2d 367, 373 (1978); *State v. Ferguson*, 261 N.C. 558, 560, 135 S.E.2d 626, 627-28 (1964); *State v. Jones*, 258 N.C. 89, 91, 128 S.E.2d 1, 3 (1962). We most recently reiterated this definition in *State v. James*, 321 N.C. 676, 688, 365 S.E.2d 579, 586 (1988). However, in *James*, as in previous cases, the evidence at trial and the issues presented on appeal did not require resolution of the question whether a mental injury may ever fulfill the requirement of serious injury under the felonious assault statute. We have never held that mental injuries of the type suffered by the victim here may not constitute serious injury within the meaning and intent of N.C.G.S. § 14-32. The injuries inflicted in the preceding cases were physical in nature, thus permitting us to equate a serious injury with a physical harm of sufficient gravity.

[1] The evidence here does not permit such a facile definition. The assaults perpetrated on the victim were in the main psychologically torturous in nature, calculated to inflict mental or emotional injury rather than bodily injury. The devices employed by defendant to assault the victim, while potentially deadly as found by the jury, were utilized in a manner calculated to degrade and dehumanize the victim. This is illustrated by defendant's threats and insults repeated to the victim during the perpetration of the assaults, as when he reminded her that she was ugly, that no other man would ever want her, and that she was stuck with him for the rest of her life. While it is possible to consider the injuries suffered by the victim in light of the physical symptoms she suffered in conjunction with her mental illness, as did the Court of Appeals, we instead hold that serious injury, within the meaning and intent of that term as used in N.C.G.S. § 14-32, includes serious mental injury caused by an assault with a deadly weapon.

We reached a similar result in *State v. Boone*, 307 N.C. 198, 297 S.E.2d 585 (1982), in which we defined the element of "serious personal injury" under our first-degree rape and sexual offense statutes to include mental injury. *Boone*, 307 N.C. at 204, 297 S.E.2d

at 589. Defendant points to the General Assembly's substitution of "serious personal injury" for the former "serious bodily injury" in the language of the rape and sexual offense statutes, 1979 N.C. Sess. Laws ch. 682, and protests that the legislative history of the felonious assault statute does not evince a parallel intent to broaden the definition of "serious injury." We do not find this argument persuasive, as the felonious assault statute never contained the element of a serious *bodily* injury in the first instance; thus, a change in the statutory language to broaden the scope of "serious injury" is not required. We note that "serious injury" may be construed to be as broad or broader than "serious personal injury," as the former contains no adjective qualifying the nature of the injury, other than the requirement that it be a serious one.

The compelling evidence of mental injury presented in this case illustrates the observation that " 'the mind is no less a part of the person than the body, and the sufferings of the former are sometimes more acute and lasting than those of the latter.' " *Young v. Telegraph Co.*, 107 N.C. 370, 385, 11 S.E. 1044, 1048 (1890) (quoting 3 Suth. Dam., 260). As we stated in *Boone*, we can offer no "bright line" rule to determine categorically when the acts of a defendant cause mental damage sufficient to support a finding of serious injury. *Boone*, 307 N.C. at 205, 297 S.E.2d at 589. In the context of the felonious assault statute, we have long held that the seriousness of the injury inflicted "must be determined according to the particular facts of each case." *State v. Jones*, 258 N.C. at 91, 128 S.E.2d at 3. The same rule must apply in cases where the serious injury caused by the assault is mental in nature.

[2] Here, the State presented evidence that the victim suffered a mental injury requiring several hospital admissions and treatment by antidepressant medication up to the time of trial. Based on this evidence, the trial court did not err in denying defendant's motion to dismiss at the close of the State's evidence. Because we hold that a mental injury will support the element of serious injury under N.C.G.S. § 14-32, we need not consider whether the evidence was sufficient to support a finding of physical injury.

For the reasons stated, we affirm the Court of Appeals.

Affirmed.

STATE OF NORTH CAROLINA v. BILLY WILLIAM McCARTY

No. 266PA89

(Filed 13 June 1990)

1. **Criminal Law § 904 (NCI4th); Rape and Allied Offenses §§ 6, 19 (NCI3d) — disjunctive instructions — unanimity of verdict**

Defendant's right to a unanimous verdict was not violated by the trial court's instruction that the jury could convict defendant of first degree sexual offense if it found that defendant engaged in either fellatio or vaginal penetration or by the instruction that an indecent liberty is an immoral or indecent touching by the defendant or an inducement by the defendant of an immoral or indecent touching by the child.

Am Jur 2d, Rape § 108.

2. **Criminal Law § 34.8 (NCI3d); Rape and Allied Offenses § 4.1 (NCI3d) — sexual offenses against daughter — molestation of stepdaughter — admissibility to show common scheme**

In a prosecution of defendant for various sexual offenses against his twelve-year-old daughter, testimony by defendant's stepdaughter that defendant had molested her from the time she was nine years old until she was eighteen years old was admissible to show a common scheme or plan by defendant to molest his stepdaughter and daughter.

Am Jur 2d, Rape §§ 70-75.

3. **Rape and Allied Offenses § 4.1 (NCI3d) — prior sexual misconduct — unnatural lust by defendant — limiting instruction — no plain error**

In a prosecution of defendant for rape, sexual offense, incest and indecent liberties involving his twelve-year-old daughter, the trial court's limiting instruction that the jury should consider testimony by the victim's sister concerning defendant's prior sexual misconduct toward her to determine whether there was unnatural lust in the mind of defendant did not constitute plain error since it did not render the trial fundamentally unfair and did not have a probable impact on the jury's verdict finding the defendant guilty.

Am Jur 2d, Rape §§ 70-75.

4. Rape and Allied Offenses § 4.1 (NCI3d)— prior sexual misconduct—admission not violation of due process

The admission of testimony by the victim's sister as to defendant's prior sexual misconduct upon her did not violate defendant's right to due process since there was no showing that defendant did not have adequate notice to meet this evidence, the instruction did not render the trial fundamentally unfair, and the testimony was strong evidence and had a rational connection with the crimes for which defendant was charged.

Am Jur 2d, Rape §§ 70-75.

ON discretionary review of an unpublished decision of the Court of Appeals, 94 N.C. App. 390, 381 S.E.2d 204 (1989), finding no error in part and granting a new trial in part in a trial before *Strickland, J.*, at the 11 March 1988 Session of Superior Court, DUPLIN County. Heard in the Supreme Court 12 March 1990.

The defendant was tried with his wife for (1) first degree rape, (2) first degree sexual offense, (3) incest, and (4) taking indecent liberties with a child. The defendant's twelve-year-old daughter testified that the defendant forced her to have sexual intercourse with him. She also testified that he French kissed her, that he performed a digital penetration on her and forced her to perform fellatio on him. The State introduced testimony in corroboration of the defendant's daughter's testimony. The defendant testified and denied that he had ever molested his daughter.

The defendant's wife was found not guilty. The jury found the defendant guilty of second degree rape and guilty of the other crimes as charged. He was sentenced to life in prison for first degree sexual offense and forty years in prison for second degree rape to commence at the expiration of the life sentence. The incest and indecent liberties cases were combined for sentencing and the defendant was sentenced to seven years on these charges to commence at the expiration of the sentence of forty years.

The Court of Appeals ordered a new trial on the first degree sexual offense charge and the indecent liberties charge. As to the first degree sexual offense the superior court instructed the jury that if it found defendant engaged in either fellatio or vaginal penetration it could convict him of first degree sexual offense.

The Court of Appeals held that this violated the defendant's right to a conviction by a unanimous jury.

As to the charge of taking indecent liberties with a child the court charged the jury that an indecent liberty was an immoral or indecent touching by the defendant or an inducement by the defendant of an immoral or indecent touching by the child. The Court of Appeals held that this instruction made it impossible to determine which act the jury found the defendant committed and ordered a new trial on this charge. The Court of Appeals found no error as to the other charges.

We granted the State's petition for discretionary review. We also granted a petition for discretionary review by the defendant in regard to a part of the charge he contends was in error.

Lacy H. Thornburg, Attorney General, by Debra C. Graves, Associate Attorney General, for the State appellant.

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

WEBB, Justice.

[1] We hold that pursuant to *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990), we are bound to reverse the Court of Appeals. *Hartness* involved a conviction of taking indecent liberties with a child. A charge was given similar to the charge in this case. We held there was no error in the charge. For the reasons given in *Hartness* we hold there was not error in the charge on first degree sexual offense or taking indecent liberties with a child.

[2] The defendant has assigned error to an evidentiary ruling by the superior court. The victim's twenty-two-year-old half sister testified that the defendant had molested her from the time she was nine years old until she was eighteen years old, at which time she joined the Marine Corps. When this testimony was adduced the court instructed the jury as follows:

> Ladies and gentlemen, this witness is tendered by the State to give testimony of commission of like crimes and this testimony is being admitted solely for the purpose of showing with respect to both of said defendants that there exists in the minds of the defendants a common plan or scheme or intent as well

> as the unnatural lust of the defendants on the alleged commission of the crimes charged in these cases.

The defendant did not object to this instruction.

The defendant now argues that it was error to admit this testimony and that the limiting instruction, given when this testimony was introduced, was in error. The defendant argues that the purpose for admitting this testimony was to prove his character in order to show he acted in conformity therewith in violation of N.C.G.S. § 8C-1, Rule 404(b) (1988). This Court has been liberal in allowing evidence of similar sex offenses in trials on sexual crime charges. *State v. Cotton*, 318 N.C. 663, 351 S.E.2d 277 (1987). In *State v. Bagley*, 321 N.C. 201, 362 S.E.2d 244 (1987), *cert. denied*, 485 U.S. 1036, 99 L.Ed.2d 912 (1988); *State v. Gordon*, 316 N.C. 497, 342 S.E.2d 509 (1986); and *State v. DeLeonardo*, 315 N.C. 762, 340 S.E.2d 350 (1986), evidence of other similar sex offenses was admitted to show a common scheme or plan to molest children. Based on the reasoning of these three cases we hold the testimony of the victim's sister was admissible to show a scheme or plan to molest defendant's stepdaughter and daughter.

[3] The defendant also argues that the court committed error in the limiting instruction given at the time this testimony was admitted. He says specifically that it was error for the court to charge that the testimony was admitted to show "that there exists in the minds of the defendants . . . the unnatural lust of the defendants in the alleged commission of the crimes charged." The defendant argues that although the testimony may have been properly admitted, error occurred when the jury was told to consider it to determine whether there was unnatural lust in the mind of the defendant. The defendant says this instructed the jury to consider his character and determine whether he had acted in conformity therewith. The defendant did not object to this instruction and we must examine this assignment of error under the plain error rule. North Carolina Rules of Appellate Procedure, Rule 10(c)(4).

The plain error rule has been adopted in this State. *See State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304 (1983); *State v. Black*, 308 N.C. 736, 303 S.E.2d 804 (1983), and *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). These cases establish the following:

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the

> entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

United States v. McCaskill, 676 F.2d 995, 1002 (4th Cir. 1982), *quoted in State v. Odom*, 307 N.C. at 660, 300 S.E.2d at 378. We hold the challenged instruction was not so fundamentally erroneous or so lacking in its elements that justice could not have been done. Nor was it so grave as to amount to a denial of a fundamental right of the accused. We hold it did not result in a miscarriage of justice or seriously affect the fairness or public reputation of judicial proceedings. We also hold that the instruction did not have a probable impact on the jury's finding that the defendant was guilty. There was testimony by the victim which was corroborated by other evidence for the State. The defendant denied the accusations. We have held that the evidence of the defendant's prior sexual misconduct was properly admitted. The jury's task was to judge the credibility of the witnesses. We cannot say its verdict would have been different if this charge had not been given. We do not believe this challenged instruction probably impacted the jury's deliberations.

[4] The defendant argues that this instruction by the court violates the due process clause of the fourteenth amendment to the United States Constitution and the law of the land clause of the Constitution of North Carolina. He cites *Spencer v. Texas*, 385 U.S. 554, 17 L.Ed.2d 606 (1967) to support this proposition. *Spencer* held that the recidivist statute in Texas was not unconstitutional because it allowed evidence of a previous conviction to be introduced in a trial for the primary charge. That case does not help the defendant. The defendant argues that evidence of prior misconduct may violate due process where (1) defendant does not have adequate notice to meet this evidence or (2) where the introduction of the evidence renders his trial fundamentally unfair. There has been no showing in this case that the defendant did not have adequate

notice to meet this evidence and we have held the instruction of the court did not render his trial fundamentally unfair. He also says there must be strong evidence of prior misconduct and there must be a rational connection between the prior act and the crime for which the defendant is being tried. The testimony of the victim's sister as to prior misconduct upon her was strong evidence and we have held it has a rational connection with the crime for which the defendant was tried. We hold that the testimony of the victim's sister and the instruction in regard to it is not prejudicial error.

For the reasons stated in this opinion we reverse the Court of Appeals in its holdings on the first degree sexual offense and the offense of taking indecent liberties with a child. We affirm the Court of Appeals on all other issues.

Reversed and remanded in part. Affirmed in part.

CECILE M. PRINCE, ADMINISTRATRIX FOR THE ESTATE OF RONALD DAVID PRINCE, DECEASED, PLAINTIFF v. DUKE UNIVERSITY, A CORPORATION, D/B/A DUKE UNIVERSITY MEDICAL CENTER AND/OR "DUKE HOSPITAL," DEFENDANT

No. 493PA89

(Filed 13 June 1990)

1. **Rules of Civil Procedure § 33 (NCI3d) — medical malpractice — list of expert witnesses — neuropathologist as treating physician**

Plaintiff in a medical malpractice action was granted a new trial where plaintiff had served defendant hospital with interrogatories calling for a list of all expert witnesses whom defendant intended to call at trial; defendant provided the names of certain experts and subsequently amended its response to note that some of decedent's treating physicians might be called to testify concerning the course of treatment of the decedent; plaintiff did not request nor did defendant list the treating physicians; defendant called at trial a neuropathologist who testified as to his review of the frozen slides of decedent's brain and rendered his opinion as to the cause of death; and, although defendant considered the neuropathologist to be a treating physician, he never saw the decedent alive and had

nothing to do with the treatment of decedent. Defendant's supplement to its interrogatory responses noting that various treating physicians might be called to testify at trial was thus an insufficient identification of the neuropathologist.

Am Jur 2d, Depositions and Discovery § 70.

2. Evidence § 14 (NCI3d)— physician patient privilege—name, address and telephone number of hospital roommate

The trial court erred in a medical malpractice action by not compelling defendant to produce identification data for the patient sharing a room with the deceased during his last hospitalization. Although defendant hospital objected to plaintiff's interrogatory on the ground that the information was privileged and confidential by virtue of the health care provider-patient privilege, that privilege has generally been construed by the North Carolina Supreme Court to extend only to the clinical portions of hospital medical records.

Am Jur 2d, Depositions and Discovery § 29.

ON appeal by plaintiff of a judgment entered on 19 June 1989 by *Hudson, J.*, at the 5 June 1989 Civil Session (Jury), Superior Court, WAKE County. This Court *ex mero motu*, pursuant to N.C.G.S. § 7A-31(a) and Rule 15(e)(2) of the North Carolina Rules of Appellate Procedure, ordered the appeal heard by it prior to a determination by the Court of Appeals. Heard in the Supreme Court 10 April 1990.

David H. Rogers for plaintiff-appellant.

Yates, Fleishman, McLamb & Weyher, by Bruce W. Berger and Jean Walker Tucker, for the defendant-appellee.

MARTIN, Justice.

Plaintiff brought this medical malpractice action against defendant hospital seeking damages for the wrongful death of Ronald David Prince as a result of defendant's negligent acts or omissions. Briefly, the facts show that Mr. Prince was an extremely obese twenty-seven-year-old man who had for several years sought medical assistance in his efforts to lose weight. In January 1980, he was admitted into Duke Hospital and underwent a surgical procedure, gastric plication or "stomach stapling." He was again admitted to Duke Hospital in March of 1980 for tests and on 17 April 1980

further surgery was performed to reverse the stapling procedure. Antibiotics were prescribed to ward off infection. Recovery was slow but uneventful until 25 April 1980. On that day, the patient was noted to have rapid pulse and respiration rates although his body temperature and white blood count were normal. At approximately 4:00 p.m. on the same day, his blood pressure dropped and his heart rate increased. Shortly thereafter, Mr. Prince vomited and apparently aspirated, leading to respiratory and cardiac arrest. After cardiopulmonary resuscitation, Mr. Prince regained cardiac function and was moved to the Intensive Care Unit (ICU). Once there, he again experienced cardiac arrest and, this time, hospital personnel were unable to revive him. He was pronounced dead at 7:55 p.m. An autopsy was performed and the report listed Wernicke's encephalopathy as the cause of death. The autopsy report also noted that Mr. Prince had a clinical history of sepsis and shock.

The complaint was filed by Mr. Prince's wife, Cecile M. Prince, on 26 April 1982 alleging that defendant's negligence in the treatment and diagnosis of her husband proximately caused his death on 25 April 1980. Plaintiff took a voluntary dismissal on 31 August 1984 and refiled her suit on 27 August 1985. Duke Hospital filed an answer on 30 September 1985 and, following extensive discovery, the trial began on 5 June 1989. After approximately two weeks of hearing evidence and arguments, the jury returned a verdict in favor of defendant, Duke Hospital. Plaintiff filed a notice of appeal to the Court of Appeals on 21 June 1989, and this Court granted discretionary review *ex mero motu* prior to a determination by the lower appellate court.

[1] We first address plaintiff's contention that the trial court erred in allowing Dr. F. Stephen Vogel, a neuropathologist at Duke Hospital, to testify at trial. On 5 June 1987, plaintiff served Duke Hospital with interrogatories asking in No. 17 for a listing of all expert witnesses whom defendant intended to call to testify on its behalf at trial. Duke Hospital timely responded on 7 July 1987. At that time the only expert named by Duke was Dr. William P.J. Peete. In keeping with Rule 26(e)(1) of the North Carolina Rules of Civil Procedure, defendant seasonably supplemented its answers to plaintiff's first interrogatories and added Dr. Walter Pories and Dr. Frances Eason to its list of experts. Later, Duke Hospital again amended its earlier response on 18 May 1988 and noted that some of decedent's treating physicians may be called to testify concerning the course of treatment of Mr. Prince and

were therefore to be denominated as expert witnesses. Plaintiff did not request nor did defendant list the treating physicians. At the trial which began on 5 June 1989, Duke Hospital called Dr. Stephen Vogel to testify. He was subsequently qualified as an expert in the field of neuropathology and testified as to his review of the frozen slides of Mr. Prince's brain. He was then allowed to render his opinion as to the cause of death of Ronnie Prince.

It is plaintiff's contention that, since Dr. Vogel was not listed as an expert witness, plaintiff was prejudiced by her inability to depose Dr. Vogel prior to trial and therefore to adequately prepare for his cross-examination. Defendant considered Dr. Vogel to be a "fact" witness who participated in Mr. Prince's autopsy and who testified concerning his participation in the medical case of Mr. Prince. Since Duke considered Dr. Vogel to be a treating physician, he was not listed as an expert witness. We have previously held that "[w]here a doctor is or was the plaintiff's treating physician and is called to testify not about the standard of the plaintiff's care but rather about the plaintiff's treatment . . . he is not an expert witness." *Turner v. Duke University*, 325 N.C. 152, 168, 381 S.E.2d 706, 716 (1989). There is nothing in the record to indicate that defendant failed in good faith to supplement its responses to discovery requests regarding the identity of its expert witnesses.

The problem lies in defendant's considering Dr. Vogel as a treating physician. The medical definition of treatment is "the management and care of a patient for the purpose of combating disease or disorder." Dorland's Illustrated Medical Dictionary 1388 (rev. 26th ed. 1985). Even given its broadest definition, treatment is defined as "the steps taken to effect a cure of an injury or disease; including examination and diagnosis as well as application of remedies." Black's Law Dictionary 1346 (rev. 5th ed. 1979). Once the patient is dead, the battle is over. Treatment has ceased.

Dr. Vogel never saw Mr. Prince alive. He was merely shown some frozen slides of Mr. Prince's brain and asked to render an opinion as to the cause of death. Dr. Vogel had nothing to do with the treatment of Mr. Prince; therefore, he was not a treating physician. Defendant's second supplement to its interrogatory responses which noted that various treating physicians might be called to testify at trial thus is insufficient identification of Dr. Vogel. Duke Hospital should have specifically identified Dr. Vogel as an expert witness, thus giving plaintiff the opportunity to depose

him prior to trial and adequately prepare for his cross-examination. Although defendant apparently acted in good faith, this does not remedy the substantial probability of unfair surprise and prejudice to the plaintiff. The ends of justice require that plaintiff be granted a new trial.

[2] One further issue argued in plaintiff's brief warrants our attention. Plaintiff contends the trial court erred in sustaining defendant's objection to her request for the identification data of the patient sharing a room with Mr. Prince during his last hospitalization. Duke Hospital was served with interrogatories on 5 June 1987 asking in Interrogatory No. 7 for the name, address and telephone numbers of Mr. Austin, the hospital roommate of the deceased. Attorneys for Duke Hospital objected to the interrogatory on the ground that the information sought was privileged and confidential by virtue of the health care provider-patient privilege. Plaintiff filed a motion to compel discovery on 13 July 1987 but failed to make an offer of proof as to what the witness would have testified. Judge Bowen heard the motion on 24 August 1987 and sustained defendant's objection to Interrogatory No. 7. Plaintiff now contends that this information is necessary to her case since Mr. Austin was the only objective, disinterested source of testimony as to the quality and quantity of nursing care given Mr. Prince.

The statute sets forth, in pertinent part:

> No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon, and no such information shall be considered public records under G.S. 132-1. Confidential information obtained in medical records shall be furnished only on the authorization of the patient, or if deceased, the executor, administrator, or, in the case of unadministered estates, the next of kin. Any resident or presiding judge . . . may . . . compel disclosure if in his opinion disclosure is necessary to a proper administration of justice.

N.C.G.S. § 8-53 (1986 & Cum. Supp. 1989). This privilege has generally been construed by this Court to extend only to the clinical portions of hospital medical records—that information acquired by the physician which is necessary for the physician to prescribe for the pa-

tient. *See Sims v. Insurance Co.*, 257 N.C. 32, 125 S.E.2d 326 (1962); Note, *Release of Medical Records by Hospitals in North Carolina*, 7 N.C. Cent. L.J. 299 (1970). Therefore, we conclude that it was error for the trial court not to compel defendant to produce the identification data of Mr. Austin. Because a new trial has been granted in this appeal, we do not find it necessary to discuss the harmless error argument. Upon remand, plaintiff will be entitled to the information requested in this interrogatory.

We do not deem it necessary to discuss the remaining issues since the case is being remanded for a new trial, and it is unlikely that the other assignments of error will recur upon remand.

New trial.

STATE OF NORTH CAROLINA v. ROLAND DOUGLAS SMITH

No. 627A86

(Filed 13 June 1990)

Jury § 5 (NCI3d); Constitutional Law § 66 (NCI3d)— murder—jury selection—presence of defendant

The trial court erred in a murder prosecution by excusing prospective jurors as a result of private unrecorded bench conferences with those jurors. The confrontation clause of the Constitution of North Carolina guarantees the right of the defendant to be present at every stage of the trial and it was error for the trial court to exclude the defendant, counsel, and the court reporter from its private communications with the prospective jurors at the bench prior to excusing them. It could not be determined from the record whether the error was harmless beyond a reasonable doubt because no record of the trial court's private discussions with the prospective jurors exists. N.C. Const. Art. I, § 23.

Am Jur 2d, Criminal Law § 913; Jury § 190.

APPEAL of right by the defendant from judgment entered at the 2 September 1986 Criminal Session of Superior Court, BURKE County, by *Sitton, J.*, sentencing the defendant to death for murder

in the first degree. The defendant's motion to bypass the Court of Appeals on his appeal of his convictions and sentences to three years for felonious breaking or entering and to life in prison as an habitual felon was allowed on 8 February 1989. Heard in the Supreme Court on 10 October 1989.

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

Malcolm Ray Hunter, Jr., Appellate Defender, and Staples Hughes, Assistant Appellate Defender, for defendant appellant.

MITCHELL, Justice.

The defendant was indicted on 7 September 1985, in separate indictments, for one count of first-degree murder, one count of felonious breaking or entering, and one count of being an habitual felon. The charges against the defendant were consolidated for trial, and he was convicted of all charges. The jury recommended and the trial court entered a sentence of death for the first-degree murder. Thereafter, the trial court sentenced the defendant to the presumptive three-year term for felonious breaking or entering and to life in prison as an habitual felon.

On appeal the defendant contends, *inter alia*, that the trial court committed reversible error by holding unrecorded private bench discussions with prospective jurors, which resulted in the trial court excusing those jurors. We agree and hold that errors committed by the trial court during the selection of the jury for this capital trial require that the verdicts and judgments against the defendant be vacated and that this case be remanded to the Superior Court for a new trial.

A review of the jury selection process for this capital trial reveals that after some jurors had been selected, additional prospective jurors were called into the courtroom. Three of those prospective jurors responded to the trial court's question as to whether any problems had developed that would prevent them from serving on the jury. On each occasion, the trial court invited the prospective juror to the bench to discuss the problem privately, even though counsel and the defendant were in the courtroom. After each of these unrecorded private bench conferences, the trial court excused the prospective juror, indicating that it was within the discretion of the court to excuse that particular juror.

The fundamental question before us is whether the trial court's action in excusing prospective jurors as a result of its private unrecorded bench conferences with them violated the defendant's state constitutional right to be present at every stage of the trial. The confrontation clause of the Constitution of North Carolina guarantees the right of this defendant to be present at *every* stage of the trial. *State v. Huff*, 325 N.C. 1, 29, 381 S.E.2d 635, 651 (1989); N.C. Const. Art. I, § 23 (1984). This state constitutional protection afforded to the defendant imposes on the trial court the affirmative duty to insure the defendant's presence at every stage of a capital trial. The defendant's right to be present at every stage of the trial "ought to be kept forever sacred and inviolate." *State v. Blackwelder*, 61 N.C. 38, 40 (1866). In fact, the defendant's right to be present at every stage of his capital trial is not waiveable. *State v. Artis*, 325 N.C. 278, 297, 384 S.E.2d 470, 480 (1989); *State v. Huff*, 325 N.C. at 31, 381 S.E.2d at 652. *But cf. State v. Tate*, 294 N.C. 189, 239 S.E.2d 821 (1978) (private communication between a judge and a seated juror expressly disapproved, however, the defendant's failure to object to the impropriety held to constitute a waiver).

The process of selecting and impaneling the jury is a stage of the trial at which the defendant has a right to be present. Therefore, it was error for the trial court to exclude the defendant, counsel, and the court reporter from its private communications with the prospective jurors at the bench prior to excusing them. *State v. Artis*, 325 N.C. at 297, 384 S.E.2d at 480. Unless the State proves that the denial of the defendant's right, under article I, section 23 of the Constitution of North Carolina, to be present at this stage of his capital trial was harmless beyond a reasonable doubt, we must order a new trial. *State v. Huff*, 325 N.C. at 33, 381 S.E.2d at 653.

We cannot tell from the record of this capital trial whether the errors in question were harmless beyond a reasonable doubt. No record of the trial court's private discussions with the prospective jurors exists to reveal the substance of those discussions. Accordingly, we are constrained to conclude that the State has failed to carry its burden, and we cannot say that the trial court's errors were harmless beyond a reasonable doubt. This conclusion is underscored by the fact that the trial court's action also violated the statutory requirement that the trial court must make a true, complete, and accurate record of the selection of the jury in a

capital trial. N.C.G.S. § 15A-1241(a) (1988). Without a record of the trial court's conversations with the prospective jurors, resulting in their being excused, we cannot exercise meaningful appellate review.

We are confident that the actions of the trial court were in good faith and resulted from its concern for the efficient conduct of the selection of the jury. Nevertheless, we must vacate the verdicts and judgments entered against the defendant after the capital trial in which these errors were committed and remand this case to the Superior Court, Burke County, for a new trial.

New trial.

STATE OF NORTH CAROLINA v. MARK CHARLES FREUND

No. 406A89

(Filed 13 June 1990)

Automobiles and Other Vehicles § 126.2 (NCI3d)— breathalyzer results—difference in first and second reading—admissible

Breathalyzer test results were admissible in a DWI prosecution even though the first and second tests were within .02 of each other only when the first test was rounded down to the nearest hundredth.

Am Jur 2d, Automobiles and Highway Traffic §§ 307, 375, 377, 380.

Justice WEBB dissenting.

APPEAL by the State of North Carolina pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, 95 N.C. App. 661, 384 S.E.2d 309 (1989), affirming the judgment of *Strickland, J.*, at the 3 October 1988 session of Superior Court, ONSLOW County. Heard in the Supreme Court 12 March 1990.

Lacy H. Thornburg, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, for the State-appellant.

No counsel contra.

MEYER, Justice.

On 4 June 1988, defendant was charged with driving while impaired (DWI) in violation of N.C.G.S. § 20-139.1. Prior to trial in district court, defendant moved to suppress the results of the chemical analysis performed at the time of his arrest, introducing into evidence the test record cards from which the chemical analyst observed and recorded the test results. Defendant contended that because the marking on the card for the first test indicated a "reading" between 0.14 and 0.15 and the markings on the card for the second test indicated a "reading" of 0.12, the test results were rendered invalid under N.C.G.S. § 20-139.1(b3). That subsection provides that "the test *results* may only be used to prove a person's particular alcohol concentration if . . . [t]he *readings* do not differ from each other by an alcohol concentration greater than 0.02." N.C.G.S. § 20-139.1(b3)(2) (1983) (emphases added).

On 22 July 1988, District Court Judge Wayne G. Kimble granted defendant's motion. The State petitioned the Superior Court, Onslow County, for writ of certiorari to the district court, seeking to reverse the suppression order. Judge George M. Fountain granted the State's petition on 22 September 1988. On 17 October 1988, Judge James M. Strickland adopted the findings and conclusions of the district court judge and upheld the suppression order.

The State appealed to the Court of Appeals, upon certificate of the prosecutor that such appeal was not taken for the purpose of delay and that the evidence of the breathalyzer results was essential to the prosecution of the case. Relying upon its analysis in *State v. Tew*, 95 N.C. App. 634, 383 S.E.2d 400 (1989), the Court of Appeals upheld the suppression of the chemical analysis, Judge Cozort dissenting.

The State appealed to this Court as of right, and its requests for writ of supersedeas and stay were allowed by this Court on 25 September 1989. The issue presented in this case is identical to that presented in *State v. Tew*, 326 N.C. 732, 392 S.E.2d 603 (1990), decided this date. Relying on the reasoning set out in our decision in *Tew*, we now reverse the Court of Appeals. This case is remanded to the Court of Appeals for further remand to the trial division for proceedings not inconsistent with this opinion.

Reversed.

Justice WEBB dissenting.

I dissent for the reasons stated in my dissenting opinion in *State v. Tew*, 326 N.C. 732, 392 S.E.2d 603 (1990).

HENRY M. FISHER, SUBSTITUTE TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF R. B. MELTON v. LILLIE P. MELTON; GRACE P. MILLAR, EXECUTRIX OF THE ESTATE OF DOROTHY MELTON; JOE H. MELTON, NORMA M. CALHOUN, PEGGY MELTON; ALICE M. SHEARIN; OLA M. BOSEMAN; LINDA M. ELLEN; THOMAS I. HUTCHINSON; JAMES B. HUTCHINSON; ELMER E. BATTS; JULIE BATTS; CHRISTY ANN BATTS; LINDA K. BATTS; THEODORE L. CONYERS, VIRGINIA L. VESTER; DONALD L. BASS; WILLIAM K. BASS; CAROLYN BASS BROWN; VIRGINIA D. BASS; PATTIE LOU SMITH; BARBARA F. COLLINS, EXECUTRIX OF THE ESTATE OF LUCINDA D. FULGHUM; HAZEL MELTON; JACQUELINE S. BAILEY, RONALD ELLIS SMITH; WILL H. LASSITER, GUARDIAN AD LITEM FOR ALL THE UNKNOWN AND UNBORN HEIRS OF R. B. MELTON, ALL THE UNKNOWN AND UNBORN HEIRS OF MAVIS MELTON BELL AND ALL THE UNKNOWN AND UNBORN BENEFICIARIES OF THE TRUST UNDER THE LAST WILL AND TESTAMENT OF R. B. MELTON

No. 480A89

(Filed 13 June 1990)

APPEAL by defendants pursuant to N.C.G.S. § 7A-31 from the decision of the Court of Appeals (*Chief Judge Hedrick* and *Judge Orr* concurring, *Judge Lewis* dissenting), reported at 95 N.C. App. 729, 384 S.E.2d 63 (1989), which affirmed the order of *Barefoot, J.*, entered 10 October 1988 in Superior Court, NASH County. Heard in the Supreme Court 14 May 1990.

Tom Matthews and Battle, Winslow, Scott & Wiley, P.A., by Robert M. Wiley and M. Greg Crumpler, for defendant-appellant Lillie P. Melton.

Hunter, Wharton & Lynch, by V. Lane Wharton, Jr. and Maria M. Lynch, for defendant-appellants Julie B. Batts (Adams), Christy Ann Batts, and Linda K. Batts.

Fields & Cooper, by Roy A. Cooper, III and John S. Williford, Jr., for defendant-appellant Pattie Lou Smith.

Keel, Lassiter & Duffy, by Will H. Lassiter, III, for defendant-appellant Guardian Ad Litem for Unknown Heirs and Beneficiaries.

Hunton & Williams, by Catherine Thomas McGee and Walton K. Joyner; Valentine, Adams, Lamar, Etheridge & Sykes, by L. Wardlaw Lamar, for defendant-appellee Barbara F. Collins, Administratrix of the Estate of Lucinda D. Fulghum.

PER CURIAM.

Affirmed.

DOROTHY D. DYSON v. GARY B. STONESTREET AND DEOMALEE F. STONESTREET

No. 35A90

(Filed 13 June 1990)

APPEAL of right by defendant Gary B. Stonestreet pursuant to N.C.G.S. § 7A-30(2) (1989) from the decision of a divided panel of the Court of Appeals, 96 N.C. App. 564, 386 S.E.2d 595 (1989), reversing an order of directed verdict for said defendant entered by *Barefoot, J.*, on 14 February 1989 in Superior Court, NEW HANOVER County. Heard in the Supreme Court 16 May 1990.

Thomas J. Morgan for plaintiff-appellee.

Murchison, Taylor, Kendrick, Gibson & Davenport, by Vaiden P. Kendrick and John L. Coble, for defendant-appellant.

PER CURIAM.

For the reasons stated in the dissenting opinion of Becton, J., the decision of the Court of Appeals is

Reversed.

BOUTWELL v. BOUTWELL

No. 142P90

Case below: 97 N.C.App. 332

Petition by defendant for writ of supersedeas denied 13 June 1990. Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 13 June 1990.

BREININGER v. MACKO

No. 174P90

Case below: 97 N.C.App. 665

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 13 June 1990.

BROWNING-FERRIS INDUSTRIES v. LOWE'S OF GREENSBORO

No. 176P90

Case below: 97 N.C.App. 508

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 13 June 1990.

FOUR COUNTY ELECTRIC MEMBERSHIP CORP. v. POWERS

No. 50P90

Case below: 96 N.C.App. 417

Motion by defendant to dismiss appeal for lack of substantial constitutional question allowed 13 June 1990. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 13 June 1990.

GORDON v. NORTHWEST AUTO AUCTION

No. 63A90

Case below: 97 N.C.App. 88

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals allowed 13 June 1990.

HATCHER v. ROSE

No. 171PA90

Case below: 97 N.C.App. 652

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 13 June 1990.

IN RE APPEAL OF FOUNDATION HEALTH SYSTEMS CORP.

No. 45PA90

Case below: 96 N.C.App. 571

Petition by Forsyth County for discretionary review pursuant to G.S. 7A-31 allowed 13 June 1990.

IN RE ESTATE OF FLETCHER

No. 546P89

Case below: 96 N.C.App. 275; 326 N.C. 264

Motion by Carol Fletcher for reconsideration of petition for discretionary review pursuant to G.S. 7A-31 denied 13 June 1990.

JUDA v. N. C. NATIONAL BANK

No. 175P90

Case below: 97 N.C.App. 666

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 13 June 1990.

KEPLEY v. KEPLEY

No. 159P90

Case below: 97 N.C.App. 508

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 13 June 1990.

McELVEEN-HUNTER v. FOUNTAIN MANOR ASSN.

No. 143PA90

Case below: 96 N.C.App. 627

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 13 June 1990.

MECHANICS AND FARMERS BANK v. HIGGINS

No. 155P90

Case below: 97 N.C.App. 508

Petition by defendant (Charles B. Higgins, Sr.) for discretionary review pursuant to G.S. 7A-31 denied 13 June 1990.

MOSLEY & MOSLEY BUILDERS v. LANDIN LTD.

No. 165P90

Case below: 97 N.C.App. 511

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 13 June 1990.

PITTMAN v. N.C. DEPT. OF TRANSPORTATION

No. 191P90

Case below: 97 N.C.App. 658

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 13 June 1990.

RUCKER v. FIRST UNION NAT. BANK

No. 192P90

Case below: 98 N.C.App. 100

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 13 June 1990.

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

STATE v. CESAR

No. 182P90

Case below: 98 N.C.App. 155

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 13 June 1990.

STATE v. CUNNINGHAM

No. 170P90

Case below: 97 N.C.App. 631

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 13 June 1990.

STATE v. DAVIS

No. 216P90

Case below: 98 N.C.App. 340

Petition by defendant for writ of supersedeas and temporary stay denied 23 May 1990. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 23 May 1990. Motion by defendant for reconsideration of petition denied 13 June 1990.

STATE v. GANDY

No. 144P90

Case below: 98 N.C.App. 155

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 13 June 1990. Temporary stay dissolved 13 June 1990.

STATE v. JERRELLS

No. 209P90

Case below: 98 N.C.App. 318

Petition by Attorney General for temporary stay allowed pending consideration and determination of the petition for discretionary review 29 May 1990. Temporary stay dissolved 13 June 1990. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 13 June 1990.

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

STATE v. JOYCE

No. 147P90

Case below: 97 N.C.App. 464

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 13 June 1990.

STATE v. MARTIN

No. 166P90

Case below: 97 N.C.App. 604

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 13 June 1990.

STATE v. MAYSE

No. 177P90

Case below: 97 N.C.App. 559

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 13 June 1990.

STATE v. MILLS

No. 139P90

Case below: 97 N.C.App. 507

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 13 June 1990.

STATE v. MOORE

No. 136P90

Case below: 97 N.C.App. 507

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 13 June 1990.

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

STATE v. NEWSOME

No. 138P90

Case below: 97 N.C.App. 507

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 13 June 1990.

STATE v. RAMBO

No. 246P90

Case below: 98 N.C.App. 516

Petition by defendant for writ of supersedeas and temporary stay denied 13 June 1990. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 13 June 1990.

STATE v. ROBINSON

No. 153P90

Case below: 97 N.C.App. 597

Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 13 June 1990. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 13 June 1990.

STATE v. SLADE

No. 180P90

Case below: 97 N.C.App. 667

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 13 June 1990.

STATE EX REL. COMR. OF INS. v. N.C. RATE BUREAU

No. 167P90

Case below: 97 N.C.App. 644

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 13 June 1990.

STONE v. STONE

No. 39P90

Case below: 96 N.C.App. 633

Motion by defendant to dismiss appeal for lack of substantial constitutional question allowed 13 June 1990. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 13 June 1990.

TOWN OF ATLANTIC BEACH v. TRADEWINDS CAMPGROUND

No. 179P90

Case below: 97 N.C.App. 655

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 13 June 1990.

VANDIFORD v. N.C. DEPT. OF CORRECTION

No. 173P90

Case below: 97 N.C.App. 640

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 13 June 1990.

WARD v. THE DAILY REFLECTOR

No. 168P90

Case below: 97 N.C.App. 668

Motion by defendants to dismiss appeal for lack of substantial constitutional question allowed 13 June 1990. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 13 June 1990.

APPENDIXES

AMENDMENTS TO RULES GOVERNING
ADMISSION TO PRACTICE OF LAW

RUFFIN MEMORIAL

AMENDMENTS TO STATE BAR
RULES RELATING TO LEGAL SPECIALIZATION

UPDATE OF THE HISTORY OF
THE SUPREME COURT OF NORTH CAROLINA

AMENDMENTS
TO
RULES GOVERNING ADMISSION
TO PRACTICE OF LAW

The following amendments to the Rules Governing Admission to the Practice of Law in the State of North Carolina were duly adopted by the Council of the North Carolina State Bar at its regular quarterly meeting on January 15, 1988.

BE IT RESOLVED that Rules .0501(5), .0502(3), .0502(4) and .0903 of the Rules Governing Admission to the Practice of Law in the State of North Carolina as appear in 289 N.C. 742 and as amended in 293 N.C. 759, 295 N.C. 747, 296 N.C. 746, 304 N.C. 746, 306 N.C. 793, 307 N.C. 707, 310 N.C. 753, and 312 N.C. 838 be amended as shown by the Resolution of the Board of Law Examiners attached hereto.

RESOLUTION

WHEREAS, the Board of Law Examiners of the State of North Carolina held a meeting in its offices in the N.C. State Bar Building located at 208 Fayetteville Street Mall, Raleigh, North Carolina, on January 22, 1988; and,

WHEREAS, at this meeting, the Board considered amendments to:

Rule	.0201	Rule	.0404(4)	Rule	.0605
Rule	.0202(3)	Rule	.0404(5)	Rule	.0701
Rule	.0202(4)	Rule	.0405	Rule	.0702
Rule	.0202(5)	Rule	.0501(1)	Rule	.0802
Rule	.0205	Rule	.0501(2)	Rule	.0804
Rule	.0206	Rule	.0501(3)	Rule	.0805
Section	.0300	Rule	.0501(4)	Rule	.0901
Rule	.0301	Rule	.0501(5)	Rule	.1001
Rule	.0302	Rule	.0501(6)	Rule	.1002
Rule	.0303	Rule	.0501(7)	Rule	.1004(1)
Rule	.0304	Rule	.0502(2)	Rule	.1202
Rule	.0401	Section	.0600	Rule	.1203
Rule	.0402(1)	Rule	.0601	Rule	.1203(3)
Rule	.0404(1)	Rule	.0603	Rule	.1207
Rule	.0404(2)	Rule	.0603(1)	Rule	.1401
Rule	.0404(3)	Rule	.0604	Rule	.1403

of the Rules Governing Admission to the Practice of Law in the State of North Carolina; and,

WHEREAS, on motion by Arch Schoch, Jr., seconded by Landon Roberts, it was RESOLVED that the above enumerated rules in the Rules Governing Admission to the Practice of Law in the State of North Carolina be amended to read as set out on the attached pages.

NOW, THEREFORE BE IT RESOLVED by unanimous vote of the Board of Law Examiners of the State of North Carolina that the above enumerated rules in the Rules Governing Admission to the Practice of Law in the State of North Carolina be amended to read as set out on the attached thirteen (13) pages; and that the action of this Board be certified to the Council of the North Carolina State Bar and to the North Carolina Supreme Court for approval.

Enacted at a regularly scheduled meeting of the Board of Law Examiners of the State of North Carolina on January 22, 1988.

Given over my hand and seal of the Board of Law Examiners, this the 22nd day of January, 1988.

FRED P. PARKER III
Executive Secretary

TABLE OF CONTENTS

TABLE OF CONTENTS — Continued

SECTION .0100—ORGANIZATION

.0101 Address — No Changes

.0102 Purpose — No Changes

.0103 Membership — No Changes

SECTION .0200—GENERAL PROVISIONS

.0201 Compliance Provisions

No person shall be admitted to the practice of law in North Carolina unless *that person* has complied with these rules and the laws of the state.

.0202 Definitions

(1) No Changes

(2) No Changes

(3) Delete

(3)(4) As used in these rules, the word "filing" or "filed" shall mean received in the office of the Board of Law Examiners.

(4)(5) As used in these rules, the word "Chapter" refers to the "Rules Governing Admission to the Practice of Law in the State of North Carolina."

.0203 Applicants — No Changes

.0204 List — No Changes

.0205 Hearings

Every applicant may be required to appear before the board to be examined about any matters pertaining to *the applicant's* moral character *and general fitness*, educational background or any other matters set out in Section .0500 of this Chapter.

.0206 Nonpayment of Fees

Failure to pay the fees as required by these rules shall result in a denial of the application to take the North Carolina Bar Examination. All checks payable to the board for any fees which are not honored upon presentment shall be returned to the applicant who shall, within ten (10) days following the receipt thereof, pay to the board in cash, cashier's check, certified check or money order, any fees payable to the Board.

SECTION .0300—REGISTRATION—Delete

.0301 Who Must Register—Delete

Delete

.0302 Registration Forms—Delete

Delete

.0303 Filing Date—Delete

Delete

.0304 Fees; Late Registration—Delete

Delete

SECTION .0400—APPLICATIONS OF GENERAL APPLICANTS

.0401 How to Apply

Applications for admission to an examination must be made upon forms supplied by the board and must be complete in every detail. Every supporting document required by the application form must be submitted with each application. The application form may be obtained by writing or *telephoning* the board's offices.

.0402 Application Form

(1) The application form requires an applicant to supply *full and complete* information relating to the *applicant's* background, including family *history*, past *and current* residences, education, military *service, past and present* employment, credit status, *involvement in* disciplinary, *civil or criminal* proceedings, *substance abuse*, mental *treatment and bar admission and discipline history. Applicants must list references and submit as part of the application*:

—Four Certificates of Moral Character from individuals who know the applicant;

—A recent photograph;

—One set of clear fingerprints;

—*Two executed informational Authorization and Release forms*;

—A birth certificate;

—*Transcripts from the applicant's undergraduate schools*;

—*A copy of all applications to take a bar examination or an attorney's examination or for admission to the practice of law that the applicant has filed with any state, territory, or the District of Columbia*;

—*A certificate from the proper court or agency of every state in which the applicant is or has been licensed, that the applicant is in good standing and not under pending charges of misconduct*;

—*Copies of any legal proceedings in which the applicant has been a party.*

The application must be filed in duplicate. The duplicate may be a photocopy of the original.

(2) No Changes

.0403 Filing Deadlines

(1) No Changes

(2) No Changes

(3) No Changes

.0404 Fees

Every application by an applicant who:

(1) is *not* a licensed attorney in any other jurisdiction shall be accompanied by a fee of $300.00.

(2) is a licensed attorney in any other jurisdiction shall be accompanied by a fee of $700.00.

(3) is filing to take the North Carolina Bar Examination using a Supplemental Application shall be accompanied by a fee of $225.00.

(4) *is filing after the deadline set out in Rule .0403(1) shall be accompanied by a late fee of* $100.00 *in addition to all other fees required by these* rules.

(5) Delete

.0405 Refund of Fees

No part of the fee required by Rule .0404 of this Chapter shall be refunded to the applicant unless the applicant shall file with the secretary a written request to withdraw as an applicant, not later than the 15th day of June preceding the July written bar examination and not later than the 15th day of January preceding the February written bar examination, in which event not more than one-half of the fee may be refunded to the applicant in the discretion of the board.

SECTION .0500—REQUIREMENTS FOR APPLICANTS

.0501 Requirements for General Applicants

No Changes

(1) *Possess the qualifications of character and general fitness requisite for an attorney and counselor-at-law, and* be of good moral character and *entitled to the high regard and confidence of the public and* have satisfied the requirements of Section .0600 of this Chapter both at the time the license is issued and at the time of standing and passing a written bar examination as prescribed in Section .0900 of this Chapter.

(2) Delete

(2)(3) No Changes

(3)(4) No Changes

(4)(5) No Changes

(5)(6) No Changes

(6)(7) have stood and passed the Multistate Professional Responsibility Examination approved by the Board within the twenty-four (24) month period next preceding the beginning day of the written bar examination prescribed by Section .0900 of this Chapter which the applicant applies to take, or shall take and pass the Multistate Professional Responsibility Examination within the twelve (12) month period thereafter.

(7)(8) if the applicant is a licensed attorney then *the applicant* be in good professional standing in every state or territory of the United States, or the District of Columbia in which the applicant has been licensed to practice law and not under pending charges of misconduct.

.0502 Requirements for Comity Applicants

No Changes

(1) No Changes

(2) Pay to the Board with each written application, a fee of $1,000.00, no part of which may be refunded to the applicant whose application is denied.

(3) No Changes

(4) No Changes

(5) No Changes

(6) No Changes

(7) No Changes

(8) No Changes

(9) No Changes

SECTION .0600 – MORAL CHARACTER AND GENERAL FITNESS

.0601 Burden of Proof

Every applicant shall have the burden of proving that the applicant *possesses the qualifications of character and general fitness requisite for an attorney and counselor-at-law and* is possessed of good moral character and is entitled to the high regard and confidence of the public.

.0602 Permanent Record

No Changes

.0603 Failure to Disclose

No one shall be licensed to practice law by examination or comity *or be allowed to take the bar examination* in this state:

(1) who fails to disclose fully to the Board, whether requested to do so or not, the facts relating to any disciplinary proceedings or charges as to *the applicant's* professional conduct, whether same have been terminated or not, in this or any other state, or any federal court or other jurisdiction, or

(2) No Changes

.0604 Bar Candidate Committee

Every applicant shall appear before a bar candidate committee, appointed by the chairman of the board, in the judicial district in which *the applicant* resides, or in such other judicial district as the board in its sole discretion may designate to the *applicant*, to be examined about any matter pertaining to *the applicant's* moral character *and general fitness to practice law*. An applicant who has appeared before a bar candidate committee may, in the board's discretion, be excused from making a subsequent appearance before a bar candidate committee. The applicant shall give such information as may be required on such forms provided by the board. A bar candidate committee may require the applicant to make more than one appearance before the committee and to furnish to the committee such information and documents as it may reasonably require pertaining to the moral *character and general* fitness of the applicant to be licensed to practice law in North Carolina. Each applicant will be advised *when to appear* before the bar candidate committee.

.0605 Denial; Re-Application

No new application or petition for reconsideration of a previous application from an applicant who has *either* been denied permission to take the bar examination *or has been denied a license to practice law on the grounds set forth in Section .0600* shall be considered by the board within a period of three (3) years next after the date of such denial unless, for good cause shown, permission for re-application or petition for a reconsideration is granted by the board.

SECTION .0700—EDUCATIONAL REQUIREMENTS

.0701 General Education

Each applicant must have satisfactorily completed the academic work required for admission to a law school approved by the Council of the North Carolina State Bar.

.0702 Legal Education

Every applicant applying for admission to practice law in the State of North Carolina, before being granted a license to practice law, shall prove to the satisfaction of the board that said applicant has graduated from a law school approved by the Council of the North Carolina State Bar or that said applicant will graduate within thirty (30) days after the date of the written bar examination from a law school approved by the Council of the North Carolina State Bar. *There* shall *be* filed with the secretary a certificate of the dean, or other proper official of said law school, certifying the date of *the applicant's* graduation. A list of the approved law schools is available in the office of the secretary.

SECTION .0800—PROTEST

.0801 Nature of Protest

No Changes

.0802 Format

A protest shall be made in writing, signed by the person making the protest and bearing *the person's* home and business address, and shall be filed with the secretary prior to the date on which the applicant is to be examined.

.0803 Notification; Right to Withdraw

No Changes

.0804 Hearing

In case the applicant does not withdraw as a candidate for admission to the practice of law at that examination, the person or persons making the protest and the applicant in question shall appear before the board at a time and place to be designated by the board. In the event time will not permit a hearing on the protest prior to the examination, the applicant may take the written examination, *and the results will be sealed* until final disposition of the protest in favor of the applicant.

.0805 Refusal to License

Nothing herein contained shall prevent the board on its own motion from refusing to issue a license to practice law until the board has been fully satisfied as to the moral *character and general* fitness of the applicant as provided by Section .0600 of this Chapter.

SECTION .0900—EXAMINATIONS

.0901 Written Examination

Two written bar examinations shall be held each year for those applying to be admitted to the practice of law in North Carolina.

.0902 Dates

No Changes

.0903 Subject Matter

No Changes

.0904 Passing Score

No Changes

SECTION .1000—REVIEW OF WRITTEN BAR EXAMINATION

.1001 Review

An unsuccessful applicant to the bar examination may examine the test booklets containing *the applicant's* essay examination along with model answers and the essay examination in the board's offices.

.1002 Fees

The board will furnish an unsuccessful applicant a copy of the applicant's essay examination at a cost to be determined by the secretary not to exceed $20.00. No copies of *any* model answers will be made or furnished to the applicant.

.1003 Multistate Bar Examination

No Changes

.1004 Scores

(1) Upon written request the board will release to an unsuccessful applicant *the applicant's* scores on the bar examination

(2) No Changes

.1005 Board Representative

No Changes

SECTION .1200—BOARD HEARINGS

.1201 Nature of Hearings

(1) No Changes

(2) No Changes

.1202 Notice of Hearing

The chairman will schedule the hearings before the board or panel and such hearings will be scheduled by the issuance of a

notice of hearing mailed to the applicant or *the applicant's* attorney within a reasonable time before the date of the hearing.

.1203 Conduct of Hearings

(1) No Changes

(2) No Changes

(3) The Board or a Panel of the Board may require an applicant to make more than one appearance before the Board or Panel, to furnish information and documents as it may reasonably require, and to submit to reasonable physical or mental examinations, all at the applicant's expense, pertaining to the moral character or general fitness of the applicant to be licensed to practice law in North Carolina.

.1204 Continuances; Motions For

No Changes

.1205 Subpoenas

(1) No Changes

(2) No Changes

.1206 Depositions and Discovery

(1) No Changes

(2) No Changes

.1207 Reopening of a Case

After a final decision has been reached by the board in any matter, a party may petition the board to reopen or reconsider a case. Petitions will not be granted except when petitioner can show that the reasons for reopening or reconsidering the case are to introduce newly discovered evidence which was not presented at the initial hearing because of some justifiable, excusable or unavoidable circumstances and that fairness and justice require reopening or reconsidering the case. The decision made by the board will be in writing and a copy will be sent to the petitioner or *the petitioner's* attorney and made a part of the record of the hearing.

SECTION .1300—LICENSES

.1301 Interim Permit for Comity Applicants

No Changes

.1302 Licenses for General Applicants

No Changes

SECTION .1400—JUDICIAL REVIEW

.1401 Appeals

A general applicant may appeal from an adverse ruling or determination by the board as to the applicant's eligibility to take the written examination. After a general applicant has successfully passed the written examination, *the applicant* may appeal from any adverse ruling or determination withholding *the applicant's* license to practice law. A comity applicant may appeal from an adverse ruling of the Board of Law Examiners denying *the applicant's* application to the North Carolina Bar by comity for failure to meet any of the requirements of Rule .0502 of this Chapter.

.1402 Notice of Appeal

No Changes

.1403 Record to be Filed

Within sixty days after receipt of the notice of appeal, *and after the applicant has paid the cost of preparing the record,* the Secretary shall prepare, certify, and file with the clerk of the Superior Court of Wake County the record of the case, comprising:

(1) No Changes

(2) No Changes

(3) No Changes

(4) No Changes

(5) No Changes

No Changes

.1404 Wake County Superior Court

No Changes

.1405 North Carolina Supreme Court

No Changes

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments were duly adopted by the Council of the North Carolina State Bar at its meeting on Friday, January 15, 1988, and concurred in by the Board of Law Examiners at its meeting on January 22, 1988.

Given over my hand and Seal of the North Carolina State Bar, this the 26th day of January, 1988.

B. E. JAMES
Secretary

After examining the foregoing amendments to the Rules Governing Admission to Practice of Law as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 3rd day of February, 1988.

JAMES G. EXUM, JR.
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules Governing Admission to Practice of Law be spread upon the Minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 3rd day of February, 1988.

WHICHARD, J.
For the Court

AMENDMENTS TO RULES GOVERNING ADMISSION TO PRACTICE OF LAW

The following amendments to the Rules Governing Admission to the Practice of Law in the State of North Carolina were duly adopted by the Council of the North Carolina State Bar at its regular quarterly meeting on July 13, 1990.

BE IT RESOLVED that Rule .0404 of the Rules Governing Admission to the Practice of Law in the State of North Carolina as appear in 289 N.C. 742 and as amended in 293 N.C. 759, 295 N.C. 747, 296 N.C. 746, 304 N.C. 746, 306 N.C. 793, 307 N.C. 707, 310 N.C. 753, 312 N.C. 838, and as approved by the Court on February 3, 1988, be amended as follows:

.0404 FEES

Every application by an applicant who:

(1) is not a licensed attorney in any other jurisdiction shall be accompanied by a fee of $400.00.

(2) is a licensed attorney in any other jurisdiction shall be accompanied by a fee of $800.00.

(3) is filing to take the North Carolina Bar Examination using a Supplemental Application shall be accompanied by a fee of $300.00.

(4) is filing after the deadline set out in Rule .0403(1) shall be accompanied by a late fee of $150.00 in addition to all other fees required by these rules.

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments were duly adopted by the Council of the North Carolina State Bar at its meeting on Friday, July 13, 1990.

Given over my hand and the Seal of the North Carolina State Bar, this the 23rd day of July, 1990.

B. E. JAMES
Secretary

After examining the foregoing amendments to the Rules Governing Admission to Practice of Law as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 26th day of July, 1990.

JAMES G. EXUM, JR.
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules Governing Admission to Practice of Law be spread upon the Minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 26th day of July, 1990.

WHICHARD, J.
For the Court

RUFFIN MEMORIAL

On February 12, 1990, at 9:30 p.m., the Supreme Court of North Carolina convened in regular session. Upon the opening of Court, Chief Justice James G. Exum, Jr., addressed the assembled members of the bar and public as follows:

> "This morning, in celebration of the seventy-fifth anniversary of the presentation of the statue of former Chief Justice Thomas Ruffin, Sr., and in recognition of his contributions and accomplishments as a member of this Court, I will call on the Court's chairman of ceremonial occasions, chief of protocol, and principal historian, Associate Justice Harry C. Martin, for a few remarks concerning Chief Justice Ruffin."

REMARKS OF ASSOCIATE JUSTICE HARRY C. MARTIN MEMORIALIZING FORMER CHIEF JUSTICE THOMAS RUFFIN, SR. TO THE SUPREME COURT OF NORTH CAROLINA FEBRUARY 12, 1990

"Thank you, Mr. Chief Justice Exum, my brothers on this Court, members of the bar, and ladies and gentlemen.

"I wish to thank Mr. Dan Moody of the North Carolina Historical Commission for assisting in this ceremony honoring Chief Justice Ruffin.

"February of this year marked the 75th anniversary of the unveiling of the memorial statue of Chief Justice Thomas Ruffin. Because of his profound influence on the legal community, both here in North Carolina and across the nation, this Court believes that it is proper and fitting to pause in our deliberations today and to reflect on the life of a judge from North Carolina who is recognized as one of the greatest judges that the United States has ever produced.

"Thomas Carter Ruffin was born on November 17, 1787, in Virginia, the son of a Methodist minister. He received a classical education at the Warrenton Academy in Warren County, and from there removed to Princeton, where he received a Bachelor's Degree in 1805. Returning to Virginia, he read law under Daniel Robertson, Esquire, of Petersburg, for two years. In the fall of 1807, the Ruffin family moved to Rockingham County, North Carolina. It was there that Thomas met the eminent jurist, Archibald Murphy, who later was a member of this Court, and continued his legal education under Judge Murphy. In 1809, at the age of 22, Ruffin was admitted to the bar and began his professional career.

"In his only venture into politics, Ruffin represented Hillsborough in the House of Commons in 1813, 1815 and 1816. He served as Speaker of the House in 1816; and it was also in 1816 that he was elected to the superior court. Judge Ruffin remained on the superior court bench only two years, resigning due to the modest salaries paid to judges and the demands of an increasing family. At that time, all judges of superior court and the Supreme Court were elected by the legislature for life terms.

"From 1818 until 1825, Ruffin built a practice that was unequaled during that period in our history. For those people who had hard or difficult cases, it was Ruffin to whom they turned. He rode the circuit for 43 weeks a year, and despite traveling on horseback in all conditions of weather, he rarely failed to meet the calendar call.

"Ruffin gained a reputation during this period as being rough toward opposing litigants and witnesses. He was 'a vehement speaker, and sometimes would knock the floor instead of the table with his knuckles . . . .' His powerful cross-examinations were such that witnesses often trembled when they took the stand on the prospect of being questioned by Judge Ruffin. His practice at the bar included the state courts, the newly organized Supreme Court of North Carolina and the Circuit Court of the United States. During his practice at the federal court, he and Chief Justice John Marshall developed a close friendship that lasted throughout their lives. During this period, Ruffin also served as a Reporter for the Supreme Court of North Carolina.

"In 1825, Judge Ruffin was named again to the superior court bench, and during the next three years he administered the law on the North Carolina circuits. Because of his excellent judgments and sound common sense, it was generally held that the next vacant seat on the North Carolina Supreme Court would be his.

"Judge Ruffin resigned from the superior court bench in 1828 to accept the presidency of the financially troubled State Bank of North Carolina. Within twelve months he had returned the bank to solvency and restored the confidence of the public to the bank.

"It was also in 1828 that he was assured election to the United States Senate if he would only give his permission for his name to be placed into nomination. Judge Ruffin told his friends that after the labor and attention he had bestowed upon his profession, 'it is my desire to go down to posterity as a lawyer and prefer to be known as a jurist.' And it is as a jurist that Ruffin is most remembered.

"In *The Formation Years of American Law*, Dean Pound lists ten judges that he ranked higher than all others in American judicial history. Thomas Ruffin is listed with John Marshall, Joseph Story, James Kent, and Oliver Wendell Holmes. Later, Professor William Hurst said that he had an 'uneasy suspicion that all of the solemn judgments came back to that one list which Dean Pound gave us.'

"Judge Ruffin came to the North Carolina Supreme Court in December 1829, and upon the demise of Chief Justice Henderson, was elected as the Chief Justice of North Carolina in 1833 by his brothers on the Court. He served as Chief Justice until 1852.

"Upon the death of Chief Justice Nash, Ruffin, at the age of 72, was again elected to the Court as an Associate Justice and served an additional eighteen months. Mr. Chief Justice, you and Chief Justice Ruffin share an unusual experience: both of you left the Court and subsequently returned to serve in different capacities. You left as an associate justice and returned as Chief Justice—Ruffin left as Chief Justice and later returned to serve as an associate justice.

"It was as Chief Justice that he won imperishable fame. Although Ruffin may have had equals in either law or equity, he was master of them. During his nearly 25 years on the Supreme Court Bench, Justice Ruffin wrote over 1,400 opinions which constitute the bulk of our judicial literature for a full generation. The topics are as broad as the subject of law itself and have been quoted in the state and federal courts and by legal authors. The Ruffin Court was the only southern court ever quoted with approval by the English Courts of Westminster Hall.

"It is through these opinions that Thomas Ruffin will live through the centuries. Governor Locke Craig of Buncombe said it best in his speech upon accepting the Ruffin Memorial Statue —'In the uttermost parts of the earth, where the English jurisprudence exercises its beneficent rule, he speaks and will speak to legislatures, to courts, and to executives, directing and enlightening them in a way of truth and in the conception and the administration of justice.' Thomas Ruffin was 'great as a lawyer, great as a judge, great as a financier,' and will be known throughout the ages as North Carolina's great Chief Justice.

"Although he was born a Methodist, Chief Justice Ruffin became an Episcopalian, and as a founding member of St. Matthews Church in Hillsborough, he donated the land for that church. Ruffin raised 13 children, one being Thomas Ruffin, 'the younger,' who also

served upon this Court. Father and son lie buried in the graveyard of St. Matthews in Hillsborough.

"Thank you, Mr. Chief Justice."

Chief Justice Exum accepted the memorial remarks on behalf of the Court:

> "Thank you, Justice Martin, for those remarks. I might add that the portrait of 'the great judge' stands just behind me, and the lighting of that portrait, when it was installed a number of years ago, was something of a technological achievement and has a story behind it which I won't go into at this time.
>
> "I will ask that the remarks of Associate Justice Martin be spread upon the minutes of the Court and be published in our *Reports*. Thank you very much, Justice Martin, for that recognition and those remarks. It is well, I think, from time to time, to remember our predecessors and our forebears and the wonderful legacies which they left us as we now stand in their shoes and carry on the work of the Court."

AMENDMENTS TO STATE BAR RULES RELATING TO LEGAL SPECIALIZATION

The following amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted and amended by the Council of the North Carolina State Bar at its quarterly meeting on April 13, 1990.

BE IT RESOLVED by the Council of the North Carolina State Bar, that Article VI, Section 5, Standing Committees of the Council, as appear in 313 N.C. 756 and amended by the Council and approved by the Supreme Court as appear in 323 N.C. 723, be and the same are hereby amended by adding the following:

There is hereby created, pursuant to Section 5. Standing Committees of the Council, J. (3.2) of the Committee on Legal Specialization the following additional designated area in which certification of specialty may be granted.

5. Criminal Law. The specialty of Criminal Law is the practice of law dealing with the defense or prosecution of those charged with misdemeanor and felony crimes in state and federal trial and appellate courts. Subspecialty in the field is identified and defined as follows:

"Criminal Appellate Practice—The practice of criminal law at the appellate court level."

BE IT FURTHER RESOLVED THAT THE STANDARDS FOR CERTIFICATION AS A SPECIALIST IN CRIMINAL LAW are as follows:

STANDARDS FOR CERTIFICATION AS A SPECIALIST IN CRIMINAL LAW

1. **Establishment of Specialty Field**

The North Carolina State Bar Board of Legal Specialization (hereinafter referred to as the Board) hereby designates Criminal Law, including the subspecialty of Criminal Appellate Practice, as a field of law for which certification of specialists under the North Carolina Plan of Legal Specialization is permitted.

2. **Definition of Specialty**

The specialty of Criminal Law is the practice of law dealing with the defense or prosecution of those charged with misdemeanor and felony crimes in state and federal trial and appellate courts. Subspecialty in the field is identified and defined as follows:

2.1 Criminal Appellate Practice

The practice of criminal law at the appellate court level.

3. **Recognition as a Specialist in Criminal Law**

A lawyer may qualify as a specialist by meeting the standards set for Criminal Law or the subspecialty of Criminal Appellate Practice. If a lawyer qualifies as a specialist in Criminal Law, a lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Criminal Law." If a lawyer qualifies as specialist in the subspecialty of Criminal Appellate Practice, a lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Criminal Appellate Practice." If a lawyer qualifies as a specialist in Criminal Law by meeting the standards set for both Criminal Law and the subspecialty of Criminal Appellate Practice, a lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Criminal Law and Criminal Appellate Practice."

4. **Applicability of Provisions of the North Carolina Plan of Legal Specialization**

Certification and continued certification of specialists in criminal law shall be governed by the provisions of the North Carolina Plan of Legal Specialization as supplemented by these Standards for Certification.

5. **Standards for Certification as a Specialist in Criminal Law**

Each applicant for certification as a specialist in Criminal Law shall meet the minimum standards set forth in Section 7 of the North Carolina Plan of Legal Specialization. In addition each applicant shall meet the following standards for certification in Criminal Law:

A. **Licensure and Practice**

An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of the application. During the period of certification an applicant shall continue to be licensed and in good standing to practice law in North Carolina.

B. **Substantial Involvement**

An applicant shall affirm to the Board that the applicant has experience through substantial involvement in the practice of Criminal Law and/or in the practice of Criminal Appellate Procedure.

1. For the specialty of Criminal Law the applicant must have been engaged in the active practice of law for at least five years prior to certification with a substantial involvement in the area of criminal law. For the specialty of Criminal Law substantial involvement in Criminal Law shall mean the following:

   (a) The applicant must have completed the requirements set forth in subparagraphs 5(B)(1)(b) and 5(B)(1)(c).

   (b) The applicant must have been participating counsel of record in criminal proceedings as follows:

      (i) Five (5) felony jury trials in cases submitted to jury for decision; and

      (ii) Ten (10) additional jury trials, regardless of offenses, submitted to jury for decision; and

      (iii) Fifty (50) additional criminal matters to disposition in the State District or Superior Courts, or in the U.S. District Court (disposition being defined as the conclusion of a criminal matter); and

      (iv) Any one of the following:

         a) Two (2) oral appearances before an appellate court of the State of North Carolina or the United States; or

         b) Three (3) written appearances before any appellate court in which the applicant certifies that he/she had primary responsibility for the preparation of the record on appeal and brief; or

         c) Twenty-five (25) additional criminal trials in any jurisdiction which were submitted to the judge or jury for decision.

   (c) During the 5 years prior to application, the applicant must:

      (i) Appear as participating counsel for at least 25 days in the actual trial of one or more criminal cases to a jury, whether to verdict or not; and

      (ii) Make 75 court appearances in any substantive non-jury trial or proceeding (excluding calendar calls, continuance motions or other purely administrative matters) in a criminal court of any jurisdiction; and

(iii) Have devoted an average of 500 hours per year in the area of criminal law but not less than 400 hours in any one year.

(d) Upon recommendation by the Specialty Committee and approval by the Board, where the profession of an applicant or the geographical location of an applicant prohibits his/her completing all of the above requirements in 5(B)(1), and the applicant shows substantial involvement in other areas of law requiring similar skills, engaged in research, writing, teaching special studies of criminal law and procedure, to include criminal appellate law, said applicant may substitute such experience for one (1) year of the five (5) required years of 5(B)(1)(c) and must meet all of the requirements of 5(B)(1)(b)(iv) and three-fifths of the remaining requirements of Section 5(B)(1)(c) over a period of five years.

2. For the specialty of Criminal Appellate Practice the applicant must have been engaged in the active practice of law for at least five years prior to certification with a substantial involvement in the area of criminal law. For the specialty of Criminal Appellate Practice, substantial involvement shall mean the following:

(a) The applicant must have, for the five (5) years prior to certification, completed the requirements set forth in subparagraphs 5(B)(2)(b) and 5(B)(2)(c).

(b) For the specialty of Criminal Appellate Practice the applicant must have been engaged in the active practice of law for at least five (5) years prior to certification, at least three (3) (unless excepted under (c)(iii) below) of which must immediately precede the application during which time the applicant must have completed the requirements set forth in 5(B)(1)(b).

(c) The applicant must:

(i) Have represented a party in at least 15 criminal appeals, 5 of which must have been within the two years preceding the application; and

(ii) Have had at least 5 years of the actual practice of law of which a substantial portion has been criminal appellate practice; and

(iii) Have had substantial involvement in criminal appellate work, including brief writing, motion practice, oral arguments, and extraordinary writs. Sitting as an appellate court judge for at least one (1) year of the three (3) years preceding application will fulfill three (3) years of the practice requirements.

(d) Upon recommendation by the Committee and approval by the Board, where the profession of the applicant or the geographical location of an applicant prohibits his/her completion of all or a portion of the requirements of Section 5(B)(2)(b) and the applicant can show substantial involvement in other areas of law requiring similar skills, or engagement in research, writing, teaching special studies of criminal law and procedure, to include criminal appellate law, said applicant may substitute such experience for one (1) year of the required five (5) years and may qualify by meeting all of the requirements of Section 5(B)(1)(b)(i) and (ii), and upon the showing of the representation of at least five (5) criminal appellate actions within the last two years.

C. **Continuing Legal Education**

1. In the specialty of Criminal Law, an applicant must have earned no less than forty (40) hours of accredited continuing legal education credits in Criminal Law during the three years preceding application, which forty (40) hours must include the following:

   a. At least ten (10) hours in the area of evidence; and

   b. At least ten (10) hours in the areas of trial advocacy or trial tactics; and

   c. At least ten (10) hours in the areas of substantive criminal law and/or criminal procedure; and

   d. At least six (6) hours in the area of ethics of criminal law.

2. In the subspecialty of Criminal Appellate Practice, an applicant must have earned no less than forty (40) hours of accredited continuing legal education credits in Criminal Appellate Law during the three years preceding application, including continuing legal education in each of the following areas:

a. At least ten (10) hours in the area of evidence; and

b. At least ten (10) hours in the areas of appellate advocacy or appellate tactics; and

c. At least ten (10) hours in the areas of substantive appellate law and/or procedure; and

d. At least six (6) hours in the area of ethics of criminal law.

3. In order to be certified as a specialist in Criminal Law, and as a specialist in the subspecialty of Criminal Appellate Practice, the applicant must have earned no less than forty-six (46) hours of accredited continuing legal education credits during the three years preceding application, including continuing legal education in each of the following areas:

a. At least ten (10) hours in the area of evidence; and

b. At least ten (10) hours in the areas of appellate advocacy or appellate tactics; and

c. At least ten (10) hours in the areas of trial advocacy or trial tactics; and

d. At least ten (10) hours in the areas of procedure and substantive criminal law; and

e. At least six (6) hours in the area of ethics of criminal law.

D. **Peer Review**

An applicant must make a satisfactory showing of qualification through peer review in the specialty of Criminal Law and the subspecialty of Criminal Appellate Practice.

1. Each applicant for Criminal Law must provide for reference and independent inquiry the names and addresses of the following:

a) Four (4) attorneys of generally recognized stature, not associates or partners of the applicant who practice in the field of criminal law; and

b) Two (2) judges of different jurisdictions to which the applicant has litigated a case to disposition within the previous two (2) years; and

c) Opposing counsel, co-counsel, and judges in the last five (5) jury trials conducted by the applicant; and

d) Opposing counsel, co-counsel, and judges in the last five (5) non-jury trials or procedures conducted by the applicant; and

e) If the applicant has participated in appellate matters, opposing counsel, co-counsel, and judges in the last two (2) appellate matters conducted by the applicant as well as copies of all briefs filed by the applicant in these two appellate matters; and

f) If an applicant has not prepared any appellate briefs, then the applicant shall submit to the Specialty Committee two (2) separate trial court memoranda submitted to a trial court within the last three (3) years which were prepared and filed by the applicant.

2. An applicant for the subspecialty of Criminal Appellate Practice shall provide the following:

a) Names and addresses of at least four (4) attorneys of generally recognized stature, not associates or partners, to attest to the applicant's substantial involvement and competence in criminal appellate practice. Such lawyers shall be substantially involved in criminal appellate practice and familiar with the applicant's practice; and

b) The applicant shall submit names and addresses of at least two (2) judges before whom the applicant has appeared in criminal appellate matters within the last two (2) years to attest to the applicant's substantial involvement and competence in criminal appellate practices; and

c) The applicant shall submit the names and addresses of opposing counsel, judges, and any co-counsel in the last two (2) appellate matters the applicant has handled, as well as all briefs filed in these matters.

All lawyers submitted must be licensed and in good standing to practice in North Carolina. An applicant also consents to the confidential inquiry by the Board or the Specialty Committee of the submitted references and other persons concerning the applicant's competence and qualifications.

E. **Examination**

The applicant must pass a written examination designed to test the applicant's knowledge and ability in Criminal Law.

1. **Terms**

The examination(s) shall be in written form and shall be given at such times as the Board deems appropriate. The examination(s) shall be administered and graded uniformly by the Specialty Committee.

2. **Subject Matter**

The examination shall cover the applicant's knowledge in the following topics in Criminal Law and/or in the subspecialty of Criminal Appellate Practice, as the applicant has elected:

a) The North Carolina and Federal Rules of Evidence;

b) State and Federal criminal procedure and State and Federal laws affecting criminal procedure;

c) Constitutional Law;

d) Appellate procedure and tactics;

e) Trial procedure and trial tactics;

f) Criminal substantive law;

g) The North Carolina Rules of Appellate Procedure.

6. **Standards for Continued Certification as a Specialist**

The period of certification is five (5) years prior to the expiration of the certification. A certified specialist who desires continued certification must apply for continued certification within the time limit described in Section 6.D. below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the Board of all applicants for continued certification.

A. **Substantial Involvement**

The specialist must demonstrate that for the five (5) years preceding reapplication he or she has had substantial involvement in the specialty as defined in Section 5(B)(1)(c) or (d)

for the specialty of Criminal Law and Section 5(B)(2) for the subspecialty of Criminal Appellate Practice.

B. **Continuing Legal Education**

Since last certified a specialist must have earned no less than sixty-five (65) hours of accredited continuing legal education in Criminal Law with not less than six (6) credits earned in any one year.

C. **Peer Review**

The specialist must comply with the requirements of Section 5(D).

D. **Time for Application**

Application for continuing certification shall be made not more than one hundred eighty (180) days nor less than ninety (90) days prior to the expiration of the prior period of certification.

E. **Lapse of Certification**

Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Section 5, including the examination.

F. **Suspension or Revocation of Certification**

If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Section 5.

7. **Applicability of Other Requirements**

The specific standards set forth herein for certification of specialists in Criminal Law or the subspecialty of Criminal Appellate Practice are subject to any general requirement, standard, or procedure adopted by the Board applicable to all applicants for certification or continued certification.

BE IT FURTHER RESOLVED that the standards for certification as a specialist in family law in Rule 5.(C) Continuing Legal Education, are hereby amended by striking the period at the end of said sentence which designates the subject matters which can be used to satisfy the CLE requirements as appear in 323 N.C. 727 by adding juvenile law so that said last sentence in said paragraph shall read:

"related fields which include taxation, trial advocacy, evidence, negotiation, and juvenile law."

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its meeting on April 13, 1990, and the amendments as certified were duly adopted at a regularly called meeting of the Council.

Given over my hand and the Seal of the North Carolina State Bar, this the 27th day of April, 1990.

B. E. JAMES
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 10th day of May, 1990.

JAMES G. EXUM, JR.
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 10th day of May, 1990.

WHICHARD, J.
For the Court

UPDATE OF THE HISTORY OF THE SUPREME COURT OF NORTH CAROLINA

From 1 January 1969 until 31 December 1989

By Retired Justice David M. Britt

The History of the Supreme Court of North Carolina covering the first century of its existence, from 1 January 1819 until 1 January 1919, was written by Chief Justice Walter Clark and appears in Volume 166 of the Supreme Court Reports, beginning at page 617. The history of the Court from 1 January 1919 until 1 January 1969 was written by Retired Chief Justice Emery B. Denny and is recorded in Volume 274 of the Supreme Court Reports, beginning at page 611.

Although Chief Justice Denny, near the end of his history, mentioned some of the changes that were made in our state court system during the nineteen sixties, I desire to review those changes more fully due to the considerable impact they made on our state courts.

As of 1960 our state's court system was basically the same as it had been since 1868 when a new constitution was adopted following the War Between the States. The greatest change had come in the courts below the Superior Court by the creation of numerous types of local courts. There were county courts, mayor courts, recorder courts and municipal courts in addition to the justice of the peace courts.

During the late fifties, at the instigation of The North Carolina Bar Association, a commission was appointed to study our courts and make recommendations to the General Assembly for a *unified* court system. The commission concluded that our state needed only two courts, a court for the trial of impeachments and a General Court of Justice. Since the former court is seldom used, only the General Court of Justice will be discussed here.

Bills implementing the recommendations of the study commission were introduced in the 1959 session of the General Assembly but the bills failed to receive the votes required for submission of constitutional amendments to the voters. Similar bills were introduced at the 1961 legislative session and received the required number of votes. In the 1962 general election the amendments were approved by the voters.

The substance of the adopted amendments is stated in what is now Sec. 2 of Article IV of our state constitution: "The General

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

Since the 1963 General Assembly convened only three months after the amendments were adopted and considerable study was required to implement the amendments, the only action taken by the 1963 session with regard to the amendments was the creation of a continuing Courts Commission to make recommendations to subsequent sessions of the Assembly. The personnel of the commission included key members of the House and Senate, with Senator Lindsay C. Warren, Jr. of Goldsboro as chairman.

The Commission directed its attention primarily to the lower courts. When the 1965 Legislative session convened, the Commission, following months of intensive work, was prepared to make its recommendations regarding a unified system of district courts. About that time the Commission was informed that the workload of the Supreme Court had increased so dramatically that an intermediate Court of Appeals was needed. In 1961 legislative leaders were advised that the then members of the Supreme Court were opposed to an intermediate appellate court, therefore, the amendments approved in 1962 contained no provision for such court.

Since the creation of an intermediate appellate court would mean further amending the constitution, the 1965 session of the General Assembly, pursuant to recommendations made by the Courts Commission, approved such an amendment to be submitted to the voters. Also during the session, the recommendations of the Courts Commission regarding the district courts were overwhelmingly approved. At a special election in the fall of 1965, constitutional amendments with respect to a Court of Appeals were approved. Between that time and the convening of the 1967 Legislative session, the Courts Commission, following long and careful study, made its recommendations regarding an intermediate Court of Appeals. With only minor changes, the Legislature overwhelmingly enacted the legislation recommended by the Commission.

The initial six judges of the Court of Appeals were appointed by Governor Dan K. Moore in July of 1967 and the Court began hearing appeals in January of 1968. The Court now has twelve judges.

One of the chief aims of the original study commission and the Courts Commission was to make the Supreme Court the apex of the state court system in fact as well as name. All court officials, including clerks of court and magistrates, were made state employees.

An administrative office of the courts was created in July 1965 and Superior Court Judge (later Justice) J. Frank Huskins was named as the first director.

The new system greatly increased the duties of the chief justice. Several years previously the chief justice had been vested with the responsibility of assigning Superior Court judges. Under the new system he was given the responsibility of appointing the director of the administrative office of the courts, designating the judge of the Court of Appeals who would serve as chief judge, and the district court judge in districts having more than one judge who would serve as chief district court judge. Hence the Chief Justice of our Supreme Court in effect became the Chief Justice of North Carolina.

On 1 January 1969 the members of the Supreme Court were Chief Justice R. Hunt Parker and Associate Justices William H. Bobbitt, Carlisle W. Higgins, Susie Sharp, I. Beverly Lake, Joseph Branch and J. Frank Huskins. A biographical sketch of each of these members is set forth in Chief Justice Denny's history.

On 10 November 1969 Chief Justice Parker died. He had served as associate justice from 1952 until 1966 and as chief justice from 1966 until his death. Chief Justice Parker had a legion of friends from all over the state and beyond and he was known as one who demanded respect for the courts over which he presided. He was the essence of dignity and decorum.

Justice William H. Bobbitt was the senior associate justice and on 13 November 1969 Governor Robert W. Scott appointed him chief justice to serve until the next general election. In November of 1970 Chief Justice Bobbitt was elected to complete the term of Chief Justice Parker which expired on 31 December 1974.

On 20 November 1969 Governor Scott appointed former Governor Dan K. Moore associate justice to fill the vacancy caused by the elevation of Justice Bobbitt to the office of chief justice. In November 1970 Justice Moore was elected to an eight-year term as a member of the Court.

It appears that Justice Moore was the sixty-seventh person to serve on our Supreme Court but no more distinguished person ever graced the Court. He was one of the few persons who served in all three branches of our state government.

Daniel Killian Moore was born in Asheville, N.C., on 2 April 1906. His father died soon thereafter and his mother with her

several young children moved to Sylva, N.C. Justice Moore attended the public schools of Jackson County and then attended U.N.C.—Chapel Hill where he earned his B.S. degree in business administration. He then attended the U.N.C. Law School and was admitted to the North Carolina Bar in 1928. While at the University he became a member of Phi Beta Kappa. He began the practice of law in Sylva where he became very active in civic and Democratic Party affairs. After serving as Jackson County's representative in the 1941 General Assembly, he served in the U.S. Army 1943-1945, serving part of that time in Europe.

Following his discharge from the Army, he returned to Jackson County to practice law and during 1946-1948 he served as solicitor for the Twentieth Judicial District. In 1948 he was appointed judge of the Superior Court for the Twentieth District and in 1950 was elected to that position. He resigned from the judiciary in 1958 and became General Counsel and Assistant Secretary for one of Western North Carolina's largest companies.

In the Primary Elections of 1964 he won the Democratic nomination for Governor of North Carolina and in the following November election he was elected to that office. He served as Governor from January of 1965 until January of 1969. During those years he provided our state with an honest and progressive administration. He made many appointments to judicial positions, including three persons to the Supreme Court, seven to the Court of Appeals and many to the Superior Court. A sizeable number of people that he appointed to judgeships did not support his candidacy for Governor but he appointed them nonetheless for the reason that he considered them the most qualified.

Governor Moore succeeded four governors who in order had stressed rural development, business and industry expansion, and improvement of education. The theme of the Moore Administration was TOTAL DEVELOPMENT and it strove to make that theme a reality. While it would be difficult to enumerate the major areas of progress made during 1965-1969, three areas stand out in the writer's mind: court improvement, highways improvement and business expansion. Probably Governor Moore's greatest contribution to the economy of North Carolina was his part in inducing I.B.M. to locate in the Research Triangle Park. Not only did this move bring thousands of new high-paying jobs to central North Carolina, it also ignited a spark that caused the RTP to attract many other high-tech businesses to its borders which benefit all of our state.

When Justice Moore assumed his place on the Supreme Court, he and three people that he had appointed to the Court constituted a majority of the seven-member tribunal. A few years later two men that he had appointed to the Superior Court bench were elected to the Supreme Court. While this situation might have provided an opportunity for one to completely dominate the Court, there has never been any suggestion that Justice Moore ever tried to improperly exert pressure on those who served with him.

Traditionally, the junior member of the Court serves as secretary at conferences of the Court. There were other members of the Court who gladly would have relieved Justice Moore of this mundane function but he would not permit it and served as secretary for approximately five years until he ceased to be the junior member.

Justice Moore served until the term to which he was elected expired on 31 December 1978. He then proceeded to become the senior member of a Raleigh law firm and practiced law until his death on 7 September 1986. No person who ever served in high places in North Carolina possessed and exerted more basic integrity than did Dan K. Moore.

During the early seventies the Courts Commission, under the chairmanship of Senator J. Ruffin Bailey of Raleigh, recommended at least three proposals that would have considerable impact on the judiciary of North Carolina: the Uniform Judicial Retirement Act, mandatory retirement ages for justices and judges, and The Judicial Standards Commission.

The retirement act was passed in 1973. Prior to its effective date justices of the Supreme Court and judges of the Court of Appeals and of the Superior Court, after reaching a specified age and after serving a required number of years, were entitled to retire and receive for life two-thirds of the salary from time to time paid to the holders of the position from which they retired. The justices and judges made no contributions to a retirement fund and their retirement benefits were paid from the state's general fund; however, no benefits were paid to widows of deceased justices or judges.

The 1973 act (now codified as N.C.G.S. § 135-50 et seq.) requires that all justices and judges contribute a specified portion of their salaries to the Consolidated Judicial Retirement Fund. Upon retirement, benefits are paid from this fund and provision is also made for widows of deceased justices and judges who meet specified requirements.

The 1971 General Assembly enacted a law (now N.C.G.S. § 7A-4.20) which provides, among other things, that "[n]o justice or judge of the Appellate Division of the General Court of Justice may continue in office beyond the last day of the month in which he attains his seventy-second birthday." Similar provisions provide that trial judges may not continue in office beyond the last day of the month in which they attain their seventieth birthday. The act provided that it would not be effective unless the voters approved a constitutional amendment giving the Legislature authority to enact the legislation. The amendment was approved by the voters on 11 November 1972.

The 1971 General Assembly also passed legislation creating a Judicial Standards Commission which would have the authority to hear complaints against justices and judges and to recommend that the Supreme Court censure or remove from office a justice or judge that the commission found had committed certain specified acts. The validity of this legislation was also made subject to the approval of a constitutional amendment by the voters. The amendment was approved at the November 1972 election. As of this date, several district court judges and at least two Superior Court judges have been removed from office under the authority of the act. Prior to the enactment of this legislation justices and judges could be removed only by the cumbersome remedy of impeachment.

On 24 April 1973 retired Chief Justice Denny died. Since his biographical sketch is set forth in his history of the Court it will not be repeated here. However, this writer takes note of his long and distinguished career as justice and chief justice of the Supreme Court.

Because of the mandatory retirement age law, Chief Justice Bobbitt and Justice Higgins did not offer for reelection in 1974. Justice Sharp became a candidate for election as chief justice and Superior Court Judges J. William Copeland of Hertford County and James G. Exum, Jr., of Guilford County became candidates for the associate justice positions being vacated by Justices Higgins and Sharp. All three were elected in the November 1974 election. Chief Justice Sharp was inducted on 2 January 1975 and Justices Copeland and Exum were administered their oaths on 3 January 1975.

Chief Justice Bobbitt's retirement terminated thirty-six years of very valuable service that he rendered to the judiciary of North Carolina. His service included more than fifteen years as a judge of the Superior Court, more than fifteen years as an associate justice of the Supreme Court, and more than five years as chief

justice. While Chief Justice Bobbitt's attributes are legion, this writer will mention only three: his brilliant mind, his ever-present sense of humor, and his ability to remember names and faces.

Since Justice Sharp's biographical sketch is set forth in Chief Justice Denny's history of the Court, it will not be repeated here. The same is true with respect to Justice Higgins who retired from the Court on 31 December 1974 at age 85. Justice Higgins served on the Court for more than 20 years, the longest tenure of any *associate* justice in the history of the court except Justice Platt Walker who served 23 days longer than Higgins.

Justice James William Copeland was born in Woodland, N.C., on 16 June 1914. After attending the public schools of Northampton County, he earned his A.B. degree from Guilford College in 1934 and his J.D. degree (with honors) from the U.N.C. Law School in 1937. After passing the North Carolina bar examination, he began the practice of law in Murfreesboro, N.C. He served in the U.S. Navy 1942-46, earning the rank of Lieutenant. Following his release from the Navy, he resumed the practice of law in Murfreesboro. He served in the state Senate during the 1951, 1953, 1957 and 1959 sessions. While serving in the Senate he also served as a member of the state Advisory Budget Commission. During the 1961 Legislative session he served as Governor Sanford's legislative counsel. He then served as a special judge of the Superior Court from 1961 until 1975, under appointments from Governors Sanford, Moore and Scott. He served as a justice of the Supreme Court from January of 1975 until 31 December 1984 when he retired. He died on 3 February 1988.

Justice James G. Exum, Jr., was born in Snow Hill, N.C., on 14 September 1935. After graduating from Snow Hill High School in 1953, he entered U.N.C.—Chapel Hill as a Morehead Scholar, earning his A.B. degree in English from that institution in 1957 where he was president of Phi Beta Kappa and chairman of the Men's Honor Council. He then entered the New York University School of Law as a Root Tilden Scholar and earned his law degree from that institution in 1960. Following his admission to the North Carolina Bar in 1960, he served as law clerk to then Associate Justice, later Chief Justice, Emery B. Denny. He then practiced law in Greensboro with one of the state's leading law firms. During the 1967 Session of the General Assembly he served as a Representative from Guilford County. Following the adjournment of the Legislature, he was appointed resident Superior Court judge of the Eighteenth Judicial District (Guilford County), a position that

he held until he was elected in 1974 as an associate justice of the Supreme Court to fill the vacancy created by Justice Higgins' retirement. He began service as an Associate Justice on 3 January 1975. Justice Exum served in the U.S. Army Reserves 1961-67, resigning at the rank of Captain. (More facts regarding Justice Exum will follow).

On 3 August 1976 Retired Justice William B. Rodman, Jr., died in his home town of Washington, N.C. Justice Rodman rendered outstanding service to his state as a member of the Legislature, as attorney general and as an associate justice of the Supreme Court.

The terms of Justices I. Beverly Lake and Dan K. Moore expired on 31 December 1978 and they did not offer for reelection. In January of 1978 Chief Judge Walter E. Brock of the Court of Appeals filed for election to the seat being vacated by Justice Moore and Judge David M. Britt of the Court of Appeals filed for election to the seat being vacated by Justice Lake. Brock and Britt won the Democratic nominations in the May Primary. Brock had no opposition in the general election and Britt's only opposition was a candidate submitted by the Libertarian Party.

Justice Lake decided to retire as of 30 August 1978 and Governor Hunt appointed Judge Britt to complete the remainder of Justice Lake's term. Consequently Judge Britt was sworn in as Justice Britt on 31 August 1978.

Justice Lake served with distinction on the Court for thirteen years. The opinions authored by him reflect the true scholar that he is. During his tenure he wrote the opinions for the Court in many public utility rate-making cases, a major undertaking for any jurist. Since he taught public utilities in the Wake Forest Law School for many years, the cases seemed to be easier for him. (See Chief Justice Denny's history for a biographical sketch of Justice Lake).

Justice Britt was born in McDonald, Robeson County, N.C., on 3 January 1917. After attending the McDonald Elementary School he attended and was graduated from Lumberton High School. He attended Wake Forest College and the Wake Forest Law School, passing the North Carolina bar examination in August of 1937. Since he would not be 21 years old until 3 January 1938, he was not issued his license to practice law until that date. In January of 1938 he opened an office for the practice of law in Fairmont and proceeded to practice in Fairmont and Lumberton until August of 1967. He served as solicitor of the Fairmont Recorder's Court

from 1940 until 1944 except for a part of 1943 when he served in the U.S. Army. From 1954 until 1958 he served as chairman of the Fairmont Board of Education. He served as a member of the state House of Representatives from 1958 until June of 1967. During the 1967 Session of the General Assembly he served as speaker of the House. While serving in the Legislature he also served as a member of the General Statutes Commission, the Advisory Budget Commission and the Courts Commission. In July of 1967 he was appointed by Governor Moore as one of the initial judges of the newly created Court of Appeals. He was elected to that Court in 1968 and again in 1974 and served until 31 August 1978 when he became an associate justice of the Supreme Court. He served on the Supreme Court until August of 1982 when he retired.

Justice Walter Edgar Brock was born in Wadesboro, N.C., on 21 March 1916. After graduating from high school, he attended U.N.C.—Chapel Hill which awarded him a B.S. degree in 1941. He served in the Army Air Force during World War II, earning the rank of Major. He remained in the Air Force Reserves and earned the rank of Colonel. Following the war he entered the U.N.C. Law School which awarded him a law degree in 1947. He was admitted to the bar in 1947 and began the practice of law in Wadesboro. He served as judge of the Anson County Court 1952-54 and on 1 January 1963 was appointed a special Superior Court judge by Governor Terry Sanford. On 1 July 1967 he was appointed to the Court of Appeals by Governor Dan K. Moore, was elected to the Court in 1968 and was reelected in 1974. On 1 August 1973 he was named Chief Judge of the Court of Appeals by Chief Justice William H. Bobbitt. He served as Chief Judge until 2 January 1979 when he became an associate justice of the Supreme Court. For health reasons he retired from the Supreme Court on 1 December 1980. He died on 13 June 1987.

On 31 July 1979 Chief Justice Sharp retired from the Court. She served as a member of the Court for more than 17 years, four and one-half years as chief justice. Her judicial career was an outstanding one in many respects. She was the first woman to serve on the Superior Court of North Carolina, the first woman to serve on the Supreme Court of our state, the first woman to serve as our chief justice, and, as the writer is reliably advised, she was the first woman to be *elected* chief justice of the highest court of any state in the United States. She was thorough in all phases of her work and the opinions she wrote for the Court are models of clarity. She is naturally brilliant and that virtue coupled

with the fact that she is a tireless worker caused her to set a standard of excellence that is difficult for others to emulate.

On 1 August 1979 Senior Associate Justice Joseph Branch was appointed by Governor James B. Hunt, Jr., to serve as chief justice. He was administered the oath of office on the same day and immediately assumed the duties of the office.

On 2 August 1979 Governor Hunt appointed Court of Appeals Judge John Phillips Carlton associate justice to fill the vacancy created by the elevation of Justice Branch to Chief Justice. Justice Carlton was born on 14 January 1938 in Rocky Mount, N.C. He earned his B.S. degree at N.C. State University in 1960 and his law degree from the U.N.C. Law School in 1963. Following his admission to the bar in 1963, he practiced law in Tarboro. Thereafter he served as Chief District Court Judge for the Seventh District from 1968 until 1977 after which he was appointed and served as Secretary of the state Department of Crime Control and Public Safety. On 2 January 1979 he was appointed by Governor Hunt to the Court of Appeals to succeed Judge Brock. On 2 August 1979 he resigned from the Court of Appeals to accept appointment to the Supreme Court.

In 1979 the General Assembly, as a result of the tireless efforts of Representative Mary P. Seymour of Guilford County, proposed an amendment to our state constitution providing that only persons duly authorized to practice law in the courts of this state shall be eligible for election or appointment as a justice of the Supreme Court, judge of the Court of Appeals, judge of the Superior Court or judge of the District Court. The amendment was approved by the voters and now appears as Section 22 of Article IV of the state constitution. (The amendment does provide that it shall not apply to persons elected to or serving in such capacities on or before 1 January 1981).

In the 1980 general election, Chief Justice Branch was elected to that position and Associate Justice Carlton was elected to the position to which he had been appointed.

On 9 January 1981 Louis B. Meyer, Jr., a practicing attorney of Wilson, N.C., was appointed by Governor Hunt associate justice to fill the vacancy created by the retirement of Justice Brock. Justice Meyer was born in Marion, N.C., on 15 July 1933. He grew up in Enfield, N.C., and attended the public schools there. In 1955 he earned his B.A. degree from Wake Forest University and during 1955-57 he served as a lieutenant in the U.S. Army.

Thereafter he entered the Wake Forest Law School where he earned his law degree in 1960. Following his admission to the bar in 1960, he served for one year as a law clerk for Justice (later Chief Justice) R. Hunt Parker and then he served for two years in the Federal Bureau of Investigation. In 1963 he joined a prominent law firm in Wilson where he practiced law for nineteen years, until he was appointed to the Supreme Court. In the 1982 General Election he was elected to the Court to complete the remainder of Justice Brock's term. In 1986 he was elected to an eight-year term on the Court.

On 9 October 1980 the legal community was saddened by the death of Retired Justice Carlisle W. Higgins who died eight days before his ninety-third birthday. The brilliant and varied career of Justice Higgins is set forth in Chief Justice Denny's history of the Court. He was almost 67 when he was appointed to the Court and then served for 20 years and four months.

On 1 February 1982 Justice J. Frank Huskins retired from the Court after serving as an associate justice for fourteen years. While he possessed considerable knowledge of the law in many areas, due to his several years of service as a member of the Industrial Commission, he was of special help to the Court in deciding cases involving the Workers' Compensation Law. (See Chief Justice Denny's history for a biographical sketch of Justice Huskins).

On 3 February 1982 Governor Hunt appointed former Court of Appeals Judge Burley Bayard Mitchell, Jr., of Raleigh to succeed Justice Huskins. Justice Mitchell was inducted into office on the same day of his appointment. The new justice was born in Oxford on 15 December 1940 and served with the U.S. Navy in Asia from 1958 to 1962. He earned his B.A. degree (with honors) at N.C. State University in 1966 and his law degree from the U.N.C. Law School where he was elected President of the Law Class of 1969. He was admitted to the bar in 1969 and served as an Assistant Attorney General of North Carolina from 1969 to 1972 when he was appointed by Governor Scott as District Attorney for the Tenth District. On 2 December 1977 he was appointed by Governor Hunt to the Court of Appeals as one of the additional judges authorized by the 1977 General Assembly. He was elected to the Court of Appeals in 1978 but resigned on 20 August 1979 to become Secretary of the North Carolina Department of Crime Control and Public Safety. He resigned that position to accept appointment to the Supreme Court. In the General Election of 1982 he was elected to complete Justice Huskins' term and in 1984 he was elected for an eight-year term.

On 31 July 1982 Justice David M. Britt retired from the Court and Governor Hunt appointed Court of Appeals Judge Harry C. Martin to succeed him. Justice Martin was born in Lenoir, N.C., on 13 January 1920. After attending John B. Stetson University in 1937-38, he entered U.N.C.—Chapel Hill where he earned his A.B. degree in 1942. He served in the U.S. Army Air Corps 1942-45. He then entered the Harvard Law School where he earned his law degree in 1948. Following his admission to the North Carolina bar in 1948, he entered the practice of law in Asheville. On 2 March 1962 he was appointed a Special Superior Court judge by Governor Sanford and served in that position until 1967 when Governor Moore appointed him a resident Superior Court judge. On 1 September 1978 he was appointed to the Court of Appeals by Governor Hunt to succeed Judge Britt who had become a member of the state Supreme Court. Judge Martin was elected to the Court of Appeals in 1980 and served on that Court until he became a member of the Supreme Court on 3 August 1982 by appointment of Governor Hunt. Also, during 1982 Justice Martin earned his LL.M degree at the University of Virginia Law School. In the election of 1982 he was elected to complete Justice Britt's term and in 1986 he was elected to an eight-year term. Justice Martin has been an adjunct lecturer of law at the U.N.C. Law School since 1984.

On 31 January 1983 Justice J. Phil Carlton resigned from the Court and entered the practice of law in Raleigh and Rocky Mount. On 3 February 1983 Governor Hunt appointed Attorney Henry E. Frye of Greensboro to succeed Justice Carlton. History was made by this appointment as Justice Frye was the first African-American to serve on the Supreme Court. He was elected to the Court in 1984 for an eight-year term.

Justice Frye was born in Ellerbe, N.C., on 1 August 1932. After finishing high school in his home community he entered A. & T. State University where he earned his B.S. degree in 1953. He served as an officer in the U.S. Air Force 1953-55, seeing service in Japan and Korea. He then entered the U.N.C. Law School where he earned his law degree (with honors) in June of 1959. Following his admission to the North Carolina bar in 1959 he entered the practice of law in Greensboro. During 1963-65 he served as an Assistant United States Attorney in the Middle District of North Carolina. During 1965-67 he served as a Professor of Law at N.C. Central University in Durham. In 1971 he was an organizer and began serving as President of the Greensboro National Bank and also served on the Board of Directors of the North Carolina Mutual

Life Insurance Company. In 1968 he was elected to the state House of Representatives from Guilford County thus becoming the first member of his race to serve in the North Carolina General Assembly in the twentieth century. He served in the House 1969-1980 and in the Senate 1980-1982.

Following the retirement of Justice J. William Copeland on 31 December 1984, outgoing Governor Hunt, on 2 January 1985, appointed Chief Judge Earl W. Vaughn of the Court of Appeals to fill the vacancy.

Justice Vaughn was born in Rockingham County, N.C. on 17 June 1928. Following his graduation from high school, he attended Pfeiffer College for two years after which he served two years in the U.S. Army. While in the army, he saw duty in Korea and was discharged as a sergeant. He then entered U.N.C.—Chapel Hill where he earned his A.B. degree in 1950 and in 1952 he earned his law degree from the U.N.C. Law School. He was admitted to the North Carolina Bar in 1952 and began the practice of law in Greensboro. In 1953 he moved to Draper, North Carolina, where he resumed the practice of law. He served in the state House of Representatives during the 1961, 1963, 1965, 1967 and 1969 sessions, serving as Speaker from July of 1967 until July of 1969. On 1 July 1969 he was appointed by Governor Robert W. Scott to the Court of Appeals. He was elected to that Court in 1970 and reelected in 1976 and 1984. On 3 January 1983 he was named chief judge of the Court of Appeals by Chief Justice Joseph Branch and served in that position until 2 January 1985 when he became a member of the Supreme Court. He retired for health reasons on 1 August 1985 and died on 1 April 1986.

On 4 September 1985 Governor James G. Martin appointed Rhoda B. Billings of Winston-Salem to fill the vacancy caused by the retirement of Justice Vaughn. She was sworn in on that date, becoming the first Republican to serve on the Court since the very early years of this century.

Justice Billings was born in Wilkesboro, N.C., on 30 September 1937. She earned her A.B. degree from Berea (Kentucky) College in 1959. In 1966 she earned her J.D. degree from the Wake Forest University School of Law, graduating cum laude and first in the class. She was admitted to the North Carolina Bar in 1966 and during 1966-1968 and 1984-1985 she practiced law in Winston-Salem. In 1968 she was elected a district court judge for the Twenty-First Judicial District and served until 1972. In 1973 she became a member of the faculty of the Wake Forest Law School, serving as an Assist-

ant Professor during 1973-1974, as an Associate Professor 1974-1977 and as Professor of Law 1977-present. She served as Chairman of the North Carolina Parole Commission from June until September of 1985. Since 1981 she has co-authored the supplements to Lee, *North Carolina Family Law*.

1986 was a turbulent year for the judiciary of North Carolina. From 1900 until 1972 North Carolina was a one-party state and members of the Supreme Court rarely were opposed for election after being appointed to the Court to fill a vacancy. A change began to take place in 1972 when Republican Jesse Helms was elected to the U.S. Senate and Republican James E. Holshouser, Jr., was elected governor. Governor Holshouser served only four years and did not have the opportunity to appoint anyone to the Supreme Court. However, members of his party began contesting judicial elections. A Democrat, James B. Hunt, Jr., was elected governor in 1976 and was reelected in 1980 following the passage of an amendment to the state constitution permitting a governor to serve two successive terms. Republican Governor James G. Martin was elected to his first term in 1984.

In January of 1986 Judge John Webb of the Court of Appeals became a candidate for the Democratic nomination to the Supreme Court seat held by Justice Billings. She became a candidate and neither had opposition in the primary elections.

On 31 July 1986 Chief Justice Branch retired, thus ending his illustrious twenty-year career as a member of the Court. His seven years as Chief Justice were particularly outstanding. As a former legislator and one who had kept up with personnel changes in the Legislature, he had very good rapport with that branch of our state government. He was highly respected by the legislators, especially the leaders, and he effectively presented the needs of the judicial branch. He was extremely patient and courteous in presiding over sessions and conferences of the Court. The door to his office was always open to judges and other officials of the lower courts and many of them sought his counsel and wisdom. Although it was an added burden, he seldom declined to listen to a disgruntled private citizen, either in his office or over the telephone. In sum, he epitomized public service at its best and retired as one of the most respected officials this state has ever had.

For many years prior to 1986, when the office of chief justice became vacant the senior associate justice was made chief justice. Governor Martin elected to depart from that custom and appointed Justice Rhoda Billings to succeed Chief Justice Branch. Justice

Exum was the senior associate justice, and when he failed to get the appointment, he retired from the Court and sought the Democratic nomination for chief justice. Governor Martin appointed Attorney Francis I. Parker of Charlotte as associate justice to fill the place vacated by the new chief justice and he appointed former Superior Court Judge Robert R. Browning of Greenville to fill the vacancy created by Justice Exum's retirement.

Judge Willis P. Whichard of the Court of Appeals resigned from that Court and became a candidate for the position on the Supreme Court to which Justice Browning had been appointed. The State Republican Executive Committee met and made Governor Martin's appointees the Republican nominees for the November election. The State Democratic Executive Committee met and made former Justice Exum the Democratic candidate for chief justice and former Judge Whichard the Democratic candidate to oppose Justice Browning in the November election. Judge Webb of the Court of Appeals had already been declared the Democratic nominee for the associate justice position formerly held by Justice Billings; in view of her change of candidacy, Justice Parker became Judge Webb's opponent.

Justice Francis Iredell Parker was born in Charlotte on 21 August 1923. After attending public schools in Charlotte he attended Woodberry Forest School in Virginia. In 1945 he was awarded the A.B. degree by U.N.C.—Chapel Hill and in 1949 he was awarded the LL.B degree by the U.N.C. Law School. As a member of the U.S. Naval Reserve he served in World War II and in the Korean conflict. He attained the rank of Lieutenant and served as a gunnery and executive officer while on a destroyer at sea. He was licensed to practice law in North Carolina in August 1949 and has been with the same firm continuously since that time except for the time he served in the Navy during the Korean conflict and the time he served on the Supreme Court. Since receiving his law license he has been very active in the affairs of the State Bar and the State Bar Association. From 1972 until 1986 he served on the Board of Law Examiners and during 1985-86 he served as chairman of the Board.

Any resume of Justice Parker would not be complete without at least a brief statement regarding his illustrious father, the late Chief Judge John J. Parker of the Fourth Circuit Court of Appeals. Judge Parker served on that Court from 1925 until his untimely death in 1958, a period of thirty-three years, and he was chief judge for 27 years. In 1930 he was nominated by President Hoover for the office of Associate Justice of the Supreme Court of the

United States, but for political reasons, he failed by two votes to be confirmed by the Senate. This was the closest that a North Carolinian has come to serving on the highest court in our country since 1804. Only two people from our state have served on that Court: Justice James Iredell, to whom Judge Parker was related by marriage, served from 1790 to 1799, and Justice Alfred Moore served from 1799 to 1804.

Although Judge Parker was disappointed that his nomination was not confirmed by the Senate, his strong desire to improve the administration of justice in America was not diminished. From then until his death he devoted his life to making the Fourth Circuit the best in the federal system and in challenging groups throughout the United States to improve our courts. The great admiration and respect held for him by the lawyers of North Carolina is manifest by the fact that the highest award given by the North Carolina Bar Association "in recognition of conspicuous service to the cause of jurisprudence in North Carolina" is named THE JUDGE JOHN J. PARKER AWARD.

Justice Robert R. Browning was born in Greenville, N.C. on 12 April 1936. He earned his A.B. degree from Duke University in 1957 and his J.D. degree from the U.N.C. Law School in 1966. He was admitted to the North Carolina Bar in 1966 and entered the practice of law in his home town, Greenville. In 1973 he served as a member of the State Highway Commission and its successor, the State Board of Transportation. From 1973 until 1979 he served as a special judge of the Superior Court. He served as a member of the N.C. Commission on Sentencing, Rehabilitation and Punishment from 1974 until 1977. Following his service as a Superior Court judge he resumed the practice of law in Greenville. During 1982-1986, he served as a member of the N.C. Board of Elections and in 1989, he served on the General Statutes Commission.

In the November 1986 General Election the Democratic candidates for places on the Supreme Court were successful. On 26 November 1986, former Justice Exum was sworn in as Chief Justice and Judges John Webb and Willis P. Whichard were sworn in as associate justices as successors to Justices Parker and Browning.

Justice John Webb was born in Rocky Mount, N.C. on 18 September 1926. He attended U.N.C.—Chapel Hill from 1946 to 1949 and in 1952 earned his law degree from the Columbia University School of Law. He served in the U.S. Navy 1944-46. He was admitted to the Bar in New York in 1953 and the Bar of North Carolina in 1956 after which he practiced law in Wilson until 1971.

He served as a Superior Court Judge from 1971 to 1977 when Governor Hunt appointed him to the Court of Appeals as one of the three additional judges authorized by the 1977 General Assembly. He was elected to that Court in 1978 and reelected in 1984. On 26 November 1986, he resigned from the Court of Appeals to become an Associate Justice of the Supreme Court.

Justice Willis Padgett Whichard was born in Durham, N.C. on 24 May 1940. He earned his A.B. degree from U.N.C.—Chapel Hill in 1962 and his law degree from the U.N.C. Law School in 1965. After his admission to the Bar in 1965, he practiced law in Durham. He served in the State House of Representatives 1970-74 and in the State Senate 1975-80. On 2 September 1980, he was appointed by Governor Hunt to the Court of Appeals to succeed Judge Frank M. Parker who had retired. He was elected to that Court in 1980 and reelected in 1982. In 1984 he earned his LL.M degree from the University of Virginia. On 2 September 1986, he resigned from the Court of Appeals to pursue his candidacy for the office of Associate Justice of the Supreme Court.

It is worthy of note that three of the present members of the Court served as law clerks to three justices of the Court who later became chief justices: Chief Justice Exum for then Justice Denny in 1960-61; Justice Meyer for then Justice Parker in 1960-61; and Justice Whichard for then Justice Bobbitt in 1965-66.

Thus the Supreme Court is now composed of the following members:

James G. Exum, Jr., Chief Justice
Louis B. Meyer, Jr.
Burley B. Mitchell, Jr.
Harry C. Martin
Henry E. Frye
John Webb
Willis P. Whichard
Associate Justices

For the past two decades or more, the matter of changing our method of selecting justices and judges has been widely discussed in legal circles of our state. The consensus of those advocating change is that some type of merit selection should be adopted. Bills that would change the present system have been introduced in numerous sessions of the Legislature but sufficient support for their enactment could not be garnered.

Since North Carolina has in fact become a two party state, and since judicial offices are now contested at just about every election, there is a widespread feeling that some type of merit selection should be adopted soon. Advocates for change point to the situation in at least one other southern state where justices and judges are elected in partisan elections. In that state in recent years candidates for the Supreme Court spent millions of dollars, most of the money being contributed by companies and lawyers who are often before the court. Up until now the courts of North Carolina have been free of major corruption and our leaders want to keep it that way.

Before he retired, Chief Justice Branch joined with Governor Martin in urging the Legislature to enact a plan for merit selection of judges, but their efforts did not bring about the desired result. The 1987 Legislature did, however, at the suggestion of Chief Justice Exum and others, establish a Judicial Selection Study Commission and authorized it to study North Carolina's method of judicial selection and retention and to make recommendations to the 1989 Legislature.

The 1989 Session of the General Assembly, probably for the first time in the history of the state, invited the Chief Justice of the Supreme Court to make a State of the Judiciary address. In this address Chief Justice Exum, among other things, appealed to the lawmakers to propose to the people an appointive plan for the selection and retention of judges which had by then been recommended by the Judicial Selection Study Commission. An amended version of this plan passed the Senate in 1989 and, at this writing, is pending in the House. The plan enjoys the support of the Governor, the Chief Justice, the Speaker of the House, the Majority and Minority leaders of the House, the leadership of the North Carolina Bar Association and the North Carolina State Bar, the North Carolina League of Women Voters, and the North Carolina Citizens for Business and Industry. The idea of changing our method of selecting and retaining judges from partisan political elections to nonpartisan appointments is steadily picking up support and, the writer hopes, eventually will become a reality.

Those who were serving on the Supreme Court in 1969 and since are as follows:

CHIEF JUSTICES

R. Hunt Parker	1966-1969
William H. Bobbitt	1969-1974
Susie Sharp	1975-1979

Joseph Branch	1979-1986
Rhoda B. Billings	1986
James G. Exum, Jr.	1986-

ASSOCIATE JUSTICES

R. Hunt Parker	1952-1966
William H. Bobbitt	1954-1969
Carlisle W. Higgins	1954-1974
Susie Sharp	1962-1975
I. Beverly Lake	1965-1978
Joseph Branch	1966-1979
J. Frank Huskins	1968-1982
Dan K. Moore	1969-1978
J. William Copeland	1975-1984
James G. Exum, Jr.	1975-1986
David M. Britt	1978-1982
Walter E. Brock	1979-1980
J. Phil Carlton	1979-1983
Louis B. Meyer, Jr.	1981-
Burley B. Mitchell, Jr.	1982-
Harry C. Martin	1982-
Henry E. Frye	1983-
Earl W. Vaughn	1985
Rhoda B. Billings	1985-1986
Francis I. Parker	1986
Robert R. Browning	1986
John Webb	1986-
Willis P. Whichard	1986-

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 and 4th.

TOPICS COVERED IN THIS INDEX

ABATEMENT AND REVIVAL

§ 3 (NCI3d). Abatement on ground of pendency of prior action in general

A prior action which is pending in the appellate division may serve as a prior action pending for the purpose of a plea in abatement. *Clark v. Craven Regional Medical Authority*, 15.

The parties, subject matter, issues and relief requested in two actions involving the validity of legislation giving authority to enforce building and other safety codes for a medical center to Craven County rather than to cities located therein were sufficiently similar to warrant issuance of an order of abatement. *Ibid.*

ABATEMENT, SURVIVAL, AND REVIVAL OF ACTIONS

§ 3 (NCI4th). Abatement on ground of pendency of prior action generally

A prior action pending in a federal court within the territorial limits of the state constitutes a ground for abatement of a subsequent state action involving substantially similar issues and parties. *Eways v. Governor's Island*, 552.

§ 9 (NCI4th). Identity of actions and parties generally

The intervention of a third party after a motion to dismiss had been filed could not defeat a plea in abatement on the theory that the parties were no longer the same. *Eways v. Governor's Island*, 552.

ADMINISTRATIVE LAW

§ 6 (NCI3d). Review by certiorari

The trial court was sitting as court of appellate review when reviewing errors raised by plaintiff's petition for a writ of certiorari from the denial of a subdivision application by the town and could not properly grant summary judgment or make additional findings. *Batch v. Town of Chapel Hill*, 1.

APPEAL AND ERROR

§ 2 (NCI3d). Review of decision of lower court and matters necessary to determine appeal

A theory of recovery not raised in the trial court will not be considered on appeal. *River Birch Associates v. City of Raleigh*, 100.

§ 6.2 (NCI3d). Finality as bearing on appealability; premature appeals

The issuance of a preliminary injunction restraining plaintiffs from enforcing stop work orders against defendants was not immediately appealable. *Clark v. Craven Regional Medical Authority*, 15.

Although defendant's appeal was interlocutory, the Supreme Court elected to hear the matter on the merits because of the importance of the question presented. *Crist v. Moffatt*, 326.

§ 6.3 (NCI3d). Appeals based on jurisdiction, venue, and related matters

An order issued by a trial court holding that an administrative agency does not have subject matter jurisdiction over the issues on appeal is immediately appealable under G.S. 1-277(a). *Batten v. N.C. Dept. of Correction*, 338.

§ 7 (NCI3d). Parties who may appeal; party aggrieved

Third party defendant bank was an aggrieved party which could appeal summary judgment entered in favor of plaintiff against defendants-third party plaintiffs

APPEAL AND ERROR — Continued

where the bank fully participated in the determination of third party plaintiff's liability and is bound by the judgment in favor of plaintiff entered against defendants as third party plaintiffs. *Barker v. Agee*, 470.

§ 23 (NCI4th). Appeals of right from sentence of death or life imprisonment for defendant convicted of murder

Defendant could appeal a sentence of death entered upon a plea of guilty where the trial judge denied his motion to withdraw his guilty plea. *S. v. Handy*, 532.

§ 32 (NCI4th). When supervisory jurisdiction may be exercised; interest of justice

The Supreme Court amended a commitment and judgment on an underlying felony in a felony murder prosecution in the exercise of its supervisory authority where the trial court had arrested judgment on the underlying felony in open court but the record continued to contain the judgment and commitment. *S. v. McNeill*, 712.

§ 75 (NCI4th). Appeal by defendant entering plea of guilty

Defendant could appeal the denial of his motion to suppress breathalyzer results despite a subsequent guilty plea. *S. v. Tew*, 732.

Defendant could appeal a sentence of death entered upon a plea of guilty where the trial judge denied his motion to withdraw his guilty plea. *S. v. Handy*, 532.

§ 134 (NCI4th). Appealability of orders relating to attorneys or representation by attorney

Where counsel had been properly admitted pro hac vice under G.S. 84-4.1 and was actively engaged in plaintiff's products liability suit for several years, plaintiff had a substantial right to the continuation of representation by that counsel and could immediately appeal the trial court's interlocutory order disqualifying counsel from further representation of plaintiff. *Goldston v. American Motors Corp.*, 723.

§ 443 (NCI4th). Scope and nature of review on appeal generally; review on assignments of error and record

Where a trial court has reached the correct result, the judgment will not be disturbed on appeal even where a different reason is assigned to the decision. *Eways v. Governor's Island*, 552.

§ 566 (NCI4th). Law of the case; miscellaneous decisions

Plaintiff teacher's civil rights claim for damages based on alleged bias of the board of education which dismissed him was not finally decided against him in the direct judicial review of the board's decision to terminate him and the subsequent appeal of that judicial review to the Court of Appeals and was thus not barred by either the law of the case or the doctrine of issue preclusion. *Crump v. Bd. of Education*, 603.

ASSAULT AND BATTERY

§ 22 (NCI4th). What constitutes "serious injury"

A mental injury will support the element of serious injury under the felonious assault statute. *S. v. Everhardt*, 777.

The State presented sufficient evidence of serious mental injury to support defendant's conviction of assault with a deadly weapon inflicting serious injury. *Ibid.*

ASSOCIATIONS

ATTORNEYS AT LAW

AUTOMOBILES AND OTHER VEHICLES

BOUNDARIES

CONSTITUTIONAL LAW

§ 17 (NCI3d). Personal and civil rights generally

Plaintiff could not bring an action for money damages under 42 U.S.C. § 1983 against State officials in their official capacity arising from their failure to release him on parole. *Harwood v. Johnson*, 231.

The trial court properly submitted a dismissed teacher's 42 U.S.C. § 1983 claim for damages to the jury for its determination as to whether a school board member had in fact been biased against the teacher in the dismissal proceeding where there was substantial evidence that, at the board's hearing, one or more board members consciously concealed both prior knowledge of the allegations against the teacher and a fixed predisposition against him. *Crump v. Bd. of Education*, 603.

Where the jury in a § 1983 civil rights action determined that one or more school board members were biased against plaintiff teacher at a dismissal hearing, the jury was justified in returning a verdict finding that the school board's hearing denied plaintiff due process and awarding plaintiff $78,000.00 in compensatory damages for the due process violation. *Ibid.*

§ 30 (NCI3d). Discovery; access to evidence and other fruits of investigation

Defendant's statutory and due process rights were not violated by the denial of his motion to require the State to inform him of the criminal records of the prosecution witnesses. *S. v. Carter*, 243.

The trial court did not err in a first degree murder prosecution by denying defendant's motion for disclosure of notes and tape recordings of interviews of potential witnesses. *S. v. Cummings*, 298.

The State did not withhold exculpatory evidence in violation of a rape defendant's due process rights by failing to disclose the results of the first examination of the child victim where the record shows that defense counsel was aware of the results of the first examination and who performed it. *S. v. Wise*, 421.

§ 31 (NCI3d). Affording the accused the basic essentials for defense

An indigent defendant was not denied the opportunity to rebut the State's evidence by the trial court's ruling allowing only $250 rather than the $500 requested for employment of a textile science expert. *S. v. Coffey*, 268.

§ 32 (NCI3d). Right to fair and public trial

The trial court did not violate defendant's right to a public trial under the North Carolina Constitution by ejecting an excused juror from the gallery. *S. v. Porter*, 489.

§ 34 (NCI3d). Double jeopardy

Evidence of concurrent misdemeanor marijuana possession was not constitutionally inadmissible in a prosecution for felonious possession of LSD under the collateral estoppel doctrine of the Fifth Amendment where defendant had been previously acquitted of the marijuana charge. *S. v. Agee*, 542.

§ 40 (NCI3d). Right to counsel generally

Defendant's appointed counsel satisfied the requirements of *Anders v. California* in an appeal from convictions for sexual offenses in which he put six assignments of error in the record but did not argue any of them in the brief. *S. v. Noble*, 581.

§ 48 (NCI3d). Effective assistance of counsel

Defendant in a murder prosecution was not denied the effective assistance of counsel because his trial counsel did not request recordation of jury selection,

CONSTITUTIONAL LAW — Continued

the bench conferences, and the opening and closing arguments of counsel. *S. v. Hardison*, 646.

§ 63 (NCI3d). Exclusion from jury for opposition to capital punishment

There was no error in jury selection for a first degree murder prosecution where, whenever the prosecutor challenged a juror for cause based on opposition to the death penalty, the trial court asked whether the potential juror's view of the death penalty would substantially impair performance of a juror's sworn duties. *S. v. Cummings*, 298.

Excusing for cause jurors opposed to the death penalty is constitutional. *S. v. Price*, 56.

§ 66 (NCI3d). Presence of defendant at proceedings

Error, if any, in holding the charge conference outside the presence of defendant was harmless. *S. v. Wise*, 421.

The trial court erred in a murder prosecution by excusing prospective jurors as a result of private unrecorded bench conferences with those jurors. *S. v. Smith*, 792.

§ 68 (NCI3d). Right to call witnesses and present evidence

Neither a judicial warning to a witness about contempt sanctions or perjury prosecutions nor a prosecutorial threat of perjury proceedings constitutes a per se due process violation. *S. v. Melvin*, 173.

Defendant's right to due process was not violated by the trial judge's in-court admonition to two witnesses the day before defendant's trial began that they should comply with subpoenas issued to them by the State or be subject to the court's contempt powers. *Ibid.*

Defendant's right to due process was not violated by the trial judge's admonition to members of the family of a State's witness following his testimony that they would be subject to criminal prosecution if they intimidated or threatened the witness because of his testimony. *Ibid.*

Defendant's right to due process was not violated by the prosecutor's out-of-court conduct toward the State's three principal witnesses, which included threats to charge them with perjury if they changed their story and the use of profanity and some physical force. *Ibid.*

§ 80 (NCI3d). Death and life imprisonment sentences

The North Carolina death penalty is constitutional. *S. v. Price*, 56.

CONVICTS AND PRISONERS

§ 2 (NCI3d). Discipline and management

Plaintiff sufficiently stated a claim under 42 U.S.C. § 1983 alleging that the individual members of the Parole Commission acted under color of state law to deprive him of his liberty in the denial of his parole. *Harwood v. Johnson*, 231.

CORPORATIONS

§ 18 (NCI3d). Sale and transfer of stock

Shares of stock in a closely held corporation are investment securities for purposes of article 8 of the U.C.C., and the statute of frauds of G.S. 25-8-319

renders an oral agreement for the sale of such shares unenforceable. *Stancil v. Stancil*, 766.

COSTS

§ 3.1 (NCI3d). Taxing of costs in discretion of court; allowance of attorney fees

The superior court had authority under G.S. 6-21(8) to award attorney fees to defendants as part of the costs in an action to recover drainage district assessments. *Northampton County Drainage District Number One v. Bailey*, 742.

CRIMINAL LAW

§ 34.1 (NCI3d). Evidence of other offenses inadmissible to show disposition to commit offense

Relevant evidence of other crimes, wrongs or acts by a defendant is admissible under Rule 404(b) unless its only probative value is to show that defendant has the propensity or disposition to commit an offense of the nature of the crime charged. *S. v. Coffey*, 268.

§ 34.4 (NCI3d). Admissibility of evidence of other offenses generally

The trial court did not err in a first degree murder prosecution by admitting evidence of the murder of the victim's sister or by denying defendant a continuing objection to that evidence. *S. v. Cummings*, 298.

Evidence of other offenses is admissible if it is relevant to any fact or issue other than the character of the accused. *S. v. Coffey*, 268.

§ 34.5 (NCI3d). Admissibility of evidence of other offenses to show identity of defendant

The trial court did not err in a prosecution for first degree rape and first degree burglary by admitting evidence of a similar rape and burglary. *S. v. Jeter*, 457.

§ 34.7 (NCI3d). Admissibility of other offenses to show intent, motive, malice, premeditation or deliberation

Evidence that defendant admitted to the mother of a three-year-old girl and her minister that he masturbated in the presence of the three-year-old girl at a time prior to the death of the ten-year-old victim was admissible to support the State's theory of defendant's motive for the murder and to show his intent in kidnapping the victim. *S. v. Coffey*, 268.

The trial court properly exercised its discretion under Rule 403 in allowing testimony with regard to one prior incident of indecent liberties with a child and in excluding, as needlessly cumulative, testimony that defendant had taken indecent liberties with two other children. *Ibid.*

§ 34.8 (NCI3d). Evidence of other offenses; admissibility to show modus operandi or common plan, scheme or design

The trial court did not err in a first degree murder prosecution by admitting instances of prior misconduct. *S. v. Price*, 56.

Testimony by the sister of the victim of various sexual offenses that defendant father had molested her from the time she was nine years old until she was eighteen years old was admissible to show a common scheme or plan by defendant to molest the victim and her sister. *S. v. McCarty*, 782.

CRIMINAL LAW — Continued

§ 34.10 (NCI3d). Admissibility of evidence of other offenses in prosecution for second offense

Concurrent misdemeanor possession of marijuana was admissible in a prosecution for felonious possession of LSD where the discovery of marijuana on defendant's person constituted an event in the officer's narrative which naturally led to the search of defendant's vehicle and the subsequent detection of the LSD, the evidence of defendant's marijuana possession was not probative only of defendant's propensity to possess illegal drugs, and the court did not abuse its discretion in admitting the evidence despite defendant's contention that its probative value was outweighed by the danger of unfair prejudice. *S. v. Agee*, 542.

§ 35 (NCI3d). Evidence that offense was committed by another

The trial court did not err in a prosecution for felony murder by excluding a cigar box which the victim's daughter had identified as being like the one in which her father had kept money where the evidence did not point directly to the guilt of some specific person and was not inconsistent with defendant's guilt. *S. v. McNeill*, 712.

§ 43.4 (NCI3d). Gruesome, inflammatory or otherwise prejudicial photographs

The trial court did not err in a first degree murder prosecution by admitting into evidence seven photographs of the victim, the crime scene, and the autopsy. *S. v. Price*, 56.

§ 46.1 (NCI3d). Flight of defendant; sufficiency of evidence

The evidence in a murder prosecution supported the trial court's instruction on defendant's flight. *S. v. Levan*, 155.

§ 50 (NCI3d). Expert and opinion testimony in general; what constitutes opinion testimony

The trial court did not err in a murder prosecution by allowing an SBI agent to testify that he had told defendant that he did not believe defendant had been truthful in his first statement. *S. v. Hardison*, 646.

§ 50.2 (NCI3d). Opinion of nonexpert

Testimony by a State's witness in a murder trial that he understood defendant's warning to him not to tell anyone what had occurred or "you know what will happen" to mean that defendant would shoot or kill him was admissible nonexpert opinion testimony under Rule 701. *S. v. McElroy*, 752.

The trial court in a first degree murder prosecution did not err by allowing an SBI agent to compare physical evidence to other evidence which had been misplaced from the SBI lab. *S. v. Cummings*, **298.**

§ 51 (NCI3d). Qualification of experts

The trial court's overruling of defense counsel's objection to opinion testimony by a professional counselor concerning the characteristics of abused children constituted an implicit finding that the witness was an expert where the evidence was sufficient to support a finding that the witness was qualified to testify as an expert; furthermore, there was no need for the court to make a formal ruling that the witness was an expert because evidence of the nature of her job and of the experience she possessed affirmatively showed that she was better qualified than the jury to form an opinion and testify about the characteristics of abused children. *S. v. Wise*, 421.

CRIMINAL LAW — Continued

§ 65 (NCI3d). Evidence as to emotional state

A counselor's response of "genuine" to a question asking her to describe an alleged child rape victim while she was telling her story during counseling sessions was not an improper comment upon the credibility of the victim but was merely a description of the witness's personal observation of the victim's emotional state during counseling sessions. *S. v. Wise*, 421.

§ 66.9 (NCI3d). Identification from photographs; suggestiveness of procedure

The photographic identification procedure used by officers in a first degree murder prosecution was unnecessarily suggestive but did not lead to a substantial likelihood of misidentification. *S. v. Price*, 56.

§ 66.18 (NCI3d). Voir dire to determine admissibility of identification testimony

The trial court did not err in refusing to continue the voir dire hearing on the admissibility of identification testimony until television tapes could be presented by defendant to the court after several witnesses testified that they had seen television broadcasts showing defendant before they identified him. *S. v. Coffey*, 268.

§ 66.19 (NCI3d). Conduct of hearing on identification testimony; questions and evidence permitted

The trial court did not err in refusing to allow defendant to cross-examine an identification witness about the victim's clothing at the time he saw her with defendant in a hearing on defendant's motion to suppress identification. *S. v. Coffey*, 268.

§ 67 (NCI3d). Evidence of identity by voice

A witness who testified that she had heard defendant talk and could recognize his voice was properly permitted to testify that she heard defendant make a certain statement while he was in his house and she was in her yard. *S. v. Noble*, 581.

§ 69 (NCI3d). Telephone conversations

There was no prejudicial error in a first degree murder prosecution from the admission of testimony concerning a telephone call from the victim to her parents on the morning of her murder. *S. v. Price*, 56.

§ 70 (NCI3d). Tape recordings

The trial court did not err in the murder prosecution of a drug dealer by admitting into evidence testimony about a conversation another suspect had with defendant which led to defendant's arrest as well as a tape recording of the conversation and a transcript of the tape recording. *S. v. Levan*, 155.

§ 73.2 (NCI3d). Statements not within hearsay rule

A mother's testimony that her daughter told her that defendant had masturbated in front of her was not inadmissible hearsay where it was admitted for the limited purpose of explaining the mother's subsequent conduct; nor was testimony by the mother's pastor that the mother had told him about the child's statement inadmissible hearsay where it was admitted for the limited purpose of corroborating the prior testimony of the mother. *S. v. Coffey*, 268.

Testimony by a murder victim's son that the victim said she did not want defendant to come to the house because he had failed to provide support for his child was not hearsay. *S. v. Faucette*, 676.

CRIMINAL LAW — Continued

An attorney's hearsay testimony as to statements made to him by a burglary and murder victim concerning domestic difficulties between the victim and defendant and defendant's failure to support his child was material within the meaning of the Rule 804(b)(5) catchall exception to the hearsay rule because it was relevant to rebut testimony by defendant as to why he went to the victim's home and to establish ill will between defendant and the victim from which the jury could infer premeditation and deliberation. *Ibid.*

The record supports the trial court's conclusion that hearsay statements made by a murder victim to her attorney were the most probative evidence of any available to the State regarding domestic problems existing between the victim and defendant. *Ibid.*

Fifteen days was adequate notice of the State's intent to use hearsay statements made by a murder victim to her attorney. *Ibid.*

The attorney-client relationship was a sufficient guarantee of trustworthiness to admit a murder victim's hearsay statements to her attorney concerning her domestic problems with defendant. *Ibid.*

The trial court erred in ruling that a murder victim's statements to her attorney were admissible under the Rule 804(b)(5) catchall exception to the hearsay rule without finding that the statements were not otherwise admissible, but admission of the hearsay statements was not prejudicial error. *Ibid.*

§ 73.3 (NCI3d). Statements showing state of mind not within hearsay rule

Hearsay statements made by a murder victim to her son and her sister indicating that defendant had threatened her were admissible in a murder and burglary trial under the state of mind exception to the hearsay rule to explain why the victim would not allow defendant to visit her home, to prove that defendant entered the victim's home without consent, and to rebut defendant's testimony pertaining to inferences of self-defense. *S. v. Faucette*, 676.

There was no error in a prosecution for murder, burglary, and other crimes from the admission of testimony from the victim's niece that the victim told her she was afraid of defendant. *S. v. Meekins*, 689.

Testimony as to statements made by a child murder victim to two witnesses that she planned to go fishing with "a nice gray-haired man" on the day she disappeared was admissible as evidence of the victim's mental or emotional condition at the time she made the statements. *S. v. Coffey*, 268.

The trial court did not err in a first degree murder prosecution by admitting hearsay testimony of statements made by the victim which were admissible for state of mind, emotional condition, and physical condition. *Ibid.*

§ 73.4 (NCI3d). Statement that is part of res gestae and not within hearsay rule

The trial court did not err in a first degree murder prosecution by admitting the hearsay testimony of three witnesses regarding statements by the victim which were admissible as present sense impression. *S. v. Cummings*, 298.

§ 75.7 (NCI3d). Requirement that defendant be warned of constitutional rights; what constitutes "custodial interrogation"

Although defendant had not been given the Miranda warnings before he made inculpatory statements to the police at his residence on the night of a murder, the statements were admissible at defendant's murder trial because defendant (1) was not in custody or under arrest at the time he made the statements in that a reasonable person in defendant's position would not have considered himself

CRIMINAL LAW — Continued

in custody, and (2) defendant's statements were not the product of questions or interrogation by the police. *S. v. Bacon*, 404.

§ 77 (NCI3d). Admissions and declarations generally

The trial court did not err in the prosecution of a cocaine dealer for murder by admitting various hearsay statements where the statements constituted statements against the penal interest of the declarants. *S. v. Levan*, 155.

§ 78 (NCI4th). Change of venue; circumstances insufficient to warrant change

The trial court did not abuse its discretion in a prosecution for murder, robbery and burglary by denying defendant's motion for change of venue for pretrial publicity. *S. v. King*, 662.

§ 85.2 (NCI3d). State's character evidence relating to defendant generally

Defendant was not prejudiced by any error in the State's cross-examination of defendant's character witness about his knowledge that defendant had previously broken into a murder victim's house to rebut testimony by the witness that defendant was a gentle and nonviolent person. *S. v. Faucette*, 676.

§ 86.2 (NCI3d). Impeachment of defendant; prior convictions generally

The trial court in a first degree murder case erred in permitting the State to cross-examine defendant about two thirteen-year-old assault convictions because they involved the use of violence, but such error was harmless. *S. v. Carter*, 243.

§ 86.3 (NCI3d). Credibility of defendant and interested parties; prior convictions

The trial court did not err in a prosecution for felonious breaking or entering and felonious larceny by denying defendant's pretrial motion in limine to prohibit the State from questioning him for impeachment purposes as to prior cases in which he had pled no contest. *S. v. Outlaw*, 467.

§ 86.5 (NCI3d). Credibility of defendant and interested parties; particular questions and evidence as to specific acts

There was no plain error in a prosecution for first degree murder by lying in wait by allowing the prosecutor's cross-examination of defendant regarding numerous prior acts where the State sought to demonstrate that defendant's assertions of lack of intent due to alcoholism were untruthful. *S. v. Leroux*, 368.

The trial court did not err in a prosecution for murder, burglary, and other crimes by allowing the sheriff to testify over objection that defendant had told him that the murderers had said they would trust defendant because he was wanted for raping a white girl. *S. v. Meekins*, 689.

§ 86.8 (NCI3d). Credibility of State's witnesses

A counselor's response of "genuine" to a question asking her to describe an alleged child rape victim while she was telling her story during counseling sessions was not an improper comment on the credibility of the victim. *S. v. Wise*, 421.

§ 88.4 (NCI3d). Cross-examination of defendant

The trial court did not err in a prosecution for murder, burglary, and other crimes by allowing defendant to be cross-examined about a pending rape charge. *S. v. Meekins*, 689.

CRIMINAL LAW — Continued

§ 89.2 (NCI3d). Corroboration of witnesses

Testimony as to what a sexual offense victim told the witness defendant had done to him was admissible to corroborate the victim's testimony. *S. v. Noble*, 581.

§ 89.3 (NCI3d). Corroboration by prior statements of witness

The trial court did not err in a murder prosecution by admitting the testimony of an SBI agent concerning remarks made to him by a witness who was then a suspect where there were variations in the details present in the trial testimony and the prior statements. *S. v. Levan*, 155.

Prior statements of three witnesses concerning their observation of the victim and defendant on the day the victim was killed did not conflict with their trial testimony and were properly admitted as corroborative of their trial testimony. *S. v. Coffey*, 268.

§ 95.1 (NCI3d). Admission of evidence competent for restricted purpose; request for limiting instruction

The admission of corroborative evidence was not assignable as error where defendant failed to request a limiting instruction for such evidence. *S. v. Noble*, 581.

§ 98.2 (NCI3d). Sequestration of witnesses

There was no abuse of discretion in a prosecution for murder, robbery and burglary from the trial court's failure to rule upon defendant's motion for sequestration of the State's witnesses. *S. v. King*, 662.

§ 106 (NCI4th). Discovery; statements of state's witnesses

The trial court did not err in a first degree murder prosecution by denying defendant's motion for disclosure of notes and tape recordings of interviews of potential witnesses. *S. v. Cummings*, 298.

§ 146 (NCI4th). Revocation or withdrawal of plea of guilty

A presentence motion to withdraw a plea of guilty should be allowed for any fair and just reason. *S. v. Handy*, 532.

Defendant made a sufficient showing of a fair and just reason for his motion to withdraw his guilty plea prior to sentencing in a felony murder case, and the trial judge thus erred in the denial of that motion. *Ibid.*

§ 146.1 (NCI3d). Appeal limited to questions raised in lower court and properly presented on appeal

Defendant's contention that the trial court improperly excluded evidence and prevented his making a proper record of the excluded evidence was not before the appellate court for review where the record shows that defendant never actually attempted to introduce such evidence because of a conscious election against introducing evidence in order to retain his right to make the last closing argument to the jury. *S. v. Coffey*, 268.

§ 150 (NCI4th). Impermissible infringements on right to plead not guilty

Defendants' constitutional right to a jury trial was abridged and they are entitled to a new sentencing hearing in an armed robbery case where the trial court, upon being advised that defendants had refused to accept a plea bargain and demanded a jury trial, told counsel that if defendants were convicted he would give them the maximum sentence. *S. v. Cannon*, 37.

CRIMINAL LAW — Continued

§ 169 (NCI3d). Harmless and prejudicial error in admission or exclusion of evidence; admission; absence of objection; evidence admitted against codefendant

The trial court did not err by sustaining the prosecutor's objection to a defense question where there was no offer of proof and the court could only speculate as to what the answer would have been. *S. v. King*, 662.

§ 186 (NCI4th). Motions generally

A motion to prohibit jury dispersal was in effect denied where nothing in the record indicates that the motion was ever heard. *S. v. King*, 662.

§ 252 (NCI4th). Continuance for illness or incapacitation of accused

The trial judge in a capital case did not abuse his discretion in failing to recess the trial when informed by defense counsel during jury selection that defendant was so physically ill that it was interfering with his ability to participate in the proceedings. *S. v. Bacon*, 404.

§ 357 (NCI4th). Misconduct of witnesses

The trial court did not err in a first degree murder prosecution by denying defendant's motion to strike identification testimony from a witness who was embraced by a member of the victim's family after testifying. *S. v. Price*, 56.

§ 396 (NCI4th). Opening remarks

Failure of the trial judge in a first degree murder case to mention second degree murder as a possible verdict when he informed prospective jurors of the nature of the charge against defendant and the procedures followed in a capital trial did not amount to an expression of opinion that second degree murder would not be a possible verdict. *S. v. Coffey*, 268.

§ 411 (NCI4th). Selection of jury

There was no error in a first degree murder prosecution where the prosecutor repeatedly stated during jury selection that the death penalty was the central question. *S. v. Porter*, 489.

§ 415 (NCI4th). Latitude and scope of jury argument generally

There was no error from the cumulative effect of a prosecutor's closing arguments during a first degree murder prosecution. *S. v. Porter*, 489.

§ 420 (NCI4th). Review of argument for gross impropriety

The trial court in a prosecution for murder, robbery, and burglary did not err by failing to intervene ex mero motu in the prosecutor's closing argument. *S. v. King*, 662.

§ 436 (NCI4th). Comment on defendant's lack of remorse

The trial court did not err during the sentencing portion of a first degree murder prosecution by failing to intervene ex mero motu when the prosecutor called the jury's attention to defendant's lack of remorse. *S. v. Price*, 56.

§ 442 (NCI4th). Comment on jury's duty

The trial court did not err in the sentencing phase of a first degree murder prosecution by not intervening ex mero motu where the prosecution admonished the jury not to allow sympathy to inform the recommendation as to sentence. *S. v. Price*, 56.

CRIMINAL LAW — Continued

There was no prejudicial error in a first degree murder prosecution from the prosecutor's argument that the jury was the body of society. *S. v. Porter*, 489.

§ 447 (NCI4th). Comment on rights of victim and victim's family

The trial court did not err in the sentencing portion of a first degree murder prosecution by not intervening ex mero motu when the prosecutor referred in his closing statement to the rights of the victim and her family. *S. v. Price*, 56.

§ 458 (NCI4th). Comment on possibility of parole, pardon, or commutations

The trial court did not err during the sentencing portion of a first degree murder prosecution by not permitting defense counsel to argue to the jury anything concerning the possibility of parole or a life sentence to commence at the termination of a life sentence then being served in Virginia. *S. v. Price*, 56.

§ 461 (NCI4th). Jury argument commenting on matters not in evidence

Assuming arguendo that the evidence and inferences drawn therefrom did not support certain statements in the prosecutor's jury argument, those statements were not so grossly improper that the trial court abused its discretion by failing to intervene ex mero motu. *S. v. Coffey*, 268.

§ 463 (NCI4th). Comments supported by evidence

The prosecutor in a first degree murder prosecution correctly argued that defendant's statements subsequent to the shooting that he had meant to kill the victim was evidence of premeditation and deliberation and the argument was supported by the evidence. *S. v. Porter*, 489.

§ 465 (NCI4th). Explanation of applicable law

There was no prejudicial error in a prosecutor's descriptions of the elements of premeditation and deliberation in a first degree murder prosecution. *S. v. Porter*, 489.

§ 468 (NCI4th). Miscellaneous comments in jury argument

The prosecutor's jury argument concerning providence and God were not so grossly improper that the trial court abused its discretion by failing to intervene. *S. v. Coffey*, 268.

§ 490 (NCI4th). Conduct affecting jury; exposure to publicity generally

The trial court did not err in a murder prosecution in its questioning of jurors who had been exposed to a newspaper headline or in failing to declare a mistrial. *S. v. Hardison*, 646.

§ 497 (NCI4th). Use of evidence by the jury during deliberations

The trial court properly denied the jury's request to review a police report during its deliberations where the report had not been placed into evidence but was used by a witness only to refresh his recollection. *S. v. Bacon*, 404.

§ 498 (NCI4th). Jurors' notes

The trial court did not err during a murder prosecution by overruling defendant's objection and request that a particular juror not be allowed to take into the jury room written notes taken during trial. *S. v. Hardison*, 646.

§ 612 (NCI4th). Incredible evidence

Testimony by a murder victim's son about statements made by the victim that defendant had threatened her was not so unreliable as to be inadmissible on constitutional grounds. *S. v. Faucette*, 676.

CRIMINAL LAW — Continued

§ 627 (NCI4th). Sufficiency of identity of defendant as perpetrator

The State's identification evidence was not inherently incredible so as to require dismissal of a first degree murder charge because there was an extended period between the time the witnesses observed defendant with the victim at the crime scene and their identification at trial, or because the witnesses were very young and some of them viewed him at a distance. *S. v. Coffey*, 268.

§ 685 (NCI4th). Tender of written instructions; requests for instructions

The trial court did not err in failing to give the jury special instructions where defense counsel submitted no request for such instructions, failed to object to the charge as given and stated that he had no request for additional instructions. *S. v. Wise*, 421.

§ 686 (NCI4th). Recorded conference on instructions

Defendant was not prejudiced by the trial court's failure in a capital trial to have two in-chambers charge conferences recorded. *S. v. Bacon*, 404.

Defendant failed to show material prejudice from the trial court's failure to record the charge conference. *S. v. Wise*, 421.

§ 687 (NCI4th). Court's discretion to give or refuse to give requested instruction

The trial court in a first degree murder prosecution did not abuse its discretion in refusing to give defendant's requested instruction that the jury should not consider a question the State asked defendant as to whether he had stated that he would kill anyone for a named friend because defendant denied making the statement and the State elicited no evidence to show that defendant made the statement. *S. v. Carter*, 243.

§ 695 (NCI4th). References in instructions to indictment or charges

The trial judge did not read the indictment to the jury in violation of G.S. 15A-1213 and G.S. 15A-1221(b) where he drew from each indictment the case number, defendant's name, and the victim's name and set out the bare particulars of the charges against defendant. *S. v. Faucette*, 676.

§ 728 (NCI4th). Presenting a balanced view of the evidence of the State and of defendant generally

No expression of opinion by the trial judge arises merely from the comparative amount of time devoted to giving an instruction. *S. v. Porter*, 489.

§ 754 (NCI4th). Multiple charges; instructions

There was no error in a prosecution for two counts of first degree murder and two counts of armed robbery in the trial court's instruction to the jury on independent consideration of the charges. *S. v. Blake*, 31.

§ 816 (NCI4th). Instructions on witness credibility generally

The trial court did not err in a first degree murder prosecution where its charge on impeachment and corroboration by prior statement was given verbatim from the Pattern Jury Instructions. *S. v. Cummings*, 298.

§ 881 (NCI4th). Additional instructions on failure to reach verdict; not coercive

The trial court did not abuse its discretion during the sentencing phase of a first degree murder prosecution by instructing the jury and giving it additional time for deliberations after the foreman indicated that the jury was hung. *S. v. Price*, 56.

CRIMINAL LAW — Continued

the pertinent portions of the trial transcript adequate review before finding premeditation and deliberation as an aggravating factor. *Ibid.*

§ 1226 (NCI4th). Alcoholism or intoxication

The trial court did not err in a prosecution for first degree murder by lying in wait by failing to find the statutory mitigating factor that defendant was suffering from a physical condition insufficient to constitute a defense but which significantly reduced his culpability. *S. v. Leroux*, 368.

§ 1312 (NCI4th). Capital sentencing; evidence of prior criminal record or other crimes

The trial court erred in a first degree murder prosecution by allowing the State to cross-examine defendant about prior convictions more than ten years old. *S. v. Porter*, 489.

§ 1323 (NCI4th). Aggravating and mitigating circumstances generally

The trial court in its instructions in the sentencing portion of a first degree murder prosecution did not improperly emphasize the significance and weight of aggravating circumstances. *S. v. Price*, 56.

§ 1324 (NCI4th). Aggravating and mitigating circumstances; list of issues

There was prejudicial error in a first degree murder prosecution in the denial of defendant's request that proposed nonstatutory mitigating circumstances be listed in writing on the issues and recommendation form. *S. v. Cummings*, 298.

The jury in a first degree murder case was erroneously permitted to recommend a sentence of death without returning a writing signed by the foreman showing, inter alia, that the mitigating circumstances were insufficient to outweigh the aggravating circumstances found as required by G.S. 15A-2000(c)(3). *S. v. Coffey*, 268.

§ 1325 (NCI4th). Unanimous decision as to mitigating circumstances

Requiring a jury to unanimously find mitigating circumstances in the sentencing portion of a first degree murder prosecution does not violate defendant's rights. *S. v. Price*, 56.

§ 1326 (NCI4th). Mitigating circumstances; burden of proof

It is constitutional when sentencing defendant for first degree murder to place on defendant the burden of proving each mitigating circumstance by a preponderance of the evidence. *S. v. Price*, 56.

§ 1327 (NCI4th). Duty to recommend death sentence

It is constitutional to inform a jury of its duty to return a recommendation of death under appropriate circumstances. *S. v. Price*, 56.

§ 1337 (NCI4th). Aggravating circumstance; previous conviction for felony involving violence

The evidence in the sentencing phase of a first degree murder prosecution supported the aggravating circumstances of a previous conviction involving the use of violence to the person and that this murder was part of a course of conduct that included the commission of other crimes of violence. *S. v. Price*, 56.

§ 1361 (NCI4th). Mitigating circumstance; intoxication

The trial court did not err during the sentencing phase of a first degree murder prosecution by limiting testimony about defendant's drug use. *S. v. Price*, 56.

CRIMINAL LAW — Continued

§ 1362 (NCI4th). Particular mitigating circumstances in capital cases

The evidence did not support submitting defendant's age as a mitigating circumstance during sentencing for first degree murder. *S. v. Porter*, 489.

§ 1363 (NCI4th). Other mitigating circumstances arising from the evidence

The trial court in a first degree murder case committed prejudicial error in failing to submit the mitigating circumstance that defendant aided in the "apprehension" of another capital felon. *S. v. Bacon*, 404.

§ 1373 (NCI4th). Death penalty not excessive or disproportionate

The death penalty for a first degree murder was not imposed arbitrarily or capriciously and was not disproportionate. *S. v. Price*, 56.

§ 1886 (NCI4th). Prior conviction aggravating factor; date or nature of prior conviction or underlying crime

The trial court could utilize defendant's prior unrelated convictions for the sale and delivery of drugs as aggravating factors for his current convictions for taking indecent liberties since the legislature has mandated that prior convictions shall be treated as aggravating factors without regard to whether the prior crimes are related to the purposes of sentencing for the present crime. *S. v. Hartness*, 561.

DRAINAGE

§ 4 (NCI3d). Drainage commissioners and officers; powers and authority

The appointment of the commissioners of a two-county drainage district by the clerk of court of one county violates the equal protection rights of landowners who live in the drainage district in the second county since they may not vote for the clerk of court who appoints the commissioners. *Northampton County Drainage District Number One v. Bailey*, 742.

The unfettered discretion provided by statute to clerks of superior court to determine whether drainage commissioners should be elected or appointed constitutes an unlawful delegation of legislative power. *Ibid.*

§ 6 (NCI3d). Assessments

G.S. 156-138.3 violates the law of the land clause of the N. C. Constitution insofar as it dispenses with notice and an opportunity to be heard before maintenance assessments may be imposed on landowners within a drainage district. *Northampton County Drainage District Number One v. Bailey*, 742.

§ 8 (NCI3d). Enforcement

The superior court had authority under G.S. 6-21(8) to award attorney fees to defendants as part of the costs in an action to recover drainage district assessments. *Northampton County Drainage District Number One v. Bailey*, 742.

ELECTRICITY

§ 3 (NCI3d). Rates

The Utilities Commission acted within its authority when it ordered affected utilities through a rulemaking rather than a ratemaking procedure to decrease their rates to reflect savings resulting from reduced corporate tax rates in the Tax Reform Act of 1986. *State ex rel. Utilities Comm. v. Nantahala Power and Light Co.*, 190.

EVIDENCE

§ 14 (NCI3d). Communications between physician and patient

Assuming that plaintiff in a medical malpractice action impliedly waived her physician-patient privilege by her pretrial conduct, the trial court correctly found that defense counsel acted improperly by privately contacting and discussing plaintiff's medical care and treatment with plaintiff's nonparty treating physicians. *Crist v. Moffatt*, 326.

The trial court erred in a medical malpractice action by not compelling defendant to produce identification data for the patient sharing a room with the deceased because that information was not privileged and confidential by virtue of the health care provider-patient privilege. *Prince v. Duke University*, 787.

§ 32.7 (NCI3d). Parol evidence affecting writings; ambiguities

A description in a declaration of subdivision covenants of land to be conveyed to a homeowners' association as "Common Area" was latently ambiguous, and evidence of the preliminary plat and landscaping plats filed by the developer and use of these plats by sales agents was admissible to identify the common area referred to in the declaration of covenants. *River Birch Associates v. City of Raleigh*, 100.

FALSE IMPRISONMENT

§ 2 (NCI3d). Actions for false imprisonment

Plaintiff sufficiently stated a claim against members of the Parole Commission for false imprisonment arising from the denial of his parole. *Harwood v. Johnson*, 231.

HOMICIDE

§ 8.1 (NCI3d). Evidence of intoxication; instructions

The trial court did not err in a prosecution for first degree murder by lying in wait in which defendant attempted to establish that he lacked the capacity to know what he was doing due to an alcoholic blackout by allowing on rebuttal testimony regarding a breaking or entering committed two years earlier in which defendant claimed the same defense. *S. v. Leroux*, 368.

§ 15 (NCI3d). Relevancy and competency of evidence

The trial court did not err in a prosecution for murder by lying in wait in which defendant alleged lack of intent due to intoxication by permitting the prosecutor to elicit testimony that defendant had not been told that a police officer had been shot prior to his questions about the officer's condition. *S. v. Leroux*, 368.

The trial court did not err in a murder prosecution by admitting testimony that defendant owned a double-barreled sawed-off shotgun and that more than twenty weapons were found at defendant's residence. *S. v. Levan*, 155.

§ 15.2 (NCI3d). Relevancy and competency of evidence of defendant's mental condition

The trial court did not err in a first degree murder prosecution by restricting defendant's attempts to cross-examine two witnesses about what they knew or had observed of defendant's history of mental illness and aberrant behavior. *S. v. Price*, 56.

HOMICIDE — Continued

§ 18.1 (NCI3d). Circumstances showing premeditation and deliberation

There was sufficient evidence of premeditation and deliberation to submit to the jury even though the State introduced exculpatory statements by defendant. *S. v. Freeman*, 40.

§ 19.1 (NCI3d). Self-defense; evidence of character or reputation

Any error in the admission of testimony that defendant practiced martial arts exercises and possessed weapons as being relevant to self-defense was harmless in light of the state's overwhelming evidence of defendant's guilt of first degree murder. *S. v. McElroy*, 752.

§ 20.1 (NCI3d). Photographs

There was no error in a felony murder prosecution from the admission of a photograph of the victim and his brother where the photograph was offered to establish the identity of the victim even though the photograph had some emotional impact on the witness, the victim's daughter. *S. v. McNeill*, 712.

The trial court did not err in a first degree murder prosecution by introducing into evidence two autopsy photographs. *S. v. Cummings*, 298.

§ 21.5 (NCI3d). Sufficiency of evidence of guilt of first degree murder

The State's identification testimony was not inherently incredible so as to be insufficient to support defendant's conviction of first degree murder of a child under the theory of premeditation and deliberation. *S. v. Coffey*, 268.

The trial court did not err in a prosecution for first degree burglary, robbery with a deadly weapon, and first degree murder by denying defendant's motion to dismiss where defendant's admissions to his cell mates in conjunction with physical evidence at the crime scene were sufficient to establish each element of the crimes charged. *S. v. King*, 662.

§ 21.6 (NCI3d). Sufficiency of evidence of homicide by poisoning or lying in wait or in perpetration of felony

The trial court did not err in a prosecution for murder, armed robbery, and burglary by denying defendant's motion to dismiss. *S. v. McNeill*, 712.

The State's evidence was sufficient to support defendant's conviction of first degree murder of a ten-year-old girl under the theory that the murder was committed during the perpetration of the felony of kidnapping. *S. v. Coffey*, 268.

The prosecution presented substantial evidence of every element of murder by lying in wait; a specific intent to kill is not an element of the crime and evidence of intoxication is irrelevant as a defense. *S. v. Leroux*, 368.

§ 24.1 (NCI3d). Presumptions arising from use of deadly weapon

The trial judge did not commit plain error in an instruction on malice in a first degree murder prosecution where the court stated that malice was implied from a killing with a deadly weapon and peremptorily instructed the jury that a .25 caliber gun is a deadly weapon where there was no evidence of provocation on the part of the victim. *S. v. Porter*, 489.

§ 25.2 (NCI3d). Instructions; premeditation and deliberation

There was no plain error in a first degree murder prosecution from the court's instruction that the jury could consider evidence relating to expressed malice as evidence tending to show premeditation and deliberation. *S. v. Porter*, 489.

HOMICIDE — Continued

There was no plain error in a prosecution for first degree murder in the trial court's instruction on premeditation and deliberation. *S. v. Cummings*, 298.

§ 26 (NCI3d). Instructions; second degree murder

The trial court did not improperly instruct the jury on provocation in a first degree murder prosecution; mere jealousy, without more, cannot be sufficient to negate deliberation and reduce first degree murder to second degree murder. *S. v. Porter*, 489.

§ 30 (NCI3d). Submission of guilt of second degree murder

The trial court in a first degree murder prosecution did not err by refusing to submit second degree murder as a possible verdict where the facts indicated a coldly calculated killing planned well in advance and not a killing occurring on the spur of the moment in response to some unanticipated provocation. *S. v. Cummings*, 298.

The evidence in a first degree murder case overwhelmingly supported the elements of premeditation and deliberation and did not require the trial court to instruct the jury on the lesser included offense of second degree murder. *S. v. Bullock*, 253.

§ 30.1 (NCI3d). Submission of guilt of second degree murder or homicide committed by lying in wait or in perpetration of felony

The trial court acted correctly both in instructing the jury on first degree murder perpetrated by lying in wait and in refusing to instruct on second degree murder where nothing in the evidence supports a finding that the murder was committed other than by lying in wait. *S. v. Leroux*, 368.

§ 30.3 (NCI3d). Submission of guilt of lesser degrees of crime; guilt of manslaughter; involuntary manslaughter

The trial court committed harmless error in a murder prosecution by denying defendant's request for jury instructions on involuntary manslaughter. *S. v. Hardison*, 646.

INDICTMENT AND WARRANT

§ 8.4 (NCI3d). Election between offenses or counts

Defendant was entitled to a new trial on charges of embezzlement and false pretenses where the trial court did not instruct the jury that it could convict defendant only of one offense or the other, but not both. *S. v. Speckman*, 576.

INFANTS

§ 10 (NCI3d). Purpose and construction of juvenile court statutes

The district court erred when committing a juvenile to training school by ordering the State to develop and implement a specified adolescent sex offender program because the North Carolina Juvenile Code does not grant the district courts that authority. *In re Swindell*, 473.

INFANTS — Continued

§ 20 (NCI3d). Judgments and orders; dispositional alternatives

An assignment of error alleging that the trial court erred by not considering dispositional alternatives was moot where the record revealed that the juvenile was subsequently conditionally released. *In re Swindell*, 473.

INSURANCE

§ 85 (NCI3d). Automobile liability insurance; "use of other automobiles" and "non-owned automobile" clauses

A state-owned van driven daily by a medical resident between East Carolina University and Wayne County Memorial Hospital, where she was on an eight-week rotation, was "furnished for her regular use" within the meaning of her automobile insurance policy with plaintiff insurer, thus excluding it from liability coverage. *N.C. Farm Bureau Mutual Ins. Co. v. Warren*, 444.

§ 90 (NCI3d). Limitations on use of vehicle

The trial court should not have granted summary judgment for plaintiff in a declaratory judgment action to determine whether plaintiff owed coverage beyond the minimum required by statute where there was a question of fact as to whether a driver who had no driver's license reasonably believed under the circumstances that he was entitled to drive the truck. *Aetna Casualty & Surety Co. v. Nationwide Mut. Ins. Co.*, 771.

§ 100 (NCI3d). Duty of insurer to defend

An insurer's duty to defend under an automobile liability policy did not end when it paid its policy limit to the injured claimant but continued until its coverage limits were exhausted in the settlement of a claim or claims against the insured or until judgment against the insured was reached. *Brown v. Lumbermens Mut. Casualty Co.*, 387.

§ 149 (NCI3d). General liability insurance

Contamination of the State's resources such as ground water and soil is "property damage" within the meaning of the coverage clauses of a standard comprehensive general liability policy. *C. D. Spangler Construction Co. v. Industrial Crankshaft & Engineering Co.*, 133.

Expenditures incurred by an insured in complying with lawful orders of a State agency to remove hazardous waste from its premises are "damages" which the insured was legally obligated to pay because of property damage within the meaning of coverage clauses of a comprehensive general liability policy. *Ibid.*

Compliance orders issued by a State agency requiring an insured to remove hazardous waste from its premises are "suits" giving rise to the insurer's duty to defend under a comprehensive general liability policy. *Ibid.*

JAILS AND JAILERS

§ 1 (NCI3d). Generally

Plaintiff's claim against the Secretary of Correction in his individual capacity for negligently supervising the Parole Commission in the denial of his parole was properly dismissed. *Harwood v. Johnson*, 231.

JUDGES

§ 2 (NCI3d). Special judges

A special superior court judge had jurisdiction to preside at a duly authorized special criminal session of the Superior Court where AOC records indicated that a commission was properly issued but the document was not received by the Clerk of Court, the District Attorney, or the Judge. *S. v. Eley*, 759.

JUDGMENTS

§ 3 (NCI3d). Conformity to verdict and pleadings

Where plaintiff sought compensatory damages only from defendant school board and only punitive damages from the individual defendants, and the jury returned its verdict awarding only compensatory damages, the trial court's judgment should have ordered that the damages and costs be recovered from defendant board and not from the other defendants individually. *Crump v. Bd. of Education*, 603.

§ 16 (NCI3d). Direct and collateral attack

The trial court erred by granting summary judgment for defendants on the grounds of collateral estoppel in an action in which plaintiffs alleged breach of fiduciary duty, intentional disregard of duty, conspiracy and negligence by her attorneys in settling a wrongful death action but did not seek to set aside the order approving the settlement or a refund of the attorney fees. *Beckwith v. Llewellyn*, 569.

JURY

§ 5 (NCI3d). Excusing of jurors

The trial court erred in a murder prosecution by excusing prospective jurors as a result of private unrecorded bench conferences with those jurors. *S. v. Smith*, 792.

§ 6.1 (NCI3d). Voir dire examination; discretion of court

The trial court did not abuse its discretion during jury selection in a prosecution for first degree murder by lying in wait in which defendant alleged intoxication by barring defense counsel's questioning of prospective jurors regarding their opinions about alcohol. *S. v. Leroux*, 368.

§ 6.3 (NCI3d). Priority and scope of voir dire examination

The trial court did not err in a murder prosecution by permitting the prosecutor to question prospective jurors regarding their perceptions of racism in the criminal justice system. *S. v. Porter*, 489.

§ 6.4 (NCI3d). Questions as to belief in capital punishment

There was no error in a first degree murder prosecution where the prosecutor asked each juror prior to impaneling whether they could be a part of the legal machinery which might bring about the death penalty. *S. v. Porter*, 489.

There was no error in a first degree murder prosecution where the prosecutor repeatedly stated during jury selection that the death penalty was the central question. *Ibid.*

The trial court did not err in a first degree murder prosecution by sustaining the State's objection to the question of whether a potential juror felt it would be necessary for the State to show additional aggravating factors before he would vote for the death penalty. *S. v. Price*, 56.

The trial court did not err during jury selection in a first degree murder prosecution by not allowing defendant to rehabilitate prospective jurors challenged for cause on the basis of opposition to the death penalty. *S. v. Cummings*, 298.

§ 7.1 (NCI3d). Grounds for challenge to array generally; racial discrimination

The trial court did not err in a felony murder prosecution by denying defendant's motion challenging the jury pool where there was no evidence that G.S. 9-2 was not followed or that the selection process failed for any other reason to be racially neutral. *S. v. McNeill*, 712.

§ 7.9 (NCI3d). Challenges for cause; preconceived opinions

The trial court did not err in a first degree murder prosecution by denying defendant's challenge for cause of a prospective juror who had knowledge of the case based upon newspaper and television coverage and who could be potentially biased against defendant if defendant elected not to offer evidence at trial. *S. v. Cummings*, 298.

§ 7.10 (NCI3d). Challenges for cause; social relationships

The trial court did not err in a first degree murder prosecution by denying defendant's challenge for cause of a prospective juror where the voir dire tended to show that the prospective juror was a close friend and supporter of a State's witness. *S. v. Cummings*, 298.

§ 7.11 (NCI3d). Challenges for cause; scruples against capital punishment

There was no error in the jury selection for a first degree murder prosecution where, whenever the prosecutor challenged a juror for cause based on opposition to the death penalty, the trial court asked whether the potential juror's views would substantially impair performance of a juror's sworn duties. *S. v. Cummings*, 298.

§ 7.12 (NCI3d). Challenges for cause; disqualifying scruples or beliefs against capital punishment

The trial court did not err in a first degree murder prosecution by excusing for cause two jurors who expressed reservations about the death penalty without asking whether they could conscientiously apply the law as charged by the court. *S. v. Price*, 56.

§ 7.14 (NCI3d). Manner, order, and time of exercising peremptory challenges

The constitutional rights of a defendant in a first degree murder prosecution were not violated by the State's use of peremptory challenges against prospective jurors expressing reservations about the death penalty. *S. v. Price*, 56.

It was not improper for the prosecution to use its peremptory challenges to excuse potential jurors who expressed qualms or some hesitancy about the death penalty but who were not excludable under the *Witherspoon* decision. *S. v. Bacon*, 404.

Defendant makes a prima facie case of purposeful discrimination in the selection of a petit jury if he shows that he is a member of a cognizable racial minority, members of his racial group were peremptorily excused and racial discrimination appears to have been the motivation; the burden then shifts to the State to come forward with a neutral explanation; and defendant has the right of surrebuttal to show that the prosecutor's explanations are a pretext. *S. v. Porter*, 489.

The prosecutor did not impermissibly exercise peremptory challenges on the basis of race in a first degree murder prosecution in Robeson County. *Ibid.*

MUNICIPAL CORPORATIONS — Continued

The failure of a municipality to specify in its initial resolution of intent to annex that the effective date of the involuntary annexation would be at least one year from the date of passage of the annexation ordinance was an inconsequential irregularity which did not invalidate the annexation. *Ibid.*

§ 30.10 (NCI3d). Particular requirements in zoning and subdivision ordinances

A city has the authority under G.S. 160A-372 to provide by ordinance for the conveyance of an open space recreation area to a homeowners' association in accordance with a subdivision plat previously approved by the city. *River Birch Associates v. City of Raleigh*, 100.

A city did not improperly exercise its police power by refusing to process an application to develop three acres originally depicted as a common recreation area on the preliminary plat even though the common area shown on the preliminary plat exceeds the minimum required by city ordinance. *Ibid.*

A city subdivision ordinance providing for conveyance of open space to an association of homeowners living within the subdivision does not constitute the taking of land. *Ibid.*

The Chapel Hill Town Council properly denied plaintiff's petition for approval of her subdivision where a town ordinance expressly requires that subdivision plans for streets and driveways be in compliance with and coordinate to Chapel Hill's transportation plan. *Batch v. Town of Chapel Hill*, 1.

§ 31.2 (NCI3d). Subdivision applications; judicial review

A petition for a writ of certiorari to review a decision of the town denying a subdivision application was improperly joined with the cause of action alleging constitutional violations, and the superior court sitting as a court of appellate review could not properly grant summary judgment or make additional findings. *Batch v. Town of Chapel Hill*, 1.

NARCOTICS

§ 4.3 (NCI3d). Sufficiency of evidence of constructive possession

The evidence was sufficient to take charges of possession with intent to sell and deliver the controlled substance dilaudid and felonious sale of that substance to the jury where there was ample evidence that defendant was the owner and was in control of the game room where the sales transactions took place. *S. v. Thorpe*, 451.

NEGLIGENCE

§ 49 (NCI3d). Condition and maintenance of sidewalks

Prior North Carolina cases do not establish a rule that a plaintiff can never state a valid case for recovery upon tripping on a sidewalk. *Pulley v. Rex Hospital*, 701.

The trial court erred in entering summary judgment for defendant hospital in plaintiff's action to recover for injuries sustained when she fell on the uneven sidewalk while walking toward the emergency entrance to visit a patient in the hospital. *Ibid.*

§ 52.1 (NCI3d). Particular cases where person on premises is invitee

A plaintiff who was visiting a patient in a hospital was a business invitee of the hospital. *Pulley v. Rex Hospital*, 701.

PARTIES

§ 6 (NCI3d). Intervenors

The trial court did not err in denying the motion of individual homeowners to intervene in an action to determine whether a subdivision developer was required to convey to a homeowners' association a three-acre parcel designated as a common area on the preliminary plat. *River Birch Associates v. City of Raleigh*, 100.

PHYSICIANS, SURGEONS, AND ALLIED PROFESSIONS

§ 17.1 (NCI3d). Failure to inform patient of risks or side effects of treatment

The trial court properly entered summary judgment for defendant surgeon on the issue of plaintiff's informed consent to gastroplasty surgery. *Foard v. Jarman*, 24.

The informed consent statute, G.S. 90-20.13(a), does not require the health care provider to establish compliance with all three subsections. *Ibid.*

The informed consent statute imposes no duty on a health care provider to discuss his or her experience, and such a duty will not be imposed in a case where plaintiff's allegations about defendant's lack of experience were founded on speculative and erroneous assumptions. *Ibid.*

PUBLIC OFFICERS

§ 9 (NCI3d). Personal liability of public officers to private individuals

Plaintiff did not state a claim against a case analyst for the Parole Commission arising from the denial of plaintiff's parole. *Harwood v. Johnson*, 231.

RAPE AND ALLIED OFFENSES

§ 4 (NCI3d). Relevancy and competency of evidence

The trial court's overruling of defense counsel's objection to opinion testimony by a professional counselor concerning the characteristics of sexually abused children constituted an implicit finding that the witness was an expert; furthermore, there was no need for the court to make a formal ruling that the witness was an expert because evidence of the nature of her job and of the experience she possessed affirmatively showed that she was better qualified than the jury to form an opinion and testify about the characteristics of abused children. *S. v. Wise*, 421.

An alleged sexual offense victim was competent to testify that he was mentally handicapped because he was hit by a car and suffered a fractured skull, and evidence of his mental condition was relevant to prove an element of second degree sexual offense. *S. v. Noble*, 581.

§ 4.1 (NCI3d). Improper acts, solicitations, and threats; proof of other acts and crimes

Testimony by a sexual offense victim's sister that defendant father had molested her from the time she was nine years old until she was eighteen years old was admissible to show a common scheme or plan by defendant to molest the victim and her sister. *S. v. McCarty*, 782.

The trial court's limiting instruction that the jury should consider testimony by the victim's sister concerning defendant's prior sexual misconduct toward her to determine whether there was unnatural lust in the mind of defendant did not constitute plain error. *Ibid.*

RAPE AND ALLIED OFFENSES — Continued

The admission of testimony by the victim's sister as to defendant's prior sexual misconduct upon her did not violate defendant's right to due process. *Ibid.*

§ 5 (NCI3d). Sufficiency of evidence and nonsuit

The State's evidence was sufficient to support defendant's conviction of a first degree sexual offense and a second degree sexual offense committed against another man. *S. v. Noble*, 581.

§ 6 (NCI3d). Instructions in rape and sexual offense cases

There was no plain error in a prosecution for first degree sexual offense where the jury was charged that defendant would be guilty if he committed the alleged crime with either his finger or his tongue. *S. v. Holley*, 259.

The trial court in a rape case did not err in failing to charge the jury that it should infer from the State's failure to produce the results of the first medical examination of the child victim that this evidence was not favorable to the State's position or in failing to charge on the ease of bringing charges of sexual misconduct. *S. v. Wise*, 421.

Defendant's right to a unanimous verdict was not violated by the trial court's instruction that the jury could convict the defendant of first degree sexual offense if it found that defendant engaged in either fellatio or vaginal penetration. *S. v. McCarty*, 782.

§ 7 (NCI3d). Verdict; sentence and punishment

A life sentence for first-degree sexual offense is not cruel and unusual punishment. *S. v. Holley*, 259.

§ 19 (NCI3d). Indecent liberties with child

The trial court's instruction that an indecent liberty is an immoral, improper or indecent touching or act by defendant upon the child or an inducement by defendant of an immoral or indecent touching by the child did not violate defendant's right to a unanimous verdict. *S. v. Hartness*, 561; *S. v. McCarty*, 782.

ROBBERY

§ 4.4 (NCI3d). Attempted armed robbery; evidence sufficient

There was sufficient evidence of an attempted armed robbery as the underlying felony for felony murder even though defendant contended that the robbery was completed. *S. v. Blake*, 31.

RULES OF CIVIL PROCEDURE

§ 12 (NCI3d). Defenses and objections

A complaint may be dismissed under Rule 12(b)(6) if no law exists to support the claim made, facts to make out a good claim are absent, or facts are disclosed which will necessarily defeat the claim. *Burgess v. Your House of Raleigh*, 205.

§ 14 (NCI3d). Third party practice

Third party defendant bank was an aggrieved party which could appeal summary judgment entered in favor of plaintiff against defendants-third party plaintiffs where the bank fully participated in the determination of third party plaintiff's liability and is bound by the judgment in favor of plaintiff entered against defendants as third party plaintiffs. *Barker v. Agee*, 470.

RULES OF CIVIL PROCEDURE — Continued

§ 17 (NCI3d). Parties plaintiff and defendant; capacity

A homeowners' association did not have standing to prosecute on behalf of its members' claims against a subdivision developer for fraud and unfair trade practices based on its failure to convey a common area to the association. *River Birch Associates v. City of Raleigh*, 100.

§ 24 (NCI3d). Intervention

The trial court did not err in denying the motion of individual homeowners to intervene in an action to determine whether a subdivision developer was required to convey to a homeowners' association a three-acre parcel designated as a common area on the preliminary plat. *River Birch Associates v. City of Raleigh*, 100.

§ 26 (NCI3d). Depositions in a pending action

The trial court did not err in a medical malpractice action by requiring defense counsel to fully disclose the substance of all private conversations between defense counsel and plaintiff's nonparty treating physicians even though defendant contended that this forced him to reveal his work product. *Crist v. Moffatt*, 326.

§ 33 (NCI3d). Interrogatories to parties

Plaintiff in a medical malpractice action was granted a new trial where plaintiff had served defendant hospital with interrogatories calling for a list of all expert witnesses, defendant subsequently amended its response to note that some of decedent's treating physicians might be called to testify, and defendant called at trial as a treating physician a neuropathologist who rendered his opinion as to the cause of death but who had never seen the decedent alive. *Prince v. Duke University*, 787.

SCHOOLS

§ 13.2 (NCI3d). Dismissal of principals and teachers

A single school board member's bias against the teacher at a teacher dismissal hearing denies the teacher due process regardless of whether the bias affected the correctness of the board's decision. *Crump v. Bd. of Education*, 603.

The trial court properly submitted a dismissed teacher's 42 U.S.C. § 1983 claim for damages to the jury for its determination as to whether a school board member had in fact been biased against the teacher in the dismissal proceeding where there was substantial evidence that, at the board's hearing, one or more board members consciously concealed both prior knowledge of the allegations against the teacher and a fixed predisposition against him. *Ibid.*

Where the jury in a § 1983 civil rights action determined that one or more school board members were biased against plaintiff teacher at a dismissal hearing, the jury was justified in returning a verdict awarding plaintiff $78,000.00 in compensatory damages for a violation of his due process rights. *Ibid.*

SEARCHES AND SEIZURES

§ 23 (NCI3d). Search warrants; necessity and sufficiency of showing probable cause

The trial court did not err in a first degree murder prosecution by admitting evidence seized from defendant's residence and automobiles pursuant to search warrants where the warrants were supported by extensive and complete affidavits which established probable cause. *S. v. Cummings*, 298.

STATE

§ 4.2 (NCI3d). Sovereign immunity; particular actions against officers of State

Plaintiff did not state a claim against certain public officials arising from the denial of his parole because those public officials could not be held individually liable for damages caused by mere negligence in the performance of their statutory duties. *Harwood v. Johnson*, 231.

§ 12 (NCI3d). State employees

Only G.S. 126-36 confers upon the State Personnel Commission or upon the Office of Administrative Hearings the jurisdiction to deal with a state employee grievance based on a reduction in position prompted by managerial reallocation of personnel. *Batten v. N.C. Dept. of Correction*, 338.

A permanent employee in a non-policymaking, non-academic position in the Department of Correction was not barred from the appeal procedures of the Administrative Procedure Act by that Act's general exclusion of his department from its provisions. *Ibid.*

An allegation that a permanent state employee was "demoted in rank without sufficient cause" stated grounds for his department's action to be deemed "disciplinary" and presented a "contested case" which invoked the jurisdiction of the State Personnel Commission and, on appeal, that of the Office of Administrative Hearings. *Ibid.*

TELECOMMUNICATIONS

§ 1.1 (NCI3d). Regulation and control of telephone companies as to particular matters

Publishing a telephone directory with correct listings in both the white and yellow pages is a public utility function, and the Utilities Commission has jurisdiction over a telephone directory publisher with respect to complaints which arise from the publisher's performance of this function for a utility without regard to whether the publisher itself is a public utility. *State ex rel. Utilities Comm. v. Southern Bell*, 522.

The Utilities Commission has jurisdiction over a telephone book publisher with respect to a complaint arising from an incorrect listing in yellow pages advertising and the malfunctioning of equipment installed to direct callers to the correct number. *Ibid.*

TRIAL

§ 9 (NCI3d). Duties and powers of court in general

The trial court did not err in a medical malpractice action by requiring defense counsel to fully disclose the substance of all private conversations between defense counsel and plaintiff's nonparty treating physicians even though defendant contended that this forced him to reveal his work product. *Crist v. Moffatt*, 326.

UNFAIR COMPETITION

§ 1 (NCI3d). Unfair trade practices in general

A libel per se of a type impeaching a party in its business activities is an unfair or deceptive act in or affecting commerce in violation of G.S. 75-1.1. *Ellis v. Northern Star Co.*, 219.

WITNESSES

§ 8.4 (NCI3d). Conduct and mode of cross-examination; time; repetition of questions

Defense counsel's question to an alleged rape victim, "So what you're saying earlier wasn't true?" was an argumentative restatement of counsel's previous question, and the trial court's sustention of the State's objection thereto was within the court's discretion to prevent harassment of witnesses. *S. v. Wise*, 421.

WORD AND PHRASE INDEX

Printed By
COMMERCIAL PRINTING COMPANY, INC.
Raleigh, North Carolina